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A TREATISE
ON THE
LAW OF DAMAGES

EMBRACING
AN ELEMENTARY EXPOSITION OF THE LAW
AND ALSO
ITS APPLICATION TO PARTICULAR SUBJECTS OF
CONTRACT AND TORT

BY J. G. SUTHERLAND
|||
AUTHOR OF A TREATISE ON "STATUTES AND STATUTORY CONSTRUCTION"

FOURTH EDITION
BY
JOHN R. BERRYMAN

IN FIVE VOLUMES
VOL. I

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PREFACE TO FOURTH EDITION.

But little explanation is required for the publication of the fourth edition of Judge Sutherland's great classic on Damages. For thirty-four years it has been the standard work on that subject and has probably been cited by the courts more frequently than any modern text book on any subject.

The law of damages is a continuously developing subject. It is the law governing probably ninety-eight per cent. of the relief sought in civil litigation.

New applications of old principles and the modification of old principles themselves to meet the changing views of society or the progress of the age have affected the law of damages as indeed they have affected every other branch of the law, but to a greater extent. Remedial legislation such as Federal Employers' Liability Act and the Workmen's Compensation Acts have worked great changes in the existing law. So great has been the increase in judicial decisions during the thirteen years elapsing since the publication of the third edition of this work that it was found necessary to increase the number of volumes adequately to care for the increased material.

Except as changes were necessary owing to changes in the law, the text of the third edition is preserved intact while some fifteen thousand additional citations have been incorporated in the work.

The publishers regret to announce that this is a posthumous work. Mr. John R. Berryman who in 1892 edited the second edition and in 1903 was the editor of the third edition unfortunately did not live to witness the completion of his labors on the fourth edition. The publication of the work therefore has been superintended by the publishers' editorial staff.

CALLAGHAN AND COMPANY.

October, 1916.

PREFACE TO FIRST EDITION.

The law of damages is now, and for many years has been, in the course of rapid and expansive growth; its former applications have been subjected to frequent forensic and judicial review, with the advantage of the experience and learning of the past, and the stimulus as well as the suggestive aid of new and diversified interests demanding protection, and new forms of injury invoking redress.

It is therefore desirable that the law be often rewritten to incorporate in its structure the results of the latest adjudications, not only for the light they reflect upon the earlier cases, but to derive the full benefit of these accretions, which embody the contribution of contemporary jurists and master minds of the profession.

The administration of justice is committed to so many independent tribunals, that it is not surprising their determinations, especially of questions of first impression, have not proceeded in a very harmonious current. Differences of judicial opinion, more or less radical, under such circumstances, are unavoidable. These are liable to result in permanent divergencies; and to beget local exceptions and peculiarities so numerous as to greatly mar the symmetry and impair the authority of our general jurisprudence.

Frequent elementary expositions of the law, embracing a discussion of the discordant cases with reference to the general principles which all acknowledge, are of great importance; for, to the extent that they are influential, they will counteract this centrifugal tendency.

It is believed that the work now offered will be found useful in these respects, notwithstanding that excellent works on

the same subject are now in general use. It has extended to three volumes by being made to embrace a wide range of topics germane to the general subject, and by an elementary and a minutely practical treatment of them.

The First Part is elementary, and designed to aid the inquiries of the student, and to facilitate the investigations of the practitioner. In it are stated and illustrated the general principles upon which damages, recognized under various names, are allowed by law; their scope relatively to the injury to be redressed; the principles by which the elements of damage may be tested, and the amount to be allowed therefor determined; by which facts may be legitimately weighed to enhance or mitigate damages; how they may be juridically or conventionally liquidated and satisfied; and the pleadings, evidence and procedure suitable and necessary for their recovery.

The Second Part contains a particular discussion of these principles in their practical application to the subjects of contract and tort, which give rise to actual demands for damages.

The whole is copiously elucidated by decided cases and apposite quotations; and the supporting authorities will, it is believed, be found to embrace all the decisions of any importance on the subject.

The author submits his work with its faults—for he dare not hope it will be found faultless—to the indulgent judgment and fair criticism of the profession.

J. G. S.

SALT LAKE CITY, September, 1882.

PREFACE TO SECOND EDITION.

A new edition of this work has been deemed necessary to incorporate into it the results of the numerous adjudications during the ten years which have elapsed since the publication of the first edition. A thorough revision has been made, and about four hundred pages of new matter added as the fruit of nearly seven thousand later decisions. By a judicious condensation of the old matter and the exclusion of some redundancies, the additions have not so materially increased the size of the volumes as to make them inconveniently large. The text has been divided into sections for easier reference; but the side-paging will serve to direct the reader to the matter indicated in the frequent references in judicial opinions and by text-writers and practitioners to the first edition.

The editors submit their work to the profession with the assurance that they have spared no pains to make it comprehensive and accurate.

J. G. S.

J. R. B.

NOVEMBER, 1892.

PREFACE TO THIRD EDITION.

This edition of Judge Sutherland's treatise on the Law of Damages has been prepared with the view of making it expressive of the law of that subject as it is at the present time. This has not been done at the expense of the excellent perspective that distinguished writer gave of the subject in the first edition. That part of the work remains undisturbed. The editor has sought to do for this edition what he endeavored to do, under the direction of the author, in preparing the second edition: incorporate into it the results of the numerous adjudications on the various branches of the law of damages made during the eleven years which have elapsed since the publication of that edition. That endeavor met the approval of the author, who desired that this edition should be prepared by the editor of the second edition. The very numerous references in the reported cases and treatises on various branches of the law to that edition tend to show that it has been found useful to the bench and bar. The controlling aim in the preparation of this edition has been to make it as advantageous as possible in presenting the American and English law of damages as it has been declared by the courts.

The American cases which have been reported in unofficial series of reports are referred to therein. These references and the new matter added to the text and notes represent about eight hundred pages. To make room for so much additional matter, it has been found necessary to condense somewhat a portion of the matter which appeared in the former edition. It is hoped that this has been done without serious detriment to the value of the work.

MADISON, WIS., August, 1903.

JOHN R. BERRYMAN.

TABLE OF CONTENTS

VOL. I

PART I.—AN EXPOSITION OF THE ELEMENTS OF DAMAGES.

CHAPTER I.—A GENERAL STATEMENT OF THE RIGHT TO DAMAGES, THEIR LEGAL QUALITY AND KINDS.

References are to sections.

General observations	1
The right to damages; how amount ascertained	2
<i>Damnum absque injuria; injuria sine damno</i>	3
Public wrongs	4
Illegal transactions	5
Contractual exemption from liability for damages	6
Nature of the right to damages; its survival; what law governs the measure of damages	7
Injuries to unborn child	8

CHAPTER II.—NOMINAL DAMAGES.

Nature and purpose of nominal damages	9
Illustrations of the right to nominal damages	10
The right a substantial one; new trials	11

CHAPTER III.—COMPENSATION.

Section 1.—Compensatory Damages.

Award of compensation the object of the law and of equity	12
Limitation of liability to natural and proximate consequences ..	13

Section 2.—Direct Damages.

What these include	14
--------------------------	----

References are to sections.

Section 3.—Consequential Damages for Torts.

Awarded for probable consequences	15
Rule of consequential damages for torts; extension of liability by statute	16
Illustrations of the doctrine of the preceding section	17-19
Consequential damages under fence statutes	20
Nervous shock without impact; the Coultas case and American cases in harmony with it	21
Same subject; criticism of the Coultas case; nervous shock a physical injury	22
Same subject; an earlier ruling	23
Same subject; <i>Dulien v. White</i>	23a
Same subject; miscellaneous cases	24
Anticipation of injury as to persons; illustrations	25
Consequential damages in highway cases	26
Imputed negligence	27
Particular injury need not be foreseen	28
The act complained of must be the efficient cause	29-31
Breach of statutory duties	32
Injury through third person	33
Liability as affected by extraordinary circumstances	34
Illustrations of the doctrine of the preceding section	35
Liability of carriers for consequential damages; extraordinary circumstances	36
Intervening cause	37, 38
Acts of injured party; fraud and exposure to peril	39
Act of third person	40-42
Wilful or malicious injuries	43, 44

Section 4.—Consequential Damages for Breach of Contract.

Recoverable only when contemplated by the parties	45
Illustrations of liability under the rule	46
Liability not affected by collateral ventures or financial condition of a party	47
Distinction between consequential liability in tort and on contract	48
Same subject; criticism of the <i>Hobbs</i> case	49
Liability under special circumstances; <i>Hadley v. Baxendale</i>	50
Same subject; illustrations and discussion of the rule	51
Market value; resale; special circumstances	52

Section 5.—Required Certainty of Damages.

Must be certain in their nature and cause	53
Liability for the principal loss extends to details and incidents	54
Only the items which are certain are recoverable	55
Recovery on successive consequences	56-58
Required certainty of anticipated profits	59, 60

References are to sections.

Warranties of seeds and breeding quality of animals	61
Prospective growth of orchard and of animals	62
Profits of special contracts	63
Same subject; Masterton v. Mayor	64
Violation of contract to lease	65
Profits of labor	66
Profits from commercial ventures	67
Profits on dissolution of partnership	68
Commercial and insurance agencies; proof of damages	69
Tortious interference with business	70
Chances for prizes and promotions	71
Contingent advantage	72
Uncertain mitigation of breach of marriage promise	73
Failure to provide sinking fund	74

Section 6.—The Constituents of Compensation, or Elements of Damage.

Elementary limitation of damages	75
Damages for nonpayment of or failure to loan money	76
Greater damages than interest for failure to pay or loan money ..	77
Liability for gains and losses	78
What losses elements of damage	79
Same subject; labor and expenditures	80
Same subject; damages by relying on performance	81
Same subject; liability to third persons; covenants of indemnity	82
Same subject; indemnity to municipalities; counsel fees	83
Same subject; liability for losses and expenses	84
Same subject; bonds and undertakings; damages and costs	85
Same subject; necessity of notice to indemnitor to fix liability	86, 87
Expenses incurred to prevent or lessen damages	88
Same subject; between vendor and vendee	89
Same subject; extent of the duty	90
Same subject; employer may finish work at contractor's expense	91
May damages for breach of contract include other than pecuniary elements?	92
Elements of damage for personal torts	93
Character as affecting damages for personal injuries, and in actions for death	94
Mental suffering	95, 96
Same subject; liability of telegraph companies	97
Right to compensation not affected by motive	98
Distinction made for bad motive; contracts	99
Motive in tort actions	100
How motive affects consequences of confusion of goods	101
Where property sued for improved by wrong-doer	102, 103
Distinctions in the matter of proof	104
Value of property	105

References are to sections.

CHAPTER IV.—ENTIRETY OF CAUSES OF ACTION AND DAMAGES.

Section 1.—General Principles.

Cause of action not divisible	106
Present and future damages	107
What is an entire demand?	108
Entire demand may be severed	109
Contracts to do several things successively or one thing continuously	110
Items of account	111
Continuing obligations	112
Damages accruing subsequent to the action	113
Damage to real property	114–116
Contracts of indemnity	117
Damage to property and injury to person, and injury to the person and damage to reputation by same act	118
What is not a double remedy	119
Prospective damages	120
Certainty of proof of future damages	121
Same subject; action for enticing away apprentice, servant or son, or procuring discharge of servant	122
Future damages for personal injuries	123
Only present worth of future damages given	124
Continuous breach of contract or infraction of rights not an entirety	125
Continuance of wrong not presumed	126
Necessity and advantage of successive actions	127

Section 2.—Parties to Sue and Be Sued.

Damages to parties jointly injured entire	128
Actions under statutes	129
Must be recovered by person in whom legal interest is vested ...	130
Not joint when contract apportions the legal interest	131
Implied <i>assumpsit</i> follows the consideration	132
Effect of release by or death of one of several entitled to entire	133
Misjoinder of plaintiffs, when a fatal objection	134
Joinder of defendants; effect of non-joinder and misjoinder	135
How joint liability extinguished or severed	136
Principles on which joint right or liability for tort determined	137
Tortious act not an entirety as to parties injured	138
General and special owners	139
Joint and several liability for torts	140, 141
Same subject, civil damage statutes; acts of members of partnership	142

TABLE OF CONTENTS.

xiii

References are to sections.

CHAPTER V.—LEGAL LIQUIDATIONS AND REDUCTIONS.

Section 1.—Circuity of Action.

Defense of	143
Agreement not to sue	144
Principle operates in favor of plaintiff	145
Damages must be equal	146
Reciprocal obligations	147

Section 2.—Mutual Credit.

Compensation by mutual demands	148
--------------------------------------	-----

Section 3.—Mitigation of Damages.

Equitable doctrine of	149
Absence of malice	150
Words as provocation for assault; agreements to fight, payment of fine	151
Provocation in libel and slander	152, 153
Mitigating circumstances in trespass and other actions	154
Plaintiff's acts and negligence	155
Measures of prevention; return of property; discharge of plain- tiff's debt	156, 157
No mitigation when benefit not derived from defendant	158
Fuller proof of the <i>res gestæ</i> in trespass, negligence, etc.	159
Official neglect	160
Same subject; modification of the old rule	161
Plaintiff's consent	162
Injuries to character and feelings	163
Reduction of loss or benefit	164
Pleading in mitigation	165, 166
Payments	167

Section 4.—Recoupment and Counter-Claim.

Definition and history of recoupment	168, 169
Nature of defense	170, 171
Constituent features of recoupment	172
Remedy by counter-claim	173
Validity of claim essential	174
Parties	175, 176
Maturity of claim or demand; statute of limitations	177
Cross-claim must rest on contract or subject-matter of action ..	178
Recoupment for fraud, breach of warranty, negligence, etc.	179, 180
What acts may be the basis of recoupment	181
Cross-claims between landlord and tenant	182
Cause of action, connection between and cross-claim	183
Recoupment between vendor and purchaser	184
Liquidated and unliquidated damages may be recouped	185

References are to sections.

Affirmative relief not obtainable	186
Election of defendant to file cross-claim or sue upon his demand	187
Burden of proof; measure of damages	188
A cross-claim used in defense cannot be sued upon	189
Notice of cross-claim	190

Section 5.—Marshalling and Distribution.

Definition	191
Sales of incumbered property in parcels to different purchasers	192
Sales subject to incumbrance	193
Effect of creditor releasing part	194
Rights where one creditor may resort to two funds and another to only one	195
Same where the funds belong to two debtors	196
Principles on which priority determined	197

Section 6.—Set-Off of Judgments.

Power to direct set-off inherent	198
When it will or will not be granted	199
Interest of the real parties considered	200
Set-off not granted before judgment	201
Assignee must make an absolute purchase	202
Nature of action immaterial; foreign judgments	203
Liens of attorneys	204

CHAPTER VI.—PECUNIARY REPRESENTATIVE OF VALUE.

Section 1.—Money.

Characteristics of money	205
Payment to be made in money of country of performance	206
Payment in currency	207
Effect of changes in the value of money	208
Value of money at time of contracting	209
The legal tender act	210
Effect of fluctuations in currency	211

Section 2.—Par and Rate of Exchange.

Par of exchange	212
Rate of exchange	213

CHAPTER VII.—CONVENTIONAL LIQUIDATIONS AND
DISCHARGES.

Section 1.—Payment.

What is; modes of making	214-216
--------------------------------	---------

TABLE OF CONTENTS.

xv

References are to sections.

What is not payment	217
Effect of payment	218
Payment before debt due	219
Payment by devise or legacy	220
Payment by gift <i>inter vivos</i>	221
Retaining money by executor, etc.	222
Payment in counterfeit money, bills of broken banks or forged notes and checks	223, 224
Payment by note, bill or check	225-227
Collaterals collected or lost by negligence of creditor are pay- ments	228, 229
Who may make payments	230
To whom payment may be made	231
Pleading payment	232
Evidence of payment	233

Section 2.—Application of Payment.

General rule	234
By debtor	235, 236
Same subject; evidence	237
By creditor	238-240
Appropriation by the court	241
When payments applied <i>pro rata</i>	242
General payment applied to oldest debt	243
General payment applied to a debt bearing interest, and first to interest	244
General payments applied to the debt least secured; comments on conflicting views of the general subject	245

Section 3.—Accord and Satisfaction.

Definition	246
Consideration	247
Payment of part of a debt will not support agreement to dis- charge the whole	248, 248a
Any other act or promise which is a new consideration will suffice	249
Composition with creditors	250
Compromise of disputed claim	251
Agreement must be executed	252
Rescission or exoneration before breach	252a

Section 4.—Release.

Definition	253
Differs from accord and satisfaction	254
Extrinsic evidence and construction	255
Who may execute	256
Effect when executed by or to one of several claiming or liable	257

References are to sections.

What will operate as a release	258
Covenant not to sue	259

Section 5.—Tender.

Right to make	260
On what demands it may be made	261
When it may be made	262
In what money	263
By whom	264
To whom	265
It must be sufficient in amount	266, 267
How made	268
Where to be made	269
Must be unconditional	270
Effect of accepting	271
Must be kept good	272
Waiver and omission of tender on sufficient excuse	273
Tender must be pleaded and money paid into court	274
Effect of plea of tender	275
Effect of tender when money paid into court	276
Effect of tender on collateral securities	277
Paying money into court	278

Section 6.—Stipulated Damages.

Contracts to liquidate damages valid	279
Damages can be liquidated only by a valid contract	280
Modes of liquidating damages; computation of time	281
Alternative contracts	282
Liquidated damages contradistinguished from penalty	283
The evidence and effect of intention to liquidate	284
Stipulated sum where damages otherwise certain or uncertain ..	285
Contracts for the payment of money	286, 287
Large sum to secure payment of a smaller	288
Stipulation where damages certain and easily proved	289
Stipulation when damages uncertain	290–292
Same subject; illustrations	293
Stipulation for payment of a fixed sum for partial or total breach	294, 295
Effect of part performance accepted where damages liquidated	296
Liquidated damages are in lieu of performance	297
Effect of stipulation upon right of action	298
Waiver of right to stipulated damages	299

CHAPTER VIII.—INTEREST.

Definitions and general view	300
Interest by the early common law	301
Interest in England legalized by statute	302

TABLE OF CONTENTS.

xvii

References are to sections.

Interest at common law in America	303
Agreements for interest	304

Section 1.—General Promise to Pay Money “With Interest.”

Rule of construction	305
Law or custom fixes the rate	306
Legal or stipulated rate applies from date	307
Whether same rate will apply after debt due	308, 309

Section 2.—Agreements for Interest “Until Paid.”

Agreements for interest from date until debt paid	310
Agreements for a different rate after debt due	311, 312

Section 3.—Agreements for More Than Legal Rate Before Maturity.

Effect of usury found	313
Who may take advantage of usury	314
When contracts not void for usury	315
Recoveries under usury statutes	316, 317

Section 4.—Agreements for More Than Legal Rate After Maturity.

Not usury; but penalty	318
Same subject; when debtor relieved in Illinois	319

Section 5.—Interest as Compensation.

Scope of section	320
Right not absolute	321
Tacit agreements to pay interest on accounts	322
Interest where payment unreasonably and vexatiously delayed	323
<i>Quantum meruit</i> claim to interest	324
Allowed on money loaned	325
Allowed on money paid	326, 327
<i>Quantum meruit</i> claim to interest between vendor and purchaser	328
Interest allowed from time when money ought to be paid	329
No interest on penalties nor statutory liability for riots	330
When allowed on penalty of bonds	331
Interest against government	332
Judgments bear interest	333, 334
Not allowed on revival of judgment by <i>scire facias</i>	335
Interest in condemnation proceedings	336
Interest on taxes, license fees, special assessments and customs duties	337
Infants, liable for	338
Interest as between landlord and tenant	339
Interest on damages for infringing patents	340
Right to interest as affected by the marital relation	341
Interest as between partners	342

References are to sections.

Interest on stockholders' statutory liability	343
Allowed on annuities and legacies	344
Interest on advancements	345
On money due on policy of insurance, and on premiums	346
Not allowed on unliquidated demands	347, 348
Interest on accounts	349, 350
When demand necessary	351
When allowed on money had and received	352
When allowed against agents, trustees and officers	353
On money obtained by extortion or fraud, or wrongfully withheld or disposed of	354
Interest in actions for torts	355

Section 6.—The Law of What Place and Time Governs.

Importance of subject	356
General rule as to contracts	357
Rule as to notes and bills	358
Bonds to the United States	359
Between parties in different states	360, 361
Where usury is involved	362-365
The law of what place governs the rate as damages	366
Pleading and proof of foreign law	367
Effect of change in law of place of contract	368-370

Section 7.—Interest as an Incident to the Principal.

Interest due by agreement a debt	371
Interest as damages accessory to principal	372

Section 8.—Interest Upon Interest.

Compound interest	373
Instances of interest on interest	374
Interest on instalments of interest	375
Separate agreements for interest	376
Periodical interest after maturity of debt	377
Computation, application and effect of partial payments	378, 379

Section 9.—Suspension of Interest.

Miscellaneous cases	380
Where payments prevented by legal process	381
Where war prevents payment	382
Tender stops interest	383
Tender not allowed for unliquidated damages	384
When tender may be made	385, 386

Section 10.—Pleading.

How interest claimed in pleading	387
--	-----

References are to sections.

Section 11.—Interest During Proceedings to Collect a Debt.

Interest on verdict before judgment	388
On judgments pending review	389

VOL. II.

CHAPTER IX.—EXEMPLARY DAMAGES.

CHAPTER X.—PLEADING AND PROCEDURE.

Section 1.—Pleading.
Section 2.—Assessment of Damages.
Section 3.—Paying Money into Court.
Section 4.—Evidence.
Section 5.—Verdict and Judgment.
Section 6.—Restitution after Reversal of Judgment.

PART II.—APPLICATION OF THE LAW OF DAMAGES
TO VARIOUS CONTRACTS AND WRONGS.

CHAPTER XI.—BONDS AND PENAL OBLIGATIONS.

Section 1.—Penalties.
Section 2.—Bonds of Official Depositories of Money.
Section 3.—Other Official Bonds.
Section 4.—Probate Bonds.
Section 5.—Replevin Bonds.
Section 6.—Attachment and Forthcoming Bonds.
Section 7.—Injunction Bonds.
Section 8.—Appeal and Supersedeas Bonds.
Section 9.—Miscellaneous Bonds.

CHAPTER XII.—NOTES AND BILLS.

CHAPTER XIII.—VENDOR AND PURCHASER—REAL PROP-
ERTY.

Section 1.—Vendor against Purchaser.
Section 2.—Purchaser against Vendor.
Section 3.—Covenants for Title—Of Seizin and Good Right to Convey.
Section 4.—Covenants of Warranty and for Quiet Enjoyment.
Section 5.—Covenants against Incumbrances.
Section 6.—Defenses and Cross-Claims against Purchase-Money.

CHAPTER XIV.—VENDOR AND VENDEE—PERSONAL PROPERTY.

Section 1.—Vendor against Vendee.

Section 2.—Vendee against Vendor.

VOL. III.

CHAPTER XV.—CONTRACTS FOR SERVICES.

CHAPTER XVI.—CONTRACTS FOR PARTICULAR WORKS.

Section 1.—Employer against Contractor.

Section 2.—Contractor against Employer.

Section 3.—Salvage.

CHAPTER XVII.—SURETYSHIP.

Section 1.—Creditor against Surety.

Section 2.—Surety's Remedies for Indemnity.

Section 3.—Express Indemnities.

CHAPTER XVIII.—AGENCY.

Section 1.—Principal against Agent.

Section 2.—Agent against Principal.

Section 3.—Third Persons against Agent.

CHAPTER XIX.—INSURANCE.

Section 1.—Marine Insurance.

Section 2.—Fire Insurance.

Section 3.—Life and Accident Insurance.

Section 4.—Title Insurance.

Section 5.—Indemnity and Surety Insurance.

CHAPTER XX.—LANDLORD AND TENANT.

Section 1.—Landlord against Tenant.

Section 2.—Tenant against Landlord.

CHAPTER XXI.—CARRIERS.

- Section 1.—Actions by Carriers.
Section 2.—Actions against Carriers.
Section 3.—Carriers of Passengers.

CHAPTER XXII.—TELEGRAPH AND TELEPHONE COMPANIES.

VOL. IV.

CHAPTER XXIII.—BREACH OF MARRIAGE PROMISE.

CHAPTER XXIV.—EJECTMENT.

- Section 1.—Mesne Profits.
Section 2.—Dower.

CHAPTER XXV.—INJURIES TO REAL PROPERTY.

- Section 1.—Trespass to Real Property.
Section 2.—Injury to Inheritance.
Section 3.—Nuisance.

CHAPTER XXVI.—TAKING PROPERTY FOR PUBLIC USE.

CHAPTER XXVII.—CONVERSION.

CHAPTER XXVIII.—TRESPASS TO PERSONAL PROPERTY.

CHAPTER XXIX.—REPLEVIN.

- Section 1.—Plaintiff's Case.
Section 2.—Defendant's Case.

CHAPTER XXX.—FRAUD.

CHAPTER XXXI.—INFRINGEMENT OF PATENT RIGHTS.

CHAPTER XXXII.—INFRINGEMENT OF COPYRIGHT.

CHAPTER XXXIII.—INFRINGEMENT OF TRADE-MARKS.

CHAPTER XXXIV.—SLANDER AND LIBEL.

Section 1.—Plaintiff's Case.

Section 2.—The Defense.

CHAPTER XXXV.—MALICIOUS PROSECUTION.

CHAPTER XXXVI.—PERSONAL INJURY.

VOL. V.

CHAPTER XXXVII.—DAMAGES RESULTING FROM DEATH.

CHAPTER XXXVIII.—SEDUCTION.

CHAPTER XXXIX.—DAMAGES FOR TORTS IN ADMIRALTY.

CHAPTER XL.—DAMAGES UNDER THE FEDERAL EMPLOYERS'
LIABILITY ACT.

CHAPTER XLI.—WORKMEN'S COMPENSATION ACTS.

THE LAW OF DAMAGES.

PART I.

AN EXPOSITION OF THE ELEMENTS OF DAMAGES.

CHAPTER I.

A GENERAL STATEMENT OF THE RIGHT TO DAMAGES, THEIR LEGAL QUALITY AND KINDS.

- § 1. General observations.
- 2. The right to damages; how amount ascertained.
- 3. *Damnum absque injuria; injuria sine damno.*
- 4. Public wrongs.
- 5. Illegal transactions.
- 6. Contractual exemption from liability for damages.
- 7. Nature of the right to damages: its survival; what law governs the measure of damages.
- 8. Injuries to unborn child.

§ 1. **General observations.** The chief practical value of any system of law is in its adaptability and efficiency to secure the individual in the full enjoyment of his rights, and in giving him adequate relief when they are violated. The common law defines these rights, and professes to afford a remedy for their every infraction. In the nature of things, this remedy cannot consist in so annulling, by adjudication, an act which violates a right that the injured party will be restored to its enjoyment as though there had been no interruption.

The consequences of an act which is an invasion of another's right may be arrested; in some cases partial restoration is practicable. But unless compensation can be made as a substitute

for that to which a party is entitled, and of which he has been more or less deprived, there will be an irreparable injury, and a corresponding failure of justice. This compensation the law provides for; and it is the principal object of legal actions to ascertain what it should be, fix the amount, and enforce its payment. In some actions the paramount purpose is to compel the defendant to yield up possession of specific property which the plaintiff claims to own, and incidentally to obtain compensation for its detention, as in ejectment and replevin. So in actions on contracts for the direct payment of money, the effect of recovery is apparently to compel the defendant to do the very thing he agreed to do; compensation for the delay in the form of interest is a subordinate matter.¹

§ 2. **The right to damages; how amount ascertained.** In contemplation of law every infraction of a legal right causes injury; this is practically and legally an incontrovertible proposition. If the infraction is established, the conclusion of damage inevitably follows.² This deduction is made though it

¹ Radloff v. Haase, 196 Ill. 365, 729, citing this section; Vandiver v. Robertson, 125 Mo. App. 307, citing the text; International T. B. Co. v. Martin, 82 Neb. 403. § 1095.

² Tubular R. & S. Co. v. Exeter B. & S. Co., 159 Fed. 824, 86 C. C. A. 648; Dewire v. Hanley, 79 Conn. 454; Lahiff v. St. Joseph's Total A. & B. Soc., 76 Conn. 648, 100 Am. St. 1012, 65 L.R.A. 92; Graham v. Macon, etc. R. Co., 120 Ga. 757; Polar Wave I. & F. Co. v. Alton Branch H. Soc., 155 Ill. App. 310; Selman v. Barnett, 4 Ga. App. 375; VonSchoiek v. VonSchoiek, 76 N. J. L. 242; Moore v. Camden & T. R. Co., 74 N. J. L. 498; State v. McKinnon, 11 Ohio N. P. (N. S.) 165, quoting the text; Koerber v. Patek, 123 Wis. 453, 68 L.R.A. 956; Columbus Co. v. Clowes, [1903] 1 K. B. 244; Radloff v. Haase, *supra*; Hahn v. Cotton, 136 Mo. 216, 919; Watson v. New Mil-

ford W. Co., 71 Conn. 442; Board of Water Com'rs v. Perry, 69 Conn. 461; Quillen v. Betts, 1 Pennew. 53; Ross v. Louisville, etc. Co., 70 Miss. 725; New York Rubber Co. v. Rothery, 132 N. Y. 293, 28 Am. St. 575; Green Bay & M. C. Co. v. Kaukauna W. P. Co., 112 Wis. 323, 62 L.R.A. 579. See §§ 9, 10.

"All precedents necessarily have a beginning." Koerber v. Patek, *supra*.

It is not a sufficient objection to the recovery of damages that the action brought for that purpose is without precedent. It was long since determined that a special action on the case was introduced because the law will not suffer an injury and damage without affording a remedy. Winsmore v. Greenbank, Willes, 577, 580.

One who is induced by falsehood and fraud to marry a woman who is pregnant by the man who is guilty

actually appears and is recognized in the case that there was in fact no injury, but a benefit conferred.³ This legal conclusion of damage is generally indeterminate as to amount; it is that *some* damage resulted; if no proof is made of the actual damage judgment can be given only for a minimum sum—nominal damages. In cases of contract it may occur that for any breach a large and determinate sum will become due, for which judgment without proof may be rendered. But generally, within certain limits, the actual injury is to be established by proof as matter of fact. In many cases of tort, however, the injury complained of is of such a nature that compensation cannot be awarded by any precise pecuniary standard and there is no legal measure of damages, because the injury does not consist of pecuniary elements, or elements of which the value can be measured or expressed in money. The compensation which shall be allowed for an injury of this character is by the common law referred to the sound discretion and dispassionate judgment of a jury.⁴ Where there is a legal measure of damages the jury must determine the amount as a fact according to that measure, otherwise the law which measures the compensation would be of no avail; and whether they have done so or not in a given case may be proximately seen by a comparison of the verdict with the evidence.⁵ Courts of general jurisdiction have

thereof may recover from him the damage sustained. *Kujek v. Goldman*, 150 N. Y. 176, 55 Am. St. 670, 34 L.R.A. 156.

One who, notwithstanding the husband's protests, persists in selling a wife drugs knowing that she uses them constantly and that their use is destructive to her mental and physical faculties, and causes her husband the loss of her companionship and services, is liable to him. *Holleman v. Harward*, 119 N. C. 150, 56 Am. St. 672, 34 L.R.A. 803. See as to the right of action in favor of a widow for the mutilation of the body of her deceased husband. *Foley v. Phelps*, 1 App. Div. 551.

The injured party is not bound to

exercise his right to remove the cause of the injury. *Smith v. Giddy* [1904] 2 K. B. 448.

³ *Beattie v. New York, etc. R. Co.*, 84 Conn. 555; *Mohr v. Williams*, 95 Minn. 261, 1 L.R.A.(N.S.) 439, 111 Am. St. 462; *Murphy v. Fond du Lac*, 23 Wis. 365, 99 Am. Dec. 181; *Roberts v. Glass*, 112 Ga. 456; *Excelsior N. Co. v. Smith*, 61 Conn. 56. Compare *Bossu v. New Orleans, etc. R. Co.*, 49 La. Ann. 1593.

⁴ The difficulty of determining the exact damages done by a wrongdoer is not cause for denying redress. *Baker v. Akron*, 145 Iowa, 485, 30 L.R.A.(N.S.) 619.

⁵ *Gayton v. Day*, 178 Fed. 249, 101 C. C. A. 609; *Zibbell v. South-*

power over verdicts, and may set them aside when the jury have been influenced by passion or corruption, or have disregarded the legal measure of compensation. By the course of the current of modern decisions, whether compensation for the actual injury in actions for torts is subject to legal measure or not, if the injury was done maliciously, fraudulently, oppressively or with wanton violence, such measure, if any, while not entirely ignored, ceases to be the limit of recovery. The jury are at liberty, in the exercise of their judgment, on finding such malice or other aggravation, to give additional damages as a *solatium* to the party so wronged, and as a punishment to the wrong-doer. The sums so allowed by law and found by a jury for tortious injuries or losses from breach of contract are *damages*—the pecuniary redress which a successful plaintiff obtains by legal action. They are for the most part compensation for

ern Pac. Co. 160 Cal. 237; Board of Park Com'rs v. Donahue, 140 Ky. 502; Carroll Springs D. Co. v. Schnepfe, 111 Md. 420; Rock Creek S. Co. v. Boyd, 111 Md. 189; Western M. R. Co. v. Martin, 110 Md. 554; Western U. Tel. Co. v. Lehman, 106 Md. 318; Yazoo, etc. R. Co. v. Smith, 82 Miss. 656; Tourtellotte v. Westchester E. R. Co., 120 App. Div. 417; Seligman v. Beecher, 36 Pa. Super. Ct. 475; Parke v. Frank, 75 Cal. 364, citing the text; Quanah, etc. R. Co. v. Galloway (Tex. Civ. App.) 154 S. W. 653.

Where a statute enjoins a duty and imposes a civil liability for its nonperformance the rule it prescribes is the measure of liability. Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. ed. 1002.

In the exercise of its police power the state may fix a minimum sum as compensatory and exemplary damages for the violation of a statute. Cramer v. Danielson, 99 Mich. 531; Chicago, etc. R. Co. v. Cram, 228 U. S. 70, 57 L. ed. 734. And may provide that the damages found by

a jury shall be doubled by the court. Fye v. Chapin, 121 Mich. 675, 7 Am. Neg. Rep. 67; Cummings v. Riley, 52 N. H. 368; Chickering v. Lord, 67 id. 555; Fitzgerald v. Dobson, 78 Me. 559; Barrett v. Malden & M. R. Co., 3 Allen, 101, 1 Am. Neg. Cas. 141; Hoole v. Dorroh, 75 Miss. 257; Kingsbury v. Missouri, etc. R. Co., 156 Mo. 379; Carter v. Current River R. Co., 156 Mo. 635; Bekker v. White River Valley R. Co., 28 S. D. 84; Jensen v. South Dakota Cent. R. Co., 25 S. D. 506, 35 L.R.A. (N.S.) 1015. *Contra*, Atchison & N. R. Co. v. Baty, 6 Neb. 37; Grand Island, etc. R. Co. v. Swinbank, 51 Neb. 521, the court being influenced, to some extent because exemplary damages are not recoverable under the local law.

The principle stated in the text is affected by the rule of practice which permits parties to try an action on any theory of damages they may adopt. A court will not interfere of its own motion to compel the adoption of a rule contrary to that the litigants have accepted. Durkee

civil injury—exemplary damages being an exception; therefore, the law relating to the subject of damages is principally directed to defining and measuring compensation.⁶ The civil injury for which damages may be recovered must be one which is recognized as such by the law; it must result from the violation in some form of a legal right. No damages can be recovered for failure to fulfill a merely moral obligation, nor for any wrong or injury which consists in a neglect of social amenities.⁷

§ 3. *Damnum absque injuria; injuria sine damno.* The right to damages constituting a legal cause of action requires the concurrence of two things: that the party claiming them has suffered an injury, and that there is some other person who is legally answerable for having caused it. If one suffers an injury for which no one is liable it gives no legal claim for damages: it is *damnum absque injuria*; so if one does a wrong from which no legal injury ensues, there is no legal cause of action: it is *injuria sine damno*.⁸ That no act characterized by these negations is actionable is, in the abstract, a truism. When we say that a person who suffers an injury which does not arise from any other person's fault has no cause of action a self-evident proposition is stated; and equally so when we say that no person has a cause of action against another for the latter's wrongful act unless he is injured by it. The former

v. Chino L. & W. Co., 151 Cal. 561; Mountz v. Apt, 51 Colo. 491; New York E. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 34 L. ed. 231; Porter v. Metropolitan E. R. Co., 120 N. Y. 284.

⁶ The term "compensatory damages" covers all loss recoverable as matter of right; it is synonymous with "actual damages." Pecuniary loss is an actual damage; so is bodily pain and suffering. Gatzow v. Buening, 106 Wis. 1, 19, 49 L.R.A. 475, 80 Am. St. 17.

⁷ Hardison v. Reel, 154 N. C. 273, 34 L.R.A. (N.S.) 1098.

⁸ Illinois Cent. R. Co. v. Trustees, 212 Ill. 406; McKelvey v. McKelvey,

111 Tenn. 388, 64 L.R.A. 991, 102 Am. St. 787; McAllister v. Clement, 75 Cal. 182; Wittich v. First Nat. Bank, 20 Fla. 843, 51 Am. Rep. 631.

Acts done with reasonable care pursuant to valid statutes will not render those who perform them liable for damages resulting. Highway Com'rs v. Ely, 54 Mich. 173; Tate v. Greensboro, 114 N. C. 392, 24 L.R.A. 671; New Haven S. S. M. Co. v. New Haven, 72 Conn. 276; Transportation Co. v. Chicago, 99 U. S. 635, 640, 25 L. ed. 336, 337; Rowe v. Granite B. Co., 21 Pick. 344; Darlington v. Mayor, 31 N. Y. 164; Allegheny County v. Gibson, 90 Pa. 397, 35 Am. Rep. 670.

precludes any action for lawful acts lawfully done, though some actual hurt or loss results to some person therefrom.⁹ Thus, for example, adjoining land-owners have a mutual right of lateral support to the soil in its natural state, but not under the pressure of buildings, unless a prescriptive right to the support thereof has been acquired.¹⁰ When one has so loaded down his soil near the line, the other still has the right to make any use he pleases of his premises and may excavate to the line, if he does so with due care upon proper notice to the other; and if by such excavation the stability of the buildings of the adjoining proprietor is endangered or they are destroyed, it is an injury for which no action lies.¹¹ And so if a personal injury results because of the weight of the injured person upon the land adjoining the excavation.¹² According to the older

⁹ *De Baker v. Southern California R. Co.*, 106 Cal. 257, 46 Am. St. 237; *Friend v. United States*, 30 Ct. of Cls. 94, 107; *Durham v. Lisbon Falls F. Co.*, 100 Me. 238; *Emanuel v. Barnard*, 71 Neb. 756; *White v. Kincaid*, 149 N. C. 415, 23 L.R.A.(N.S.) 1177, 128 Am. St. 663; *Rosenthal v. Goldsboro*, 149 N. C. 128, 20 L.R.A.(N.S.) 809; *Biggers v. Matthews*, 147 N. C. 299; *Dewey v. Railroad*, 142 N. C. 392; *Cincinnati C. B. R. v. Burski*, 26 Ohio C. C. 486; *Lane v. Barnard*, 111 Va. 680, 31 L.R.A.(N.S.) 1209; *Board of Chosen Freeholders v. Paxson*, 196 Fed. 156.

¹⁰ *Farnandis v. Great Northern R. Co.*, 41 Wash. 486, 5 L.R.A.(N.S.) 1086, 111 Am. St. 1027; *A'Beckett v. Warburton*, 14 Vict. L. R. 308; *Johnson v. St. Louis*, 172 Fed. 31, 96 C. C. A. 617; *Simon v. Nance*, 45 Tex. Civ. App. 480; *Leerburger v. Hennessey R. Co.*, 154 App. Div. 158. See *Hummel v. Peterson*, 69 Wash. 143.

¹¹ *Ceffarelli v. Landino*, 82 Conn. 126; *Serio v. Murphy*, 99 Md. 545, 16 Am. Neg. Rep. 468; *McClelland*

v. Schwend, 32 Pa. Super Ct. 313; *Jones v. Greenfield*, 25 id. 315; *Hannicker v. Lepper*, 20 S. D. 371, 6 L.R.A.(N.S.) 243, 129 Am. St. 938; *Bass v. West*, 110 Ga. 698; *Block v. Haseltine*, 3 Ind. App. 491; *Bohner v. Dienhart H. Co.*, 19 Ind. App. 489; *Ulrick v. Dakota L. & T. Co.*, 2 S. D. 285; *Laycock v. Parker*, 103 Wis. 161; *Wyatt v. Harrison*, 3 B. & Ad. 875; *Thurston v. Hancock*, 12 Mass. 220; *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369; *Lasala v. Holbrook*, 4 Paige 169, 25 Am. Dec. 524; *McGuire v. Grant*, 25 N. J. L. 356; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Winn v. Abeles*, 35 Kan. 91; *White v. Nassau T. Co.*, 168 N. Y. 149, 64 L.R.A. 275; *Noceto v. Weill*, 166 Ill. App. 162.

A municipality exercising the right of eminent domain is not an adjoining owner within this rule where compensation must be made for damage done to property. *Tyfe v. Turtle Creek*, 22 Pa. Super. 292.

¹² *Pullan v. Stallman*, 70 N. J. L. 10; 15 Am. Neg. Rep. 125; *McMullen v. Union Drawn S. Co.*, 47 Pa. Super. 570.

cases and some late ones the exercise of one's right to dig in his own land may have the effect of diverting an underground stream of water which is beneficial to another, or of draining his well, but the act of digging which causes either result, not being wrongful even though done with malice, there is no redress for the injury.¹³ In some cases the rule is conditioned upon the stream not being well defined and its existence known or easily discernible, and also upon the absence of malice.¹⁴ The general rule has limitations attached to it by recent cases. Where an owner by the operation of a water system, consisting of wells and pumps on his own land, taps the subsurface water stored in the land of an adjacent owner and in all the contiguous territory, and leads it to his own land, and by merchandizing it prevents its return, whereby the land of such owner is impaired for agricultural purposes, he may recover for the wrong done.¹⁵ In other words, the right of an adjoining owner does not extend beyond a reasonable and beneficial use of the water underlying his own land.¹⁶

¹³ *Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. of L. Cas. 349, 2 H. & N. 168; *Mosier v. Caldwell*, 7 Nev. 363; *Chase v. Silverstone*, 62 Me. 175; *Greenleaf v. Francis*, 18 Pick. 117; *Trustees, etc. v. Youmans*, 50 Barb. 316; *Ellis v. Duncan*, 11 How. Pr. 515; *Lybe's App.*, 106 Pa. 626; *Mayor, etc. v. Pickles*, [1895] App. Cas. 587; *Houston & T. Cent. R. Co. v. East*, 98 Tex. 146, 66 L.R.A. 738, 107 Am. St. 620; *Long v. Louisville & N. R. Co.*, 128 Ky. 26, 13 L.R.A.(N.S.) 1063, (in the absence of malice).

Contra. *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am Dec. 179. See *Swett v. Cutts*, 50 N. H. 439, and *Fisher v. Feige*, 137 Cal. 39, 59 L.R.A. 333, the last case dealing with the question of motive. The same principle applies to the legitimate use of natural gas underlying land. *Calor O. & G.*

Co. v. Franzell, 128 Ky. 715, 36 L.R.A.(N.S.) 456. See *Louisville G. Co. v. Kentucky H. Co.* 132 Ky. 435.

¹⁴ *Barclay v. Abraham*, 121 Iowa 619, 100 Am. St. 365, 64 L.R.A. 255; *Stoner v. Patten*, 132 Ga. 178, citing *Williams v. Ladew*, 161 Pa. 283, 41 Am. St. 891; *Tampa W. Co. v. Cline*, 37 Fla. 586, 33 L.R.A. 376.

¹⁵ *Forbell v. New York*, 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. 666, affirming 47 App. Div. 371; *Willis v. Perry*, 92 Iowa 297, 26 L.R.A. 124; *Stone v. Providence W. & G. Co.*, 13 Pa. Dist. 557; *Erickson v. Crookston W. P. & L. Co.*, 100 Minn. 481, 8 L.R.A.(N.S.) 1250. See *Western M. R. Co. v. Martin*, 110 Md. 554; *People v. New York C. A. Gas Co.*, 196 N. Y. 421; *Hathorn v. Natural C. G. Co.*, 194 N. Y. 326, 23 L.R.A.(N.S.) 436, 128 Am. St. 555.

¹⁶ *Pence v. Carney*, 58 W. Va.

Where the civil law is not in force or its analogies have not been followed, surface water is regarded as a common enemy, and every landed proprietor has the right to take all necessary, prudent steps to protect his land from its effects, though in doing so the water is cast upon the land of a coterminous proprietor to his injury.¹⁷ Mr. Gould says this rule prevails in England, Massachusetts, Maine, Vermont, New York, New Hampshire, Rhode Island, New Jersey, Minnesota, Wisconsin, Nebraska, Washington, New Mexico, and Texas.¹⁸ By the civil law interference with the natural flow of surface water is a nuisance, for which nominal damages may be recovered without proof of actual damages. The courts of Pennsylvania, Illinois, North Carolina, Alabama, Kentucky, Tennessee, California and Louisiana have adopted this rule, and it has been referred to with approval by the courts of Ohio and Missouri.¹⁹

296, 6 L.R.A.(N.S.) 266, 112 Am. St. 963.

¹⁷ *Edwards v. Charlotte, etc. R. Co.*, 39 S. C. 472, 22 L.R.A. 246; *Morrissey v. Chicago, etc. R. Co.*, 38 Neb. 406, 430; *Rowe v. St. Paul, etc. R. Co.*, 41 Minn. 384; *Cairo, etc. R. Co. v. Stevens*, 73 Ind. 278; *O'Connor v. Fond du Lac, etc. R. Co.*, 52 Wis. 526; *Johnson v. Chicago, etc. R. Co.*, 80 Wis. 641, 14 L.R.A. 495; *McCoy v. Board*, 95 Ark. 345, 29 L.R.A.(N.S.) 396; *Paola v. Garman*, 80 Kan. 702; *Bryant v. Merritt*, 71 Kan. 272; *Werner v. Popp*, 94 Minn. 118; *Applegate v. Franklin*, 109 Mo. App. 293; *Sullivan v. Browning*, 67 N. J. Eq. 391; *Mason v. Commissioners*, 80 Ohio St. 151, 24 L.R.A.(N.S.) 903, 131 Am. St. 689; *Manteufel v. Wetzel*, 133 Wis. 619, 19 L.R.A.(N.S.) 167; *Thompson v. Chicago, etc. R. Co.*, 137 Mo. App. 62. See *Pohlman v. Chicago, etc. R. Co.*, 131 Iowa 89, 6 L.R.A.(N.S.) 146; *Chicago, etc. R. Co. v. Groves*, 20 Okla. 101, 22 L.R.A.(N.S.) 802.

Surface water may not be collected and discharged upon the land of an adjoining owner. *Grant v. St. Louis, etc. R. Co.*, 149 Mo. App. 306; *Shavlik v. Walla*, 86 Neb. 768.

¹⁸ *Gould on Waters* (3d ed.), § 265; *Cox v. Hannibal, etc. R. Co.*, 174 Mo. 588.

¹⁹ *Gould on Waters*, (3d ed.) § 266; *Southern R. Co. v. Lewis*, 165 Ala. 555, 138 Am. St. 77 (indicating an exception to the rule in the case of city or village lots); *Cox v. Odell*, 1 Cal. App. 682; *Baker v. Akron*, 145 Iowa 485, 30 L.R.A.(N.S.) 619; *Chicago, etc. R. Co. v. Davis*, 26 Okla. 434; *Taylor v. Canton*, 30 Pa. Super. Ct. 305; *Tracewell v. County*, 58 W. Va. 283. See *Launstein v. Launstein*, 150 Mich. 524, 121 Am. St. 635; *Rielly v. Stephenson*, 222 Pa. 252, 22 L.R.A.(N.S.) 947, 128 Am. St. 804; *Tyrus v. Kansas City, etc. R. Co.*, 114 Tenn. 579; *Pfeiffer v. Brown*, 165 Pa. 267, 44 Am. St. 598; *King L. Co. v. Bowen*, (Ala. App.) 61 So. 22.

The rule applies only to land in its natural state.²⁰ The owner of property may thus and otherwise, whilst in the reasonable exercise of established rights, casually cause an injury which the law regards as a misfortune merely, and for which the party from whose act it proceeds is liable neither at law nor in the forum of conscience. No legal liability is incurred by the natural and lawful use of his land by the owner thereof in the absence of malice or negligence.²¹ Thus it has been held, (though not without dissent), that one opening a coal mine in the ordinary and usual manner may, upon his own land, drain or pump the water which percolates into his mine into a stream which forms the natural drainage of the basin in which the mine is situate, although the quantity of the water may thereby be increased and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners.²² In cases of this nature a loss or damage is indeed sustained, but it results from an act, which is neither unjust nor illegal, done by another free and responsible being.²³ The prosecution in good faith of a groundless action may give the defend-

²⁰ Hall v. Rising, 141 Ala. 431.

²¹ Gordon v. Ellenville & K. R. Co., 195 N. Y. 137; Bennett v. Long Island R. Co., 181 N. Y. 431; Strauss v. Allentown, 215 Pa. 96; Pennsylvania C. Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445; Long v. Elberton, 109 Ga. 28, 41 Am. St. 454, 46 L.R.A. 428; Barnard v. Sherley, 135 Ind. 547, 24 L.R.A. 568, 575, 151 Ind. 160, 41 L.R.A. 737.

²² Pennsylvania C. Co. v. Sanderson, *supra*. This case has been considered in Robb v. Carnegie, 145 Pa. 324, 27 Am. St. 694, 14 L.R.A. 329; Lentz v. Carnegie, 145 Pa. 612, 27 Am. St. 717, and in Drake v. Lady Ensley C. I. & R. Co., 102 Ala. 501, 48 Am. St. 77, 24 L.R.A. 64, the latter favoring a contrary rule, as does Voss v. Chicago Sandoval C. Co. 165 Ill. App. 565, and local cases cited, and Teel v. Rio Bravo O. Co., 47 Tex. Civ. App. 153. See Berger

v. Minneapolis G. L. Co., 60 Minn. 296; Stroebel v. Kerr S. Co., 164 N. Y. 303, 79 Am. St. 643, 51 L.R.A. 687. It has been said of it that it was of great hardship, difficulty and doubt, involving a serious choice of evils. Strauss v. Allentown, *supra*. And that it is not in accord with principles which have for centuries applied in determining the common interests and rights of riparian proprietors, and it has received but little approval outside of the jurisdiction in which it was decided. "That decision, as it seems to us, is based upon two grounds, neither of which is sound, viz.: That the rights of one riparian owner are to be determined by the necessities of another, and by the importance of the latter's business to the community or public." Arminius C. Co. v. Landrum, 113 Va. 7, 38 L.R.A.(N.S.) 272.

²³ Broom's Max. 151.

ant great annoyance, and cause him loss of time and money; but the plaintiff in such case is exercising a legal right, and the defendant, according to the weight of authority, if there has been no interference with his person or property, is entitled to no compensation for the injury he suffers beyond the costs which may be taxed in his favor.²⁴ Every man is entitled to come into a court of justice and claim what he deems to be his right; if he fails he shall be amerced (according to the old principle) for his false claim; and the defendant is entitled to his costs, and with these he must be content.²⁵ The motive of the plaintiff in bringing an action is immaterial if he had

²⁴ *Avery v. Case P. Works*, 163 Fed. 842; *Fender v. Ramsey*, 131 Ga. 440; *Dendy v. Russell*, 84 Kan. 377; *Deere P. Co. v. Spatz*, 78 Kan. 786, 20 L.R.A. 492; *Jones v. Jones*, 119 La. 677; *Cuello v. Fuster*, 3 Porto Rico Fed. 193; *Cohen v. Minzesheimer* (N. Y. Misc.) 118 Supp. 385; *Woodmansie v. Logan*, 2 N. J. L. 67; *Canter v. American Ins. Co.*, 3 Pet. 307, 7 L. ed. 688; *Muldoon v. Rickey*, 103 Pa. 110; *Eberly v. Rupp*, 90 id. 259; *Bishop v. American P. Co.*, 105 Fed. 845. See ch. 35.

Where there was an intentional non-entry of an action in which property was attached and a new action was brought for the same cause of action, the same property being re-attached, the only claim the defendant in those actions could maintain was for the costs for failure to enter the first writ; for the malicious suing out of the second attachment he had no remedy because no wrong was done. *Johnson v. Reed*, 136 Mass. 421.

One cannot maintain an action for the malicious prosecution of a proceeding to which he was not a party. *Duncan v. Griswold*, 92 Ky. 546; *Duncan v. Citizens' Nat. Bank*, 20 Ky. L. Rep. 237.

If an attachment is not wrongfully sued out the plaintiff is not responsible for the death of a horse owing to the negligence of the officer who had it in custody. *McFaddin v. Sims*, 43 Tex. Civ. App. 598. The dissolution of an attachment does not give the right to recover attorney's fees. *Bonds v. Garvey*, 87 Miss. 335.

²⁵ *Henry v. Dufilho*, 14 La. 48; *Davies v. Jenkins*, 11 M. & W. 745; *Boardman v. Marshalltown G. Co.*, 105 Iowa 445; *Porter v. Johnson*, 96 Ga. 145; *McKenzie v. Mitchell*, 123 Ga. 72; *Mallard v. Curran*, 123 Ga. 872; *Rowland v. Maddock*, 183 Mass. 360; *Kaufmann v. Kirker*, 22 Pa. Super. 201.

The same principle applies where an appeal is taken: there is no liability because of the insolvency of a third person pending the appeal though loss results to some of the litigants. *Leary v. Murray*, 178 Fed. 209, 101 C. C. A. 529. And where a member of a body has been irregularly suspended. *Lurman v. Jarvie*, 82 App. Div. 37. And where one is wrongfully removed from the public service. *Fallon v. Wright*, 82 App. Div. 193. A partial change in the rule has been made by statute in some states if the party has acted

cause therefor. "Any transaction which would be lawful and proper if the parties were friends cannot be made the foundation of an action merely because they happened to be enemies. As long as a man keeps within the law by doing no act which violates it we must leave his motives to Him who searches the heart."²⁶ But if the suit be malicious, as well as false or groundless, the party bringing it is answerable in an action at law by the party injured.²⁷ The making, *bona fide*, of defamatory statements, though they are harsh, untrue and injurious, in the assertion of rights, in the performance of a duty, or in fair criticism upon a matter of public interest is also *damnum absque injuria*.²⁸ Private houses may be pulled down in the interest of the public to prevent the spread of fire²⁹ and bulwarks may be raised on private property as a defense against a public enemy. So owners of land exposed to the inroads of the sea, or commissioners having a statutory power to act for a number of such owners, have a right to erect barriers, though they are consequentially prejudicial to others.³⁰ Owners of land adjoining streets are often subjected to temporary inconvenience while work is being done thereon for their improvement, or to change their grade, or by their temporary use for the deposit of building material or the delivery of merchandise;

in bad faith or has been stubbornly litigious. See *Carhart v. Wainman*, 114 Ga. 632, 88 Am. St. 45. See §§ 1130 (conversion); 516 (attachment bonds); 524-5 (injunction bonds); 1237 (malicious prosecution); 564 (stipulations for attorney's fees in notes and bills).

²⁶ *Whitesell v. Study*, 37 Ind. App. 429; *Stephens v. Head*, 138 Ala. 455; *Pegues M. Co. v. Brown*, (Tex. Civ. App.) 145 S. W. 280.

²⁷ See ch. 35.

²⁸ *Todd v. Hawkins*, 8 C. & P. 88; *Huntley v. Ward*, 6 C. B. (N. S.) 514; *Mackay v. Ford*, 5 H. & N. 792; *Revis v. Smith*, 18 C. B. 126; *Barnes v. McCrate*, 32 Me. 442; *Henderson v. Broomhead*, 4 H. & N. 569; *White v. Nicholls*, 3 How. 266,

11 L. ed. 591; *Lawson v. Hicks*, 38 Ala. 279; *Calkins v. Sumner*, 13 Wis. 193, 80 Am. Dec. 738; *Allen v. Crofoot*, 2 Wend. 515, 20 Am. Dec. 647; *Lawler v. Earle*, 5 Allen, 22.

²⁹ *Wheeler v. Aberdeen*, 45 Wash. 63; *American P. Works v. Lawrence*, 23 N. J. L. 9, 21 id. 248; *Surocco v. Geary*, 3 Cal. 69; *Russell v. Mayor*, 2 Denio, 461; *Field v. Des Moines*, 39 Iowa, 575, 18 Am. Rep. 46; *Aitken v. Wells River*, 70 Vt. 308, 41 L.R.A. 566.

Public officers in the discharge of their duties may destroy private property in the interests of the public health. *Perry v. Oxeon*, 139 Ill. App. 606.

³⁰ *King v. Pagham*, 8 B. & C. 355.

yet, in the absence of legislation, there is no right to compensation therefor; no legal injury is recognized.³¹ The construction of a new way or the discontinuance of an old one may very seriously affect the value of property; the same may result from the removal of a state capital or county seat; but persons suffering only general loss from the closing of a street have no legal remedy.³² But if the vacation of part of a street destroys all access from property abutting on the remaining part of the street to the system of streets in one direction, it is otherwise.³³ A new business may, by competition, greatly impair the productiveness of an old one, but there is no redress

³¹ *Reading v. Kepplemann*, 61 Pa. 233; *Griggs v. Foote*, 4 Allen, 195; *Benjamin v. Wheeler*, 8 Gray, 409; *Macey v. Indianapolis*, 17 Ind. 267; *Terre Haute v. Turner*, 36 Ind. 522; *Radeliff v. Mayor, etc.*, 4 N. Y. 195; *Mills v. Brooklyn*, 32 N. Y. 489; *Rome v. Omberg*, 28 Ga. 46, 73 Am. Dec. 748; *Hovey v. Mayo*, 43 Me. 322; *Denver v. Bayer*, 7 Colo. 113; *Lake St. E. R. Co. v. Brooks*, 90 Ill. App. 173; *Ridge Ave. P. R. Co. v. Philadelphia*, 181 Pa. 592; *Fernandez v. Smith*, 43 La. Ann. 708; *Pueblo v. Strait*, 20 Colo. 13, 24 L.R.A. 392; *Talbot v. New York & H. R. Co.*, 151 N. Y. 155; *Sanitary Dist. v. McGuirl*, 86 Ill. App. 392; *Morris v. Indianapolis*, (Ind.) 94 N. E. 705; *In re Grade Crossing Com'rs*, 201 N. Y. 32; *Detroit v. Grand Trunk R. Co.*, 163 Mich. 229; *Warner v. State*, 132 App. Div. 611; *Johns v. Salamanca*, 129 App. Div. 717; *Dorsey v. Henderson*, 148 N. C. 423; *Adams v. Oklahoma City*, 20 Okla. 519; *Houston, etc. R. Co. v. Powell*, (Tex. Civ. App.) 125 S. W. 330; *In re Fifth Ave., etc.*, 62 Wash. 218; *Clute v. North Yakima & V. R. Co.*, 62 Wash. 531. See *Lehigh Valley R. Co. v. Canal Board*, 204 N. Y. 471.

³² *Swartz v. Board of Com'rs*, 158

Ind. 141, and cases cited; *Cooley's Const. Lim.* 384; *Paul v. Carver*, 24 Pa. 207, 64 Am. Dec. 649; *Fearing v. Irwin*, 55 N. Y. 486; *Tomlin v. Cedar Rapids, etc. R. & L. Co.* 141 Iowa, 599, 22 L.R.A.(N.S.) 530; *Ruscomb St., In re*, 30 Pa. Super. 476 (if access to property is not prevented, though it is less direct than formerly); *Sensenig v. Lancaster*, 12 Pa. Dist. 387; *Howell v. Morrisville*, 212 Pa. 349. See *Albes v. Southern R. Co.*, 164 Ala. 356; *Stout v. Noblesville & E. G. R. Co.*, 83 Ind. 466; *Huff v. Donehoo*, 109 Ga. 638; *Nichols v. Richmond*, 162 Mass. 170; *Buhl v. Fort St. U. D. Co.*, 98 Mich. 596, 23 L.R.A. 392; *Frost v. Washington County R. Co.*, 96 Me. 76, 86, 59 L.R.A. 68, and cases cited.

³³ *Park City Yacht Club v. Bridgeport*, 85 Conn. 366, 39 L.R.A.(N.S.) 478, citing *Johnston v. Old Colony R. Co.*, 18 R. I. 642, 49 Am. St. 800; *Chicago v. Bureky*, 158 Ill. 103, 29 L.R.A. 568, 42 Am. St. 142; *Highbarger v. Milford*, 71 Kan. 340; *Lewis on Em. Dom.* (3d ed.) sec. 368. To the same effect are *Marietta C. Co. v. Henderson*, 121 Ga. 399, 104 Am. St. 156, and cases cited; *Winnetka v. Clifford*, 201 Ill. 475; *Ridgway v. Osecola*, 139 Iowa,

for the loss,³⁴ unless the new business was established and conducted solely for the purpose of maliciously injuring that previously existing.³⁵ One who accepts a license from a municipality to sell liquors does so with knowledge that it is revocable at the pleasure of the officers who issued it, and cannot recover damages for its revocation though that be done without cause³⁶ or through malice.³⁷ Damage by way of increased noise, smoke, cinders, etc., due to the elevation of a railroad track and changes in operating the road is *damnum absque injuria* as to one who purchased a lot adjoining the road with notice of the existence of a right of way.³⁸ A breach of contract does not afford a cause of action where its performance is prevented by law.³⁹ Regardless of his motive, so long as his acts are not tainted with fraud,⁴⁰ a person may sell or offer for sale at any price goods of which he is not the owner, but which he expects or hopes to acquire, and may make his price public.⁴¹ The older cases, at least to some extent, conditioned the exemption of the owner of property from liability for damages to another

590; *McCann v. Clarke County*, 149 Iowa, 13, 36 L.R.A.(N.S.) 1115, overruling *Brady v. Shinkle*, 40 Iowa, 576, and other cases.

³⁴ *Ferry Co. v. Russell*, 52 W. Va. 356, 59 L.R.A. 513; *Masterson v. Short*, 3 Abb. Pr. (N. S.) 154; *Hanger v. Little Rock J. R.*, 52 Ark. 61.

³⁵ *Dunshee v. Standard Oil Co.*, 152 Iowa, 618, 36 L.R.A.(N.S.) 263, and cases cited; *Tuttle v. Buck*, 107 Minn. 145, 22 L.R.A.(N.S.) 599, 131 Am. St. 446, and cases cited.

³⁶ *Ison v. Griffin*, 98 Ga. 623.

³⁷ *Raycroft v. Tayntor*, 68 Vt. 219, 33 L.R.A. 225; *Docter v. Riedel*, 96 Wis. 158, 37 L.R.A. 580.

³⁸ *Smith v. St. Paul, etc. R. Co.*, 39 Wash. 355, 70 L.R.A. 1018; *Cincinnati C. B. R. Co. v. Burski*, 4 Ohio C. C. (N. S.) 98 (regardless of when the landowner acquired title); *Kotz v. Illinois Cent. R. Co.*, 188 Ill. 578. See *Harrison v. Denver*

City T. Co., 54 Colo. 593, 44 L.R.A.(N.S.) 1164.

³⁹ *Malcomson v. Wappoo Mills*, 88 Fed. 680; *People v. Globe Mut. L. Ins. Co.*, 91 N. Y. 174. *Contra*, *Spader v. Mural Decoration Mfg. Co.*, 47 N. J. Eq. 18.

⁴⁰ See *Richardson v. Silvester*, L. R. 9 Q. B. 34.

⁴¹ *Ajello v. Worsley*, [1898] 1 Ch. Div. 274; *Gilly v. Hirsh*, 122 La. 966, 20 L.R.A.(N.S.) 972. For other illustrations see *Southwestern Tel. & T. Co. v. Beatty*, 63 Ark. 65; *Cleveland City R. Co. v. Osborn*, 66 Ohio St. 45; *Macomber v. Nichols*, 34 Mich. 212; *Waffle v. Porter*, 61 Barb. 130; *Farmer v. Lewis*, 1 Bush. 66; *Pontiac v. Carter*, 32 Mich. 164; *Winters' App.*, 61 Pa. 307; *Tinicum F. Co. v. Carter*, 61 Pa. 21; *Conger v. Weaver*, 6 Cal. 548; *Baker v. Boston*, 12 Pick. 184; *Winchester v. Osborn*, 62 Barb. 337; *Gould v. Hudson River R. Co.*, 6 N. Y. 522; *Rood*

caused by his lawful use of it upon the motive which actuated such use, and that qualification has been embodied in several of the propositions stated in this section. The better rule doubtless is that "no use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious."⁴² Reference has been made in this section to motive as affording a ground of action for acts which would not be such aside from the motive which prompted them. There is a wide divergence of views upon this question, aside from the aspects in which it has been touched upon—as in the institution of actions, competition in business and the use of property. There are authorities of high respectability which hold that the doing of a lawful act for the express purpose of causing damage to another is not ground for an action.⁴³ On the other hand, courts of high standing declare that bad motive may make that a wrong which would not otherwise be so, as where one erects a spite fence on his premises for the purpose of cutting off light and air from another,⁴⁴ or digs a well for the sole purpose of cutting off the supply of water from a well on adjoining premises.⁴⁵

The futility of cases of *wrong without injury* is illustrated

v. New York, etc. R. Co., 18 Barb. 80; Tyson v. Com'rs, 28 Md. 510; Tonawanda R. Co. v. Munger, 5 Denio, 255; Radeliff v. Mayor, etc., 4 N. Y. 195; Botsford v. Wilson, 75 Ill. 132; Mitchell v. Harmony, 13 How. 135, 14 L. ed. 84; Cleveland, etc. R. Co. v. Speer, 56 Pa. 325; Snyder v. Pennsylvania R. Co., 55 Pa. 340; Hollister v. Union Co., 9 Conn. 436; Runnels v. Bullen, 2 N. H. 532; Banks v. Eastern R. & L. Co., 46 Wash. 610, 11 L.R.A.(N.S.) 485.

⁴² Mayor, etc. v. Pickles, [1895] App. Cas. 587; Fisher v. Feige, 137 Cal. 39, 59 L.R.A. 333. A limitation of the rule is suggested in the last case, based on the right to use water for irrigating purposes under the

local law. Compare Horan v. Byrnes, 72 N. H. 93, 62 L.R.A. 602, 101 Am. St. 670, and Huskie v. Griffin, 75 N. H. 345, 27 L.R.A.(N.S.) 966.

⁴³ Loehr v. Dickson, 141 Wis. 332, 30 L.R.A.(N.S.) 495, citing local cases and Dawson v. Kemper, 32 Weekly L. Bull. 15, Jenkins v. Fowler, 24 Pa. 308. To the same effect is Gamble R. Co. v. Chicago, etc. R. Co., 168 Fed. 161, 94 C. C. A. 217, 21 L.R.A.(N.S.) 982. See next note.

⁴⁴ Barger v. Barringer, 151 N. C. 433, 25 L.R.A.(N.S.) 831; Burke v. Smith, 69 Mich. 380; Flaherty v. Moran, 81 Mich. 52, 8 L.R.A. 183, 21 Am. St. 51. Numerous cases to the contrary are referred to in these.

⁴⁵ Chesley v. King, 74 Me. 177.

by cases in which damages are the gist of the action and none are shown.⁴⁶ A statute making it a misdemeanor for any citizen to assign or transfer a claim for debt against any other citizen for the purpose of having the same collected out of the wages or personal earnings of the debtor, in courts outside of the state of the parties' residence, was held to be designed merely to promote the public welfare and not to redress private grievances. The violation of it, though the consequence is the collection of the debt, is not an injury in a legal sense to the debtor, though such collection could not have been enforced under the exemption laws of the state in which the debtor and creditor resided.⁴⁷ It is not easy to harmonize this doctrine with that which gives a right of action against a creditor who seizes his debtor's exempt property or garnishes his exempt wages;⁴⁸ or with that which enjoins a citizen from prosecuting an attachment in the courts of another state against a co-citizen for the purpose of enforcing the payment of a demand out of earnings which are exempt by the law of the domicile.⁴⁹

⁴⁶ *Ford v. Smith*, 1 Wend. 48; *Kimball v. Connolly*, 3 Keyes, 57, 33 How. Pr. 237; *Hutchins v. Hutchins*, 7 Hill, 104; *Pollard v. Lyons*, 91 U. S. 225, 23 L. ed. 308; *Bassil v. Elmore*, 65 Barb. 627; *Kendall v. Stone*, 5 N. Y. 14; *Swan v. Tappan*, 5 Cush. 104; *Dung v. Parker*, 52 N. Y. 494; *Cook v. Cook*, 100 Mass. 194; *Millard v. Jenkins*, 9 Wend. 298; *Stark v. Chitwood*, 5 Kan. 141; *Franklin v. Smith*, 21 Wend. 624; *Mayer v. Walter*, 64 Pa. 283; *Birch v. Benton*, 26 Mo. 153; *Speaker v. McKenzie*, 26 Mo. 255; *Girard v. Moore*, 86 Tex. 675.

⁴⁷ *Uppinghouse v. Mundel*, 103 Ind. 238.

A statute of similar import is repugnant to the fourteenth amendment to the federal constitution. In *re Flukes*, 157 Mo. 125, 51 L.R.A. 176. But not void under the constitution of Nebraska, nor under sec. 1, art. 4, federal constitution.

Singer Mfg. Co. v. Fleming, 39 Neb. 679, 23 L.R.A. 210.

A debtor is not defrauded by being induced by a false representation to pay his debt. *Brown v. Blunt*, 72 Me. 415.

A creditor who fraudulently induces his creditor to come from the state of his residence into that of the former's domicile, with intent to cause his arrest and compel him to pay for his release commits an actionable fraud. *Sweet v. Kimball*, 166 Mass. 332, 55 Am. St. 406.

⁴⁸ *Albrecht v. Treitschke*, 17 Neb. 205; *Haswell v. Parsons*, 15 Cal. 266; *Cooper v. Seyoc*, 104 Mo. App. 414. See *Greer v. Newbill*, 89 Ark. 509.

⁴⁹ *Snook v. Snetzer*, 25 Ohio St. 516; *Zimmerman v. Franke*, 34 Kan. 650; *Stewart v. Thomson*, 97 Ky. 575, 36 L.R.A. 582, 53 Am. St. 431. See *White v. Missouri, etc. R. Co.*, 230 Mo. 287, 29 L.R.A.(N.S.) 874.

It has been held that a citizen who sues a debtor in another state for the purpose of evading the exemption laws of the state of which they are both residents is liable for such damages as may result.⁵⁰ Another such case determines that a creditor who prosecutes an attachment in a foreign state against a resident of a state, a statute of which forbids such proceedings against a debtor's exempt property, and in violation of an order of court, is liable to his debtor after collection of his demand.⁵¹

§ 4. Public wrongs. The law does not give a private remedy for anything but a private wrong.⁵² A public wrong, though the perpetrator of it may be subject to prosecution by the public, may also have the nature and consequences of a private wrong, and be actionable as such in behalf of a person who sustains an injury differing in kind from that which the public at large suffers.⁵³ A land-owner who has a right of egress in a given direction by way of a street may have an injunction to restrain the closing of the street, on the theory that, by being obliged to take a circuitous route to reach a place or

⁵⁰ *Stark v. Bare*, 39 Kan. 100.

⁵¹ *Main v. Field*, 13 Ind. App. 401.

⁵² *Morris v. Colorado M. R. Co.*, 48 Colo. 147, 31 L.R.A. (N.S.) 1106, 139 Am. St. 268; *Beck & G. H. Co. v. Knight*, 121 Ga. 287, 3 L.R.A. (N.S.) 420, (neglect of official duty).

⁵³ *Western U. Tel. Co. v. Ford*, 77 Ark. 531; *Chicago v. Union B. Ass'n*, 102 Ill. 379, 393; *Whitsett v. Union D. & R. Co.*, 10 Colo. 243; *Rose v. Miles*, 4 M. & S. 101; *Greasly v. Codling*, 2 Bing. 263; *Mayor, etc. v. Henley*, 1 Bing. N. C. 222; *Goldthorpe v. Hardman*, 13 M. & W. 377; *Wilkes v. Hungerford M. Co.*, 2 Bing. N. C. 281; *Crommelin v. Cox*, 30 Ala. 318; *Lansing v. Wiswall*, 5 Denio, 213; *Lansing v. Smith*, 8 Cow. 146, 4 Wend. 9; *Pierce v. Dart*, 7 Cow. 609; *Mills v. Hall*, 9 Wend. 315; *Myers v. Malcolm*, 6 Hill, 292;

Gates v. Blincoe, 2 Dana, 158; *Shulte v. North Pac. T. Co.*, 50 Cal. 592; *Baxter v. Winooski T. Co.*, 22 Vt. 114; *Seeley v. Bishop*, 19 Conn. 128; *Stetson v. Faxon*, 19 Pick. 147; *Francis v. Schoellkopf*, 53 N. Y. 152; *Venard v. Cross*, 8 Kan. 248; *Pittsburgh v. Scott*, 1 Pa. 309; *Runyan v. Bordine*, 14 N. J. L. 472; *Hatch v. Vermont Cent. R. Co.*, 28 Vt. 142; *Brown v. Watson*, 47 Me. 161; *Bruning v. New Orleans, etc. Co.*, 12 La. Ann. 541; *Clark v. Peckham*, 10 R. I. 35; *Gordon v. Baxter*, 74 N. C. 470; *Dudley v. Kennedy*, 63 Me. 465; *Hamilton v. Mayor, etc.*, 52 Ga. 435; *Baxter v. Coughlin*, 70 Minn. 1; *Pueblo v. Strait*, 20 Colo. 13, 24 L.R.A. 392. See *Shaubut v. St. Paul, etc. R. Co.*, 21 Minn. 502; *Proprietors, etc. v. Newcomb*, 7 Met. 276; *Pekin v. Brereton*, 67 Ill. 477; § 972.

object, he suffers special damage.⁵⁴ On grounds of public policy, and because judgments cannot be impeached in collateral proceedings, a party to a suit cannot maintain an action against his successful adversary for suborning a witness whose false testimony tended to produce the judgment,⁵⁵ nor for the adverse party's fraud and false swearing, so long as the judgment stands.⁵⁶ For like reasons a defeated suitor cannot maintain an action for damages against a witness for falsely testifying in favor of the adverse party.⁵⁷ Where a statute prohibited the sending of animals affected with a contagious disease to market and inflicted penalties on any person so sending them, the violation of it, with knowledge, was a public offense, but it did not amount, by implication, to a representation that the animals sent were sound, and did not raise, as between the parties to a sale of them, any right on the part of the purchaser to claim damages in respect of an injury he had suffered in consequence of buying the animals.⁵⁸ A citizen cannot recover damages from a canal company for its failure to reconstruct a part of its canal because he was thereby prevented from deriving a profit by the use of his boat on the canal.⁵⁹

§ 5. Illegal transactions. It may be assumed as an undisputed principle that no action will lie to recover a demand or a supposed claim for damages if, to establish it, the plaintiff requires aid from an illegal transaction, or is under the neces-

⁵⁴ *Sheedy v. Union Press B. Works*, 25 Mo. App. 527; *Glasgow v. St. Louis*, 15 Mo. App. 112, 87 Mo. 678; *Cummings v. St. Louis*, 90 Mo. 259.

⁵⁵ *Bostwick v. Lewis*, 2 Day, 447; *Smith v. Lewis*, 3 Johns. 157; *Ross v. Wood*, 70 N. Y. 8; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Pico v. Cohn*, 91 Cal. 129, 13 L.R.A. 336; *Gray v. Barton*, 62 Mich. 196; *Eyres v. Sedgewicke*, Cro. Jac. 601; *Young v. Leach*, 27 App. Div. 293.

⁵⁶ *Godette v. Gaskill*, 151 N. C. 52, 24 L.R.A.(N.S.) 265, 134 Am. St. 964; *Curtis v. Fairbanks*, 16 N. Suth. Dam. Vol. 1.—2.

H. 542; *Lyford v. Demeritt*, 32 M. H. 234; *Damport v. Sympton*, Cro. Eliz. 520; *Revis v. Smith*, 18 C. B. 125.

⁵⁷ *Horner v. Schinstock*, 80 Kan. 136, 23 L.R.A.(N.S.) 134 (while the judgment is unreversed); *Stevens v. Rowe*, 59 N. H. 578, 47 Am. Rep. 231.

⁵⁸ *Ward v. Hobbs*, L. R. 4 App. Cas. 13. See *Mairs v. Baltimore & O. R. Co.*, 175 N. Y. 409; *Midland Ins. Co. v. Smith*, 6 Q. B. Div. 561; *Bradlaugh v. Clarke*, L. R. 8 App. Cas. 354.

⁵⁹ *Saylor v. Pennsylvania C. Co.*, 183 Pa. 167.

sity of showing and depending in any degree upon an illegal agreement to which he was a party.⁶⁰ The same principle applies to an illegal agreement set up in defense of an action; either party may plead and prove its real character.⁶¹ A bank is not liable for failure to perform its contract to lend or advance money to be used in speculating in futures.⁶² The sender of a telegram relating to a gambling contract in stocks cannot invoke such contract, or the gain or loss resulting from it, to measure the damages sustained in consequence of its non-delivery.⁶³ This principle does not extend to a contract which is merely *ultra vires*, involves no turpitude, and does not offend against any express statute.⁶⁴ Neither does it follow that if two persons are engaged in the same unlawful enterprise, each of them while so engaged is irresponsible for wilful injuries done to the property of the other. If, in such a case, the plaintiff can maintain his action without being obliged to show that he was unlawfully engaged when his right to bring it accrued he may recover, though the defendant makes proof of

⁶⁰ Welch v. Wesson, 6 Gray, 505; Gregg v. Wyman, 4 Cush. 122; Phalen v. Clark, 19 Conn. 421, 50 Am. Dec. 253; Simpson v. Bloss, 7 Taunt. 246; Myers v. Meinrath, 101 Mass. 366; Connolly v. Boston, 117 Mass. 64; Gulf, etc. R. Co. v. Johnson, 71 Tex. 619, 1 L.R.A. 730; Kitchen v. Greenabaum, 61 Mo. 110; The Arrogante Barcelones, 7 Wheat. 496, 5 L. ed. 507; The Clarita and The Clara, 23 Wall. 1, 23 L. ed. 146; Meguire v. Corwine, 101 U. S. 108, 25 L. ed. 899; Oscanyan v. Winchester A. Co., 103 U. S. 261, 26 L. ed. 539; Niagara Falls B. Co. v. Wall, 98 Mich. 158; Haggerty v. St. Louis I. Mfg. & S. Co., 143 Mo. 238, 65 Am. St. 647, 40 L.R.A. 151; Pullman's P. C. Co. v. Central T. Co., 171 U. S. 138, 150, 43 L. ed. 108, 113; Bishop v. American P. Co., 105 Fed. 845; Meyers v. Merrillion, 118 Cal. 352; Edwards v. Randle, 63 Ark. 318, 58 Am. St. 108, 36 L.R.A.

174; Kelly v. Courter, 1 Okla. 277; Richardson v. Scott's Bluff County, 59 Neb. 400, 48 L.R.A. 294, 80 Am. St. 682; Johnston v. United States, 41 Ct. of Cls. 76; Lewis v. Brannen, 6 Ga. App. 419; Coppedge v. Goetz B. Co., 67 Kan. 851, citing the text; Gloster O. Works v. Buckeye C. O. Co., 87 Miss. 618; People v. Mercantile Co-op. Bank, 104 App. Div. 219; Hardison v. Reel, 154 N. C. 273, 34 L.R.A. (N.S.) 1098. See Mitchell v. Branham, 104 Mo. App. 480.

⁶¹ Lauer v. Banning, 152 Iowa, 99; Jenness v. Simpson, 84 Vt. 127.

⁶² Garseed v. Sternberger, 135 N. C. 501; Moss v. Exchange Bank, 102 Ga. 808, overruling Western U. Tel. Co. v. Blanchard, 68 Ga. 299.

⁶³ Weld v. Postal Tel.-C. Co., 199 N. Y. 88; Morris v. Western U. Tel. Co., 94 Me. 423.

⁶⁴ Bath G. L. Co. v. Claffy, 151 N. Y. 24, 36 L.R.A. 664.

the illegal act. The latter cannot be relieved from the consequences of his unlawful conduct by showing the wrong-doing of the plaintiff and his own participation therein.⁶⁵ In Massachusetts if the injury is sustained on the Lord's day and results from the negligence of the defendant, no element of wilfulness existing, the violation of the statute concerning the observance of that day is regarded as contributory negligence, though the plaintiff is otherwise free from fault.⁶⁶ As applied to actions which are not based on contract the rule stated is generally disapproved.⁶⁷ "The cases may be summed up," said Dixon, C. J., "and the result stated generally to be the affirmation of two very just and plain principles of law as applicable to civil actions of this nature, namely: first, that one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily connected with, or leading to, or causing or producing the wrongful act complained of; and secondly, that the fault, want of due care or negligence on the part of the plaintiff which will preclude a recovery for the injury complained of as contributing to it must be some act or conduct of the plaintiff having the relation to that injury of a cause to the effect produced by it."⁶⁸

Though an illegal contract will not be executed, yet when

⁶⁵ Welch v. Wesson, 6 Gray, 505; Disbrow v. Creamery & P. Mfg. Co., 110 Minn. 237, and cases cited; if such wrongdoing did not proximately contribute to the injury sustained. Moore v. Smith, 6 Ga. App. 649, 7 Ga. App. 675.

⁶⁶ Bosworth v. Swansey, 10 Met. 363, 43 Am. Dec. 441; Jones v. Andover, 10 Allen, 18.

⁶⁷ Sutton v. Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534; Louisville, etc. R. Co. v. Buck, 116 Ind. 566, 11 Am. Neg. Cas. 508, 2 L.R.A. 520, 9 Am. St. 883; Same v. Frawley, 110 Ind. 18, 14 Am. Neg. Cas. 541, 1 L.R.A. 730; Knowlton v. Milwaukee City R.

Co., 59 Wis. 278; Gulf, etc. R. Co., v. Johnson, *infra*, and numerous other cases referred to in the three first cited; Kansas City v. Orr, 62 Kan. 61, 50 L.R.A. 783, citing numerous cases.

An action lies for injury done to property used for gaming purposes if it was not so used at the time it was damaged. Gulf, etc. R. Co. v. Johnson, 71 Tex. 619, 1 L.R.A. 730.

⁶⁸ Sutton v. Wauwatosa, *supra*; Taylor v. Western U. Tel. Co., 95 Iowa, 740; Hughes v. Atlanta S. Co., 136 Ga. 511, 36 L.R.A.(N.S.) 547, modifying earlier cases; Coppedge v. Goetz, *supra*; Gabbert v.

it has been executed by the parties and the illegal object has been accomplished, the money or thing which is the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin.⁶⁹

§ 6. **Contractual exemption from liability for damages.** The benefit of the rules of law which provide compensation for injury may, where no question of public policy is involved, be waived or relinquished in whole or in part by contract.⁷⁰ Thus persons engaged in public employments out of which spring duties and responsibilities to patrons may be relieved to some extent by contract of liabilities imposed by law, where such waivers or limitations are reasonable and not inconsistent with sound public policy. The responsibility of a common carrier as an insurer may be so limited by contract.⁷¹ It is settled, however, that a carrier cannot, by any agreement with shippers or patrons, relieve itself from responsibility for its own negligence or that of its servants; and this because such release is unreasonable and contrary to public policy.⁷² The weight of authority is to the contrary where injury is sustained by a passenger while riding on a free pass which

Hackett, 135 Wis. 86, 14 L.R.A. (N.S.) 1070. See *McNeill v. Railroad Co.*, 135 N. C. 682, 67 L.R.A. 227.

⁶⁹ *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. ed. 473; *McBlair v. Gibbes*, 17 How. 232, 15 L. ed. 132; *Kinsman v. Parkhurst*, 18 How. 289, 15 L. ed. 385; *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732.

⁷⁰ *Geiser Mfg. Co. v. Krogman*, 111 Iowa, 503, citing the text; *Griswold v. Illinois Cent. R. Co.*, 90 Iowa, 265, 24 L.R.A. 647; *Lambert H. E. Co. v. Paschal*, 151 N. C. 27; *Terry v. Southern R.*, 81 S. C. 279, 18 L.R.A. (N.S.) 295; *Ancrum v. Camden W., L. & I. Co.*, 82 S. C. 284, 21 Am. Neg. Rep. 74, 21 L.R.A. (N.S.) 1029. See

§ 279 *et seq.* as to stipulated damages.

⁷¹ See *Mechem's Hutchinson on carriers*, ch 7; note to *Cole v. Goodwin*, 32 Am. Dec. 495-506; ch. 21.

⁷² *Bank v. Adams Exp. Co.*, 93 U. S. 181; 23 L. ed. 875; *Railway Co. v. Stevens*, 95 U. S. 655, 10 Am. Neg. Cas. 638, 24 L. ed. 535; *Chicago, etc. R. Co. v. Abels*, 60 Miss. 1017; *Wallingford v. Columbia & G. R. Co.*, 26 S. C. 258; *Alabama, etc. R. Co. v. Little*, 71 Ala. 611; *American Exp. Co. v. Sands*, 55 Pa. 140; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Judson v. Western R. Co.*, 6 Allen 486; *Ball v. Wabash, etc. R. Co.*, 83 Mo. 574; *Christenson v. American Exp. Co.*, 15 Minn. 270.

stipulates for the release of the carrier's liability for injury sustained through its negligence.⁷³ At common law there was no right to recover damages for negligence which caused the death of a human being. That right, being given by statute, may be abolished or limited. But after the right of unlimited recovery for personal injury or for death caused by negligence has been declared by the constitution no statute which purports to fix limits to the amount recoverable can have effect.⁷⁴ The value of the interest of a wife and children in the life of the husband and father, and the amount they may recover in case of his death through the negligence of another, cannot be affected by any contract he may make.⁷⁵ Neither will the acceptance of money in pursuance of such a contract, nor the execution of a release of liability by the widow affect the administrator's right of action on behalf of the widow and children.⁷⁶

The rule seems to be different in New York if the intention is clearly expressed. *Nelson v. Hudson River R. Co.*, 48 N. Y. 498; *Nicholas v. New York Cent. etc. R. Co.*, 89 N. Y. 370.

A railway company may contract as a private carrier for the transportation of matter for express companies and require exemption from liability as a condition precedent to carrying. *Pittsburgh, etc. R. Co. v. Mahoney*, 148 Ind. 196, 2 Am. Neg. Rep. 335, 40 L.R.A. 101. *Contra*, *Voight v. Baltimore, etc. R. Co.*, 79 Fed. 561.

⁷³ *Payne v. Terre Haute & I. R. Co.*, 157 Ind. 616, 56 L.R.A. 472, 11 Am. Neg. Rep. 205; *Griswold v. New York, etc. R. Co.*, 53 Conn. 371, 55 Am. Rep. 115; *Rogers v. Kennebec Co.*, 86 Me. 261, 3 Am. Neg. Cas. 590, 25 L.R.A. 491; *Quimby v. Boston & M. R. Co.*, 150 Mass. 365, 3 Am. Neg. Cas. 859, 5 L.R.A. 846; *Kinney v. Central R. Co.*, 34 N. J. L. 513, 9 Am. Neg. Cas. 575, 3 Am. Rep. 265; *Wells v. New York, etc. R. Co.*, 24 N.

Y. 181, 9 Am. Neg. Cas. 616; *Muldoon v. Seattle City R. Co.*, 7 Wash. 528, 10 Am. Neg. Cas. 400, 401, 22 L.R.A. 794, 38 Am. St. 901, 10 Wash. 311, 45 Am. St. 787.

⁷⁴ *Pennsylvania R. Co. v. Bowers*, 124 Pa. 183, 2 L.R.A. 621.

Where the United States authorizes a suit to be brought against it, and after it has been brought, repeals the authorizing act, there cannot be a recovery for damages sustained after such repeal. *Paine L. Co. v. United States*, 55 Fed. 854.

⁷⁵ *Maney v. Chicago, etc. R. Co.*, 49 Ill. App. 105; *Chicago, etc. R. Co. v. Wymore*, 40 Neb. 645, 12 Am. Neg. Cas. 229, Same 16 Am. Neg. Cas. 590; Same v. Martin, 59 Kan. 437, 4 Am. Neg. Rep. 266. See *Oyster v. Burlington Relief Department*, 65 Neb. 789, 59 L.R.A. 291.

⁷⁶ *Chicago, etc. R. Co. v. Healy*, 76 Neb. 783, 10 L.R.A.(N.S.) 198, overruling *Walters v. Chicago, etc. R. Co.*, 74 Neb. 531, 19 Am. Neg. Rep. 350.

In some states contracts between persons who sustain the relation of master and servant to each other, by which the former undertakes to secure immunity beforehand from the liability attaching to his negligence as master, are valid if any criminal neglect is not waived.⁷⁷ A railroad company which is a party to such a contract does not enter into it as a common carrier; hence the principle which limits its power to restrict its liability in the latter capacity does not affect the agreement.⁷⁸ It is strongly intimated in Arkansas that a stipulation which relieves the employer from liability for the negligence of co-servants (he having selected such as are competent in the first instance, and afterwards discharged those found careless, vicious or inefficient) might be sustained as reasonable, notwithstanding the abolishment of the common-law rule of non-liability for the acts and omissions of fellow-servants.⁷⁹ This intimation was made with decisions before the court which hold otherwise. The employer may not, by a contract with his employee, put upon the latter the risks arising from the employer's disregard of specific statutory requirements for the employee's safety.⁸⁰

The cases which deny the validity of such contracts do so upon the ground that they are contrary to public policy.⁸¹ On

⁷⁷ *Western & A. R. Co. v. Bishop*, 50 Ga. 465; *Galloway v. Western & A. R. Co.*, 57 Ga. 512, 14 Am. Neg. Cas. 239; *Cook v. Same*, 72 Ga. 48, 14 Am. Neg. Cas. 89; *Fulton B. & C. Mills v. Wilson*, 89 Ga. 318, 14 Am. Neg. Cas. 50; *Atlantic C. L. R. Co. v. Beazley*, 54 Fla. 311, citing many cases. See *Piper v. Boston & M. R. Co.*, 75 N. H. 435.

⁷⁸ *Western & A. R. Co. v. Bishop*, *supra*; *Little Rock, etc. R. v. Eubanks*, 48 Ark. 460.

⁷⁹ *Little Rock, etc. R. Co. v. Eubanks*, *supra*, 13 Am. Neg. Cas. 200.

⁸⁰ *Davis C. Co. v. Pollard*, 158 Ind. 607, 618, citing *Narramore v. Cleveland, etc. R. Co.*, 96 Fed. 298,

37 C. C. A. 499, 48 L.R.A. 68; *Durant v. Lexington C. M. Co.*, 97 Mo. 62, 16 Am. Neg. Cas. 397; *Greenlee v. Southern R. Co.*, 122 N. C. 977, 41 L.R.A. 399, 65 Am. St. 734; *Baddeley v. Earl Granville*, 19 Q. B. Div. 423; *Groves v. Wimborne*, [1898] 2 Q. B. 402; *Curran v. Grand Trunk R. Co.*, 25 Ont. App. 407.

⁸¹ *Railway Co. v. Spangler*, 44 Ohio St. 471; *Kansas Pac. R. v. Peavey*, 34 Kan. 472, 29 Kan. 169, 15 Am. Neg. Cas. 26; *Weir v. Rountree*, 173 Fed. 776, 97 C. C. A. 500, (Kansas statute); *Atchison, etc. R. Co. v. Fronk*, 74 Kan. 519; *Johnston v. Fargo*, 184 N. Y. 379, 7 L.R.A.(N.S.) 537; *Pugmire v. Oregon S. L. R. Co.*, 33 Utah, 27,

this ground contracts which assume to relieve employers from liability for neglect to furnish suitable appliances are void,⁸² as is a contract of a parent relieving an employer from liability for negligence resulting in injury to a minor employee.⁸³ It is provided by the English employers' liability act, 1880, that where personal injury is caused to a workman in specified cases he may, or in case death is caused by the injury his representatives shall, have the same right of compensation and remedies against the employer as if the workman had not been in the employer's service. This has been held to affect the contract so far only as to negative the implication of an agreement on the workman's part to assume the risks of the employment. It does not render invalid his express contract to relieve the employer from liability for injuries sustained in the employment; and a contract which expressly releases all right on behalf of the servant and his representatives to claim compensation is not void as against public policy because it affects only the interest of the employed.⁸⁴ This position, it seems to the writer,

13 L.R.A.(N.S.) 565, 126 Am. St. 805; *Stone v. Union Pac. R. Co.*, 32 Utah 185; *Sewell v. Atchison, etc. R. Co.*, 78 Kan. 1 (the court being divided three to four on the question of the validity of the contract under the statute). The validity of such a contract was recognized in *International, etc. R. Co. v. Hinzie*, 82 Tex. 623, but it has been assumed that this case is overruled by the refusal of a writ of error in *Texas & P. R. Co. v. Putnam* (Tex. Civ. App.), 63 S. W. 910, which holds otherwise. In accord with the last is *Galveston, etc. R. Co. v. Pigott*, 54 Tex. Civ. App. 367.

⁸² *Davis v. Chesapeake & O. R. Co.*, 122 Ky. 528, 5 L.R.A.(N.S.) 458, 121 Am. St. 481, (the constitution forbids a limitation of the common-law liability of carriers); *Little Rock, etc. R. v. Eubanks*, 48 Ark. 460, 13 Am. Neg. Cas. 200;

Roesner v. Hermann, 10 Biss. 486, 8 Fed. 782; *Runt v. Herring*, 2 N. Y. Misc. 105; (including besides the agreement not to sue a condition not to appear as a witness, etc.).

A contract to which an employee is not a party cannot affect his right to recover against his employer. *Ominger v. New York Cent. R. Co.*, 6 Thomp. & C. 498; *Kenney v. Same*, 54 Hun, 143. The master's liability is not affected by a rule, made part of the contract, requiring that the servant shall be responsible for the condition of the appliances with which he works. *Ford v. Fitchburg R. Co.*, 110 Mass. 240, 261, 15 Am. Neg. Cas. 427.

⁸³ *Pacific Exp. Co. v. Watson* (Tex. Civ. App.), 124 S. W. 127.

⁸⁴ *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357. The substance of the opinion in this case is given in a note in 44 Am. Rep. 633.

is well answered by Smith, J., who said: But surely the state has an interest in the lives and limbs of all its citizens. Laborers for hire constitute a numerous and meritorious class in every community. And it is for the welfare of society that their employers shall not be permitted, under the guise of enforcing contract rights, to abdicate their duties to them. The consequence would be that every railway company and every owner of a factory, mill or mine would make it a condition precedent to the employment of labor that the laborer should release all right of action for injuries sustained in the course of the service, whether by the employer's negligence or otherwise. The natural tendency of this would be to relax the employer's carefulness in those matters of which he has the ordering and control, such as the supplying of machinery and materials, and thus increase the perils of occupations which are hazardous even when well managed. And the final outcome would be to fill the country with disabled men and paupers, whose support would become a charge upon the counties or upon public charity.⁸⁵

A contract of membership between a railroad employee and the voluntary relief department of the railroad, such department being a beneficial insurance association largely supported by the employer, which permits the employee, if he sustains injury, either to sue for damages or accept the benefit of the relief fund, and which makes such acceptance a release and satisfaction of his damages, is not void as against public policy, and the acceptance of money from such department bars an action for damages,⁸⁶ and estops the employee from alleging

⁸⁵ *Little Rock, etc. R. v. Eubanks, supra.*

An Indiana statute nulifies contracts made by corporations with their employees releasing the former from liability to the latter for personal injuries. Such statute includes a contract which binds the employee to accept certain benefits in lieu of damages, and the acceptance of the benefits does not bar his right of action. *Pittsburgh, etc.*

R. Co. v. Montgomery, 152 Ind. 1, 69 L.R.A. 875. As to what contracts are not within a similar statute, see *Railway Co. v. Cox*, 55 Ohio St. 497, 35 L.R.A. 507. Such statutes are void. *Shaver v. Pennsylvania Co.*, 71 Fed. 931. It is otherwise in Canada, *In re Railway Act*, 36 Can. Sup. Ct. 136.

⁸⁶ *Eckman v. Chicago, etc. R. Co.*, 169 Ill. 312, 38 L.R.A. 750, affirming 64 Ill. App. 444; *Chicago,*

that the contract was *ultra vires* his employer.⁸⁷ Such contracts are clearly distinguishable from those in which the right of action is bargained away in advance because such right exists until after the employee has knowledge of all the facts, and then he elects between his right against the relief fund and his action for damages.⁸⁸ Such a contract is binding on an infant if beneficial to him,⁸⁹ and upon all who claim under the person who was a party to it.⁹⁰ Upon its non-performance the employee's right of action reverts for such damages as he sustained, less the amount paid.⁹¹ Under the federal statute governing the liability of employers such contracts are void except to the extent that payments made by a common carrier lessen its liability.⁹² The courts of another jurisdiction than

etc. R. Co. v. Miller, 22 C. C. A. 264, 76 Fed. 439; Maine v. Chicago, etc. R. Co., 109 Iowa, 260; Chicago, etc. R. Co. v. Bell, 44 Neb. 44, 16 Am. Neg. Cas. 581, Lease v. Pennsylvania Co., 10 Ind. App. 47; Pittsburgh, etc. R. Co. v. Mahoney, 148 Ind. 196, 2 Am. Neg. Rep. 335, 40 L.R.A. 101; Same v. Moore, 152 Ind. 345, 44 L.R.A. 638; Chicago, etc. R. Co. v. Curtis, 51 Neb. 442, 2 Am. Neg. Rep. 743. Railway Co. v. Cox, *supra*; Johnson v. Philadelphia & R. R. Co., 163 Pa. 127; Ringle v. Pennsylvania R., 164 Pa. 529; Vickers v. Chicago, etc. R. Co., 71 Fed. 139; Shaver v. Pennsylvania Co., 71 Fed. 931; Brown v. Baltimore & O. R. Co., 6 D. C. App. Cas. 237, 13 Am. Neg. Cas. 816, Spitze v. Same, 75 Md. 162; Petty v. Brunswick & W. R. Co., 109 Ga. 666; Carter v. Same, 115 Ga. 853; 12 Am. Neg. Rep. 421; Donald v. Chicago, etc. R. Co., 93 Iowa, 284, 33 L.R.A. 492, 14 Am. Neg. Cas. 626; Fuller v. Baltimore, etc. Ass'n, 67 Md. 433; Otis v. Pennsylvania Co., 71 Fed. 136; King v. Atlantic C. L. R. Co. 157 N. C. 44, 48 L.R.A.(NS) 450; Reese v. Pennsylvania R. Co., 229 Pa. 340. But

see Wacksmuth v. Atlantic C. L. R. Co., 157 N. C. 34, Barden v. Same, 152 N. C. 318. *Contra*, Miller v. Chicago, etc. R. Co., 65 Fed. 305. The South Carolina court was equally divided on the question of the validity of such a contract. Johnson v. Charleston & S. R. Co., 55 S. C. 152, 44 L.R.A. 645. The doctrine of the Miller case, *supra*, is inferentially disapproved in 76 Fed. 439, 22 C. C. A. 264, by the statement that the authorities were all the other way, though the reviewing court did not expressly pass upon the question. See article in 8 Va. Law Reg. 858.

⁸⁷ Eckman v. Chicago, etc. R. Co., 169 Ill. 312, 38 L.R.A. 750.

⁸⁸ Jack v. Pennsylvania R. Co., 43 Pa. Super. Ct. 337; Railway Co. v. Co., 55 Ohio St. 497, 35 L.R.A. 507; Johnson v. Philadelphia & R. R. Co., *supra*.

⁸⁹ Clements v. London, etc. R. Co., [1894] 2 Q. B. 482.

⁹⁰ Baltimore & O. R. Co. v. Ray, 36 Ind. App. 430.

⁹¹ Pennsylvania Co. v. Chapman, 220 Ill. 428.

⁹² McNamara v. Washington T. Co., 35 App. D. C. 230; Philadel-

that in which such a contract was made will not enforce it if a local statute declares it void.⁹³

§ 7. Nature of the right to damages; its survival; what law governs the measure of damages. When a cause of action arises it has a legal value as a chose in action; it is a species of property.⁹⁴ The right to damages vests when the act or neglect out of which it arises occurs. Even where there is no legal measure of damages, as in case of slander or assault, the injured party has an indeterminate right to compensation the instant he receives the injury. The verdict of the jury and the judgment of the court thereon do not give, they only define, the right.⁹⁵ Such right when vested is to the injured party of the nature of property, and is protected as property in tangible things is protected. It cannot be annulled⁹⁶ or changed by legislation,⁹⁷ nor extinguished except by satisfaction, release or the operation of statutes of limitation.⁹⁸ Trover will lie for its conversion⁹⁹ or the conversion of paper evidence of it;¹ and other actions will lie for breaches of duty or contract, as well as for other wrongs relating to it.² Except when the

phia, etc. R. Co. v. Schubert, 36 App. D. C. 565.

⁹³ Hamilton v. Chicago, etc. R. Co., 145 Iowa, 431.

⁹⁴ 2 Black. Com. 438.

⁹⁵ 2 Black. Com. 438.

⁹⁶ Cooley on Const. Lim. 449; Streubel v. Milwaukee, etc. R. Co., 12 Wis. 67; Westervelt v. Gregg, 12 N. Y. 211; Dash v. Van Kleeck, 7 Johns. 477; Thornton v. Turner, 11 Minn. 336; Terrill v. Rankin, 2 Bush, 453, 92 Am. Dec. 500; Williar v. Baltimore, etc. Ass'n, 45 Md. 546; Griffin v. Wilcox, 21 Ind. 370; Ettor v. Tacoma, 228 U. S. 148, 57 L. ed. 773.

⁹⁷ Osborn v. Leach, 135 N. C. 628, 66 L.R.A. 648; Chicago, etc. R. Co. v. Pounds, 11 Lea, 127.

⁹⁸ State v. McKennon, 11 Ohio N. P. (N. S.) 165, quoting the text; Bowman v. Teall, 23 Wend. 305;

Allaire v. Whitney, 1 Hill, 484; Whitney v. Allaire, 1 N. Y. 305; Christianson v. Linford, 3 Robert. 215; Baylis v. Usher, 4 Moore & P. 790; Bayliss v. Fisher, 7 Bing. 153; Willoughby v. Backhouse, 4 Dowl. & Ry. 539, 2 B. & C. 821; Clark v. Meigs, 10 Bosw. 337.

⁹⁹ Ayres v. French, 41 Conn. 151; Payne v. Elliot, 54 Cal. 341, 342.

¹ Fullam v. Cummings, 16 Vt. 697; Archer v. Williams, 2 C. & K. 26; Comparet v. Burr, 5 Blackf. 419; Hudspeth v. Wilson, 2 Dev. 372, 21 Am. Dec. 344; Pierce v. Gilson, 9 Vt. 216; Moody v. Keener, 7 Port. 218.

² Terry v. Allis, 20 Wis. 32; Evans v. Trenton, 24 N. J. L. 764; Allen v. Suydam, 17 Wend. 368; Walker v. Bank, 9 N. Y. 582; McNair v. Burns, 9 Watts, 130; Rhineland v. Barrow, 17 Johns. 538.

right of action and to damages is for a personal tort or breach of a marriage promise it survives the death of the injured party and is assignable.³

The general subject embraces the principles and illustrative examples by which all legal causes of action may be tested and their pecuniary value measured or adjudicated. By these courts determine, first, whether the party complaining has suffered a legal injury, and how the conclusion that he has shall be expressed in damages; and secondly, they direct and limit the inquiries for the ascertainment of the amount which shall be recovered by way of recompense.

In other sections the rule of damages for the breach of various contracts and for torts where the parties may invoke the law of different jurisdictions is stated.⁴ All that need be observed here in connection with the subject of conflict of laws is that for the breach of contracts the law of the place of per-

³ *Hullett v. Baker*, 101 Tenn. 689; *Final v. Backus*, 18 Mich. 218; *Sears v. Conover*, 3 Keyes, 113; *North v. Turner*, 9 S. & R. 244; *Johnston v. Bennett*, 5 Abb. Pr. (N. S.) 331; *Richtmeyer v. Remsen*, 38 N. Y. 206; *Waldron v. Willard*, 17 N. Y. 466; *McKee v. Judd*, 12 N. Y. 622; *Rice v. Stone*, 1 Allen, 566; *Munsell v. Lewis*, 4 Hill, 635; *Jordan v. Gillen*, 44 N. H. 424; *Grant v. Ludlow*, 8 Ohio St. 1; *Taylor v. Galland*, 3 Greene, 17; *Blakeney v. Blakeney*, 6 Port. 109; *Nettles v. Barnett*, 8 Port. 181; *Hoyt v. Thompson*, 5 N. Y. 347; *Brig Sarah Ann*, 2 Sumn. 211; *Meech v. Stoner*, 19 N. Y. 26; *Linton v. Hurley*, 104 Mass. 353; *Love v. Detroit*, etc. R. Co. 170 Mich. 1; *Shields v. Cincinnati T. Co.*, 13 Ohio N. P. (N. S.) 133; *Prescott v. Grimes*, 143 Ky. 191, 33 L.R.A. (N.S.) 669, *Baltimore B. R. Co. v. Sattler*, 105 Md. 264; *Hagar v. Norton*, 188 Mass. 47; *Holmes v. Loud*, 149 Mich. 410; *Mast v. Sapp*, 140 N. C. 533, 5 L.R.A. (N.S.) 379, 111

Am. St. 864; *Texas*, etc. R. Co. v. *Smith*, 35 Tex. Civ. App. 351; *Jordan v. Welch*, 61 Wash. 569. See *Sensenig v. Pennsylvania R. Co.*, 229 Pa. 168; *Barnard v. Harrington*, 3 Mass. 228.

Under the Kentucky statute the right of action arising out of a personal injury which results in the death of a child, in so far as it is based on his suffering, survives to the personal representative. *Meyer v. Zoll*, 119 Ky. 480. Actions arising out of contracts will not survive where the damages caused by their breach result in injuries to the person. *Hedekin v. Gillespie*, 33 Ind. App. 650, and cases cited. An action for the breach of a marriage promise survives if the obligor has been put in default. *Johnson v. Levy*, 118 La. 447, 9 L.R.A. (N.S.) 1020, 118 Am. St. 378.

⁴ See §§ 356-370, interest; 563, notes and bills; 958, telegraph companies; 1280, actions for wrongful death.

formance governs the measure of compensation;⁵ while for torts the law of the state in which the wrong was done controls.⁶

§ 8. *Injuries to unborn child.* In 1884 the question was raised in Massachusetts whether a child prematurely born and surviving only a few minutes, in consequence of an injury to its mother, was a "person" within the meaning of a statute giving an action for the loss of life against the town whose defective highway caused the death of any person. The court, after reviewing, by Holmes, J., the argument in favor of the administrator of the child, which was based on Lord Coke's statement to the effect that if a woman is quick with child, and takes a potion, or if a man beats her and the child is born alive and dies of the potion or battery, this is murder⁷ said that "no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb. Yet that is the test of the principle relied on by the plaintiff, who can hardly avoid contending that a pretty large field of litigation has been left unexplored until the present moment." If the difficulties stated by the court could be got over, "and if we should assume, irrespective of precedent, that a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being, and if we should assume also that causing an infant to be born prematurely stands on the same footing as wounding or poisoning, we should then be confronted with the question raised by the defendant, whether an infant dying before it was able to live separate from its mother could be said to be a person recognized by the law as capable of having

⁵ Sandham v. Grounds, 94 Fed. 83, 36 C. C. A. 103; Meyer v. Estes, 164 Mass. 457, 32 L.R.A. 283.

⁶ Louisville & N. R. Co. v. Graham, 98 Ky. 688; Same v. Withlow, 105 Ky. 1, 41 L.R.A. 614.

⁷ 3 Inst. 50; 1 Hawk. P. C., c. 31, § 16; 1 Black. Com. 129, 130; 4 id. 198; Beale v. Beale, 1 P. Wms. 244, 246; Burdet v. Hopegood, id. 486; Rex v. Senior, 1 Moody C. C. 346.

The court did not consider how far

the statement in the text would be followed by it if the question were to be regarded as one at common law, but observed that it was opposed to the case in 3 Ass., pl. 2, Y. B. 1 Ed. III. 23, pl. 18; which seems not to have been doubted by Fitzherbert or Brooke, and which was afterwards cited as law by Lord Hale. Fitz. Abr., "Enditement," pl. 4; "Corone," pl. 146; Bro. Abr., "Corone," pl. 146; 1 Hale P. C. 433. See note 10.

a *locus standi* in court, or of being represented there by an administrator.⁸ And this question would not be disposed of by citing those cases where equity has recognized the infant provisionally while still alive *en ventre*.⁹ And perhaps not by showing that such an infant was within the protection of the criminal law. . . . Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, and damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning."¹⁰ In 1891 the court of queen's bench in Ireland ruled that an infant who was deformed from its birth by reason of an accident which happened to its mother while it was *en ventre sa mere* could not maintain an action for the permanent injuries thereby inflicted. The mother was injured while a passenger on a railroad train. The chief justice said that the statement of claim did not allege that the mother made any contract in reference to the child—the contract was with the mother in respect of herself alone. It did not allege that any consideration was received by the company in respect of the child. It did not allege that the company, through its servants or otherwise, knew anything about the child or the condition of the mother. "It is quite plain, for aught that appears in this statement of claim, that however the child in the womb may be regarded, whether as part of the mother or having a distinct personality—whether an entity or a nonentity,—it was, so far as any actual relation the company had with it, a non-entity; and therefore, in my opinion, the existence of the duty, for the breach of which the defendants would be liable as carriers of passengers, cannot be inferred. To infer the exist-

⁸ Marsellis v. Thalhimier, 2 Paige, 36; Harper v. Archer, 4 Sm. & M. 99.

In the first case it was held that "an unborn child, after conception, is to be considered *in esse* for the purpose of enabling it to take an estate or for any other purpose which is for the benefit of the child, if it should be afterwards born alive."

⁹ Lutterel's Case, stated in Hale v. Hale, Prec. Ch. 50; Wallis v. Hodson, 2 Atk. 114. See Musgrave v. Parry, 2 Vern. 710.

¹⁰ Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242; Buel v. United R. Co., 248 Mo. 126, 45 L.R.A.(N.S.) 625, 4 N. C. C. A. 129.

ence of such a duty from the mere possibility that the mother was with child when she was received as a passenger by the defendants would be to act without the sanction of any judicial decision, or, in my opinion, of any legal principle.”¹¹ The judge was anxious to have it understood that he did not go so far as to hold that if a person, knowing that a woman is *enceinte*, wilfully inflicts injuries on her with a view to injuring the child, which is born a cripple or becomes so subsequently as a result of the injuries, an action will not lie at the suit of such child. The other judges concurred in separate opinions which are very interesting and instructive. The Massachusetts case and the Irish case have been followed where an action was brought on behalf of a child born with serious physical defects because of injuries sustained by its mother through the negligence of the officers of a hospital where she went for the purpose of being cared for during confinement.¹² An action will not lie to recover for the death of a child prematurely born, as the result of injuries to the mother, in consequence of which birth it died.¹³ It is worthy of note in this connection that it has been held that a child *en ventre sa mere* is a child within the meaning of Lord Campbell’s act, so as to be capable, after its birth, of maintaining an action in respect of the pecuniary loss sustained by the death of its father owing to the wrongful act of others done while it was in the womb.¹⁴ And such a child may maintain an action for loss of support upon a bond given under a civil damage act for the recovery of damages sustained in consequence of the illegal sale of liquor to its father before it was born.¹⁵

¹¹ Walker v. Great Northern R. Co., 28 L. R. Ire. 69; Nugent v. Brooklyn Heights R. Co., 154 App. Div. (N. Y.) 667.

¹² Allaire v. St. Luke’s Hospital, 184 Ill. 359, 75 Am. St. 176, 7 Am. Neg. Rep. 427, 48 L.R.A. 225, affirming 76 Ill. App. 441. See Prescott v. Robinson, 74 N. H. 460, 17 L.R.A. (N.S.) 594, 124 Am. St. 987.

¹³ Gorman v. Budlong, 23 R. I. 169, 55 L.R.A. 118; Hawkins v. Front St. C. R. Co., 3 Wash. 592, 10 Am. Neg. Cas. 397, 28 Am. St.

72, 16 L.R.A. 808. See Lathrope v. Flood, 135 Cal. 458, 57 L.R.A. 215; Kirk v. Middlebrook, 201 Mo. 245.

¹⁴ The George and Richard, L. R. 3 Ad. & Eccl. 466; Texas & P. R. Co. v. Robertson, 82 Tex. 657, 27 Am. St. 922; Nelson v. Galveston, etc. R. Co., 78 Tex. 621, 11 L.R.A. 391, 22 Am. St. 81; Herndon v. St. Louis, etc. R. Co., 37 Okla. 256.

¹⁵ State v. Soale, 36 Ind. App. 73, approving Quinlen v. Welch, 69 Hun, 584.

CHAPTER II.

NOMINAL DAMAGES.

- § 9. Nature and purpose of nominal damages.
10. Illustrations of the right to nominal damages.
11. The right, a substantial one; new trials.

§ 9. **Nature and purpose of nominal damages.** For every actionable injury there is an absolute right to damages; the law recognizes such an injury whenever a legal right is violated. Rights are legal when recognized and protected by law. Every invasion of such right threatens the right itself, and to some extent impairs the possessor's enjoyment of it. The logical sequence of finding an invasion is the legal sequence, —a legal injury; this entitles the injured party to compensation. In abstract principle the law is that the person whose rights have been invaded is entitled to compensation proportioned in amount to the injury. The extent of the actual injury, however, is seldom matter of law; and when it is not, merely showing the wrong or breach of contract which constitutes the injury will only authorize the court to judicially declare that the party injured is entitled to *some* damages. If there is no inquiry as to actual damages, or none appear on inquiry, the legal implication of damage remains. This requires some practical expression as the compensation for a technical injury; therefore, nominal damages are given, as six cents, a penny, or a farthing, a sum of money that can be spoken of, but has no existence in point of quantity. Verdicts and judgments for damages generally specify a small sum which may be paid.¹ When actual damages are assessed

¹ McGlone v. Haugher, 56 Ind. App. 243; Brown v. Moslotter, — Iowa, —, 149 N. W. 908, citing the text; Meek v. Union Pac. R. Co., 95 Kan. 111; Jean v. Brentlinger, 155 Ky. 509; Crosby v. Plummer, 111

Me. 355; Ideal Leather Goods Co. v. Eastern S. S. Corp. 220 Mass. 133; Ochs v. Woods, 160 App. Div. (N. Y.) 740; Grand Boulevard in City of New York, Matter of, 160 App. Div. (N. Y.) 80; Smith v.

those which are nominal are included and are not separately added. Where a plaintiff sued in an inferior court for a debt

Postal Telegraph-Cable Co., 167 N. C. 248; Smith v. Holmes, 167 N. C. 561; Caswell v. J. S. McCall & Sons, — Tex. Civ. App. —, 163 S. W. 1001; Diana Shooting Club v. Kohl, 156 Wis. 257; Tuskegee L. & S. Co. v. Birmingham Realty Co., 161 Ala. 542, 23 L.R.A.(N.S.) 992; Price v. High Shoals Mfg. Co., 132 Ga. 246, 22 L.R.A.(N.S.) 684; Batson v. Higginbotham, 7 Ga. App. 835; Pratt v. Davis, 118 Ill. App. 161, citing the text; Green v. Farmers' Con. D. Co., 113 Ia. 869, (\$50 allowed); Lampert v. Judge & D. D. Co., 119 Mo. App. 693, citing the text; Roberts v. Brown, 43 Tex. Civ. App. 206; Hessey v. Quinn, 21 Ont. L. R. 519; Wilson v. St. Louis, etc. R. Co., 160 Mo. App. 649; Clay v. Board, 85 Mo. App. 237, citing the text; Quigley v. Birdseye, 11 Mont. 439; Trumbull v. School Dist. 22 Wash. 631; Greensboro v. McGibboney, 93 Ga. 672; Jurnick v. Manhattan O. Co., 66 N. J. L. 380; Douglass v. Railroad Co., 51 W. Va. 523; Diana S. Club v. Lamoreux, 114 Wis. 44, 58, citing the text; Bourdette v. Seward, 107 La. 258; Beaumont v. Greathead, 2 C. B. 499; Ashby v. White, 2 Ld. Raym. 938; Parker v. Griswold, 17 Conn. 303; Ripka v. Sergeant, 7 W. & S. 9, 42 Am. Dec. 214; McConnel v. Kibbe, 33 Ill. 175, 85 Am. Dec. 265; Pleasants v. North Beach, etc. R. Co., 34 Cal. 586; Tootle v. Clifton, 22 Ohio, 247, 10 Am. Rep. 732; Pastorius v. Fisher, 1 Rawle, 27; Hobson v. Todd, 4 T. R. 71; Clifton v. Hooper, 6 Q. B. 468; Foster v. Elliott, 33 Iowa, 216; Leeds v. Metropolitan G. L. Co., 90 N. Y. 26; Anders v. Ellis, 87 N. C. 207; Hill

v. Forkner, 76 Ind. 115; King v. St. Louis, 250 Mo. 501, citing the text; Ladoga C. Co. v. Corydon C. Co., 52 Ind. App. 23; Eckman v. Lehigh, etc. C. Co., 50 Pa. Super. 427; Berney v. Adriance, 157 App. Div. 628.

But see Strait v. Wilkins, 23 Cal. App. 774, affirming a judgment denying nominal damages for defendants' breach of contract to exchange lands where no right of the plaintiff would have been conserved by a judgment for nominal damages.

Where the plaintiff establishes the infraction of a right but the evidence adduced fails to show with sufficient certainty the extent of damage resultant therefrom he is entitled to nominal damages only. Birmingham Ry. Light and Power Co. v. Friedman, 187 Ala. 562; Birmingham Ry. Light & Power Co. v. Colbert, — Ala. —, 67 So. 513; Welch v. Evans Bros. Const. Co., — Ala. —, 66 So. 517; Stephenson v. Jeebles & Colias Confectionery Co., 10 Ala. App. 431; Wynn v. Atlantic Coast Line R. Co., 66 Fla. 604; Brooklyn Church Soc. v. Brooklyn F. K. Soc., — App. Div. —, 152 N. Y. S. 41; Markowitz v. Lindeman, 164 App. Div. (N. Y.) 679; Strauss v. Hoch, 162 App. Div. (N. Y.) 569.

Where property involved in a replevin action is of no intrinsic value, such as canceled stocks and bonds, nominal damages are properly awarded. Duroth Mfg. Co. v. Caulfield, 243 Pa. 24.

In an action for conversion, when not wilful, malicious, or oppressive, the return of the property uninjured and undamaged, before

of 50*l.*, which was the extent of its jurisdiction, and neither recovered nor sought to recover damages except for the pur-

suit, and placed *in statu quo*, though against the will and without the consent of the owner but with his knowledge or with notice to him will, where special damages are neither claimed nor shown, justify the award of nominal damages only. *Whittler v. Sharp*, 43 Utah, 419, 49 L.R.A.(N.S.) 931.

If there is no substantial right involved a judgment awarding \$1 as damages will not be reversed because some smaller sum would have been sufficient. *Hill v. Forkner*, 76 Ind. 115; *Moe v. Chesrown*, 54 Minn. 118; *Hogan v. Peterson*, 8 Wyo. 549, 564. *Contra*, *White v. Woodruff*, 25 Neb. 797, 806.

"Nominal damages mean in law some small amount sufficient to cover and carry the costs." *Ransome v. Christian*, 56 Ga. 351; *Conley v. Arnold*, 93 Ga. 823. But in *Western U. Tel. Co. v. Glenn*, 8 Ga. App. 168, \$250 was regarded as a nominal sum in view of the amount involved, the court saying it depends largely upon the sum involved what amount will be considered trivial. But this is not in accord with the general view. See also, *Atkinson v. Mercer*, 11 Ga. App. 462, and *Atlantic Coast Line R. Co. v. Stephens*, '14 Ga. App. 173, awarding \$150 for failure to transport passenger. See also, *Broads v. Mead*, 159 Cal. 765.

An award of \$25 as nominal damages has been sustained (*Quigley v. Birdseye*, *supra*); but it was otherwise when the instruction was to find \$1 or any nominal sum. *Trumbull v. School Dist.* *supra*.

In the exercise of equity powers in an action to recover for the death of a child, the plaintiff hav-

ing had reason to ask judicial investigation of the facts, the court awarded "nominal damages at \$250." *Hamilton v. Morgan's L. & T. R. & S. Co.*, 42 La. Ann. 824.

In *Bourdette v. Seward*, *supra*, \$500 seems to have been considered nominal damages.

There appears to be a tendency in some states to treat the question of nominal damages otherwise than seriously. No doubt there are cases in which no injustice results from so doing. As has been observed by a court of high standing: When we consider that the doctrine of *res judicata*, or even the title to property, may rest upon a judgment for nominal damages it is evident that the right to a verdict is not controlled by the incidental question of the amount of damages to be recovered. *New Jersey S. & C. F. Co. v. Board of Education*, 58 N. J. L. 646. See *Chicago West Division R. Co. v. Metropolitan West Side E. R. Co.*, 152 Ill. 519; *Dady v. Condit*, 188 Ill. 234; *Stanton v. New York & E. R. Co.*, 59 Conn. 272, 21 Am. St. 110.

The right to recover nominal damages for the breach of an indemnifying official bond is dependent upon showing a substantial injury. *State v. Green*, 112 Mo. App. 108. And so where the right denied or infringed upon is a relative, and not an absolute, one, as where an officer fails to make return to a writ for the arrest of a debtor. If he shows that by no possibility could any advantage have accrued to the creditor from the execution of the writ there is no liability for any damages whatever. *Mayne's Dam.* (8th ed.) p.

pose of obtaining costs it was held that nominal damages for this purpose did not place the debt beyond the jurisdiction.² Where judgment by default was taken on a bond in the penalty of \$250, conditioned to pay \$150, it was held that nominal damages could not be added to the penalty for detention of the debt to affect costs.³ The theory upon which and the purpose for which such damages are awarded do not entitle the defendant who seeks, under a plea of recoupment, to reduce the claim of the plaintiff, arising under a contract, by nominal damages in consequence of some breach of the same contract by the plaintiff.⁴

The damages which the law thus infers from the infraction of a legal right are absolute; they cannot be controverted; they are the necessary consequent. The act complained of may produce no actual injury; it may be in fact beneficial, by adding to the value of property or by averting a loss which would otherwise have happened; yet it will be equally true, in law and in fact, that it was in itself injurious if violative of a legal right. The implied injury is from that circumstance; the fact that beyond violating a right it was not detrimental, or was even advantageous, is immaterial to the legal quality of the act itself.⁵

7, citing *Wylie v. Birch*, 4 Q. B. 566; *Williams v. Mostyn*, 4 M. & W. 145; *Stimson v. Farnham*, L. R. 7 Q. B. 489. In some courts a neglect of official duty gives rise to the presumption of damage. *Lafin v. Willard*, 6 Pick. 64, 26 Am. Dec. 629; *State v. Dickmann*, 146 Mo. App. 396; *State v. Miles*, 149 Mo. App. 638; *Head v. Levy*, 52 Neb. 456.

In the absence of an allegation of general damages a nominal sum may not be recovered if the claim made is for special and punitive damages. *Hadden v. Southern M. Service*, 135 Ga. 372; *Sparks M. Co. v. Western U. Tel. Co.*, 9 Ga. App. 728; *Christophulus C. Co. v. Phillips*, 4 Ga. App. 819; *Wright*

v. Smith, 128 Ga. 432; *Haber v. Southern Bell Tel. & T. Co.*, 118 Ga. 874.

² *Joule v. Taylor*, 7 Ex. 58.

³ *People v. Hallett*, 4 Cow. 67.

⁴ *Foote & D. Co. v. Malony*, 115 Ga. 985.

⁵ *Brown v. Mostoller*, — Iowa, —, 149 N. W. 908; *Boston v. Alexander*, 185 Mo. App. 16; *Western U. Tel. Co. v. McMorris*, 158 Ala. 563, 132 Am. St. 46; *Gurr v. Western U. Tel. Co.*, 8 Ga. App. 556; *Moore v. Linneman*, 143 Ky. 231; *Wood v. Cummings*, 197 Mass. 80; *Woll v. Voigt*, 105 Minn. 371; *Lancaster & J. E. L. Co. v. Jones*, 75 N. H. 172; *Smith v. Gunn*, (Tex. Civ. App.) 122 S. W. 919; *Loehr v. Dickinson*, 141 Wis. 332, 30 L.R.A.

§ 10. Illustrations of the right to nominal damages. A message containing a direction to purchase a specified quantity of wheat, deliverable at a stated time in the future, was furnished a telegraph company for transmission. The message, by negligence of its servants, was not delivered. The market price of wheat advanced for two days, then fluctuated, and was less on the day specified in the message than on the day when it should have been delivered, so that there was not only no damage, but the sender was saved from the loss which he would have suffered if his message had been delivered and acted upon. But there was a neglect of duty, an infraction of the sender's right to have care and diligence used in the transmission and delivery of his message; for that he was entitled to nominal damages.⁶ The plaintiff and the defendants were ripa-

(N.S.) 495; *Kiblinger v. Sauk Bank*, 131 Wis. 595; *Troutwine v. Hoff*, 126 App. Div. 556; *Chaffin v. Manufacturing Co.*, 136 N. C. 364; 135 N. C. 95; *Erie County N. G. & F. Co. v. Carroll*, [1911] App. Cas. 105; *Jewett v. Whitney*, 43 Me. 242; *Cook v. Hull*, 3 Pick. 269, 15 Am. Dec. 208; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. 246; *Stowell v. Lincoln*, 11 Gray, 434; *Hathorne v. Stinson*, 12 Me. 183, 28 Am. Dec. 167; *Pollard v. Porter*, 3 Gray, 312; *Newcomb v. Wallace*, 112 Mass. 25; *Chamberlain v. Parker*, 45 N. Y. 569; *Marzetti v. Williams*, 1 B. & Ad. 415; *Kimel v. Kimel*, 4 Jones, 121; *Warre v. Calvert*, 7 Ad. & El. 143; *Embrey v. Owen*, 6 Ex. 353; *Northam v. Hurley*, 1 El. & Bl. 665; *Medway Nav. Co. v. Romney*, 9 C. B. (N. S.) 575; *McLeod v. Boulton*, 3 Up. Can. Q. B. 84; *Smith v. Whiting*, 100 Mass. 122; *McConnel v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265; *Barker v. Green*, 2 Bing. 317; *Graver v. Sholl*, 42 Pa. 58; *Chapman v. Thames Mfg. Co.*, 13 Conn. 269, 33 Am. Dec. 401; *Tyler v. Wilkinson*,

4 Mason, 397; *Bealey v. Shaw*, 6 East, 208; *Blodgett v. Stone*, 60 N. H. 167; *Fulkerson v. Eads*, 19 Mo. App. 623; *Adams v. Robinson*, 65 Ala. 586; *Drum v. Harrison*, 83 Ala. 384; *Barlow v. Lowder*, 35 Ark. 492; *Empire G. M. Co. v. Bonanza G. M. Co.*, 67 Cal. 406; *Hancock v. Hubbell*, 71 Cal. 537; *Kenney v. Collier*, 79 Ga. 743; *Brant v. Gallup*, 111 Ill. 487, 53 Am. Rep. 638; *Mize v. Glenn*, 38 Mo. App. 98; *Jones v. Hannover*, 55 Mo. 462; *Trammell v. Chambers County*, 93 Ala. 388; *Treadwell v. Tillis*, 108 Ala. 262; *Patrick v. Colorado S. Co.*, 20 Colo. 268; *New Jersey S. & C. F. Co. v. Board of Education*, 58 N. J. L. 646; *Taylor v. Hennifer*, 12 Ad. & E. 488; *Borough D. Co. v. Harmon*, 154 App. Div. 689. See cases cited in the first two notes to § 2.

⁶ *Hibbard v. Western U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775. Nominal damages may be recovered for such negligence though it does not appear anything was paid for sending the telegram. *Kennon v. Same*, 92 Ala. 399.

rian proprietors on a water-course and had mills thereon; various other mills belonging to third persons were located on the same stream. In case, the plaintiff complained that the defendants heated the water of the stream by operating steam boilers in their mills, increasing the evaporation five per cent., which was to that extent an abstraction of the water; also that they fouled the water by discharging into it soap suds, etc. But the pollution did no actual damage to the plaintiff, because the water was already so polluted by similar acts of other mill owners and dyers above the defendants' mill that the latter's acts made no appreciable difference; that is, the pollution by the defendants did not make the stream less applicable to practical purposes than it was before. It was held, however, that the plaintiff received damage in point of law from such pollution. It was an injury to a right; but that the loss of five per cent. would not give a cause of action if such diminution arose from a reasonable use of the stream.⁷ Where a part owner was expelled from a mill property and while wrongfully kept out of possession the mill, which was old, was replaced by a new one of greater value, so that when he regained possession the property was much more valuable and he was a gainer after deducting all intermediate lost profits, he was entitled to nominal damages.⁸

The principle that for the violation of every legal right nominal damages at least will be allowed applies to all actions, whether for tort or breach of contract, and whether the right is personal or relates to property. The offer of violence to a person is an assault, and the least unjustifiable touching of him a battery. Where a debtor was arrested on a *ca. sa.* and judgment, after an insolvent discharge, which gave him immunity from arrest, it was held that the party at whose instance the writ was issued, as well as the attorney who issued it, were liable for false imprisonment whether they were previously notified of the discharge or not. Want of notice might reduce the damages to a nominal sum, but could not be allowed to

⁷ Wood v. Waud, 3 Ex. 748; Ulbright v. Eufaula W. Co., 86 Ala. 587, 11 Am. St. 67, 4 L.R.A. 572.

⁸ Jewett v. Whitney, 43 Me. 242.

absolutely excuse a trespass.⁹ The death of a child was caused by the neglect or unskilfulness of the defendant's clerk in substituting morphine for quinine. As the child could have brought an action for the injury had he survived it was held that a liability under a statute existed in favor of the administrator; and because the statute expressly gave a right of action at least nominal damages were recoverable.¹⁰ In actions for libel and slander, wherever there has been publication of matter in itself libelous or actionable *per se*, the law infers some damage.¹¹ Every unauthorized entry upon land of another, or intermeddling with his goods, is an actionable trespass, whether there be actual injury or not; whether the owner suffer much or little he is entitled to a verdict for some damages.¹² In an action for fishing in the plaintiff's fishery he was entitled to nominal damages though the defendant took no fish and the declaration did not allege that he caught any.¹³ One's right of property is infringed by any unlawful flowage of his land.¹⁴ A riparian owner has a right to the natural flow of water not increased or

⁹ *Mill v. Roulliard*, — Iowa, —, 149 N. W. 875, awarding \$1 for assault and battery; *Deyo v. Van Valkenburgh*, 5 Hill, 242. See *Flint v. Clark*, 13 Conn. 361.

¹⁰ *Quin v. Moore*, 15 N. Y. 432; *McIntyre v. New York Cent. R. Co.*, 43 Barb. 532; *Ihl v. Forty-second St. etc. R. Co.*, 47 N. Y. 317, 12 Am. Neg. Cas. 327, 7 Am. Rep. 450.

The failure to comply with a statute requiring that, at stated times, the officers of a corporation shall file verified accounts necessarily implies an injury to the stockholders though no actual damages be shown; and neither the recovery of judgment nor the pendency of an action for a past default bars a subsequent action for a default which occurred after commencement of the prior action. *Shanklin v. Gray*, 111 Cal. 88. Where the law gives an action for the doing of an act, the doing thereof imports a damage.

Whittemore v. Cutter, 1 Gall. 429, 433. See *Enos v. Cole*, 53 Wis. 235.

¹¹ *Holmes v. Clisby*, 121 Ga. 241; *Ashby v. White*, 1 Salk. 19, 2 Ld. Raym. 955; *Flint v. Clark*, 13 Conn. 361; *Kelly v. Sherlock*, L. R. 1 Q. B. 686.

¹² *Dixon v. Clow*, 24 Wend. 188; *McAneany v. Jewett*, 10 Allen, 151; *Carter v. Wallace*, 2 Tex. 206; *Plummer v. Harbut*, 5 Iowa, 308; *Coe v. Peacock*, 14 Ohio St. 187; *Pierce v. Hosmer*, 66 Barb. 345; *White v. Griffin*, 4 Jones, 139; *Watson v. New Milford W. Co.*, 71 Conn. 442.

¹³ *Patrick v. Greenway*, 1 Sandd. 346b, note.

¹⁴ *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53; *McCoy v. Danley*, 20 Pa. 89; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732; *Kemmerrer v. Edelman*, 23 Pa. 143; *Warren v. Deslippe*, 33 Up. Can. Q. B. 59; *Plumleigh v. Dawson*, 6

diminished in quantity and unpolluted in quality, and for any infraction of this right at least nominal damages may be recovered.¹⁵ A fraud by which one is drawn into a contract is an injury actionable *per se*.¹⁶ Actual damage is not necessary to an action. A violation of a right with the possibility of damage is sufficient ground.¹⁷ One who has suffered a slight deformity in the enlargement of the wrist is entitled to nominal damages although there is no evidence showing a decreased earning capacity.¹⁸ Nominal damages will be awarded a distrainer as against one effecting a pound breach or rescue of goods properly distrained though no substantial damages are shown.¹⁹

Ill. 544, 41 Am. Dec. 199; *Pastorius v. Fisher*, 1 Rawle, 27; *Whipple v. Cumberland Mfg. Co.*, 2 Story, 661; *Jones v. Hannovan*, 55 Mo. 462; *Doud v. Guthrie*, 13 Ill. App. 653; *Mellor v. Pilgrim*, 7 Ill. App. 306; *Mize v. Glenn*, 38 Mo. App. 98.

¹⁵ *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 28 Am. St. 575; *Newhall v. Gilson*, 8 Cush. 595; *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 365; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Holsman v. Boiling Spring B. Co.*, 14 N. J. Eq. 235; *Embrey v. Owen*, 6 Ex. 353; *Northam v. Hurley*, 1 El. & Bl. 665; *Stockport W. W. Co. v. Potter*, 7 H. & N. 160; *Tyler v. Wilkinson*, 4 Mason, 397; *Wood v. Waud*, 3 Ex. 748; *Tuthill v. Scott*, 43 Vt. 525, 5 Am. Rep. 301; *Munroe v. Stickney*, 48 Me. 462; *Mitchell v. Barry*, 26 Up. Can. Q. B. 416; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453.

¹⁶ *Allaire v. Whitney*, 1 Hill, 484; *Ledbetter v. Morris*, 3 Jones, 543; *Pontifex v. Bignold*, 3 Scott N. R. 390.

¹⁷ *National Exch. Bank v. Sibley*,

71 Ga. 726, 734; *Ross v. Thompson*, 78 Ind. 90; *Hooten v. Barnard*, 137 Mass. 36; *Blodgett v. Stone*, 60 N. H. 167; *Alabama M. R. Co. v. Jones*, 121 Ala. 113.

Mr. Justice Story observed in *Webb v. Portland Mfg. Co.*, 3 Sumner, 189, that actual perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party is entitled to maintain his action in vindication of his right.

The speculative or conjectural nature of the damages flowing from the breach of a contract do not affect the right to recover nominal damages. In *re Publishers' Syndicate*, 7 Ont. L. R. 223.

Damages for the removal of lateral support to land used as a cemetery, in consequence of which bodies therein are disturbed, are so incapable of measurement that only a nominal sum may be recovered. *Orr v. Dayton & M. T. Co.*, 178 Ind. 40, 48 L.R.A.(N.S.) 474.

¹⁸ *Sloss-Sheffield Steel & Iron Co. v. Dunn*, 9 Ala. App. 524.

¹⁹ *Van Horne v. Brown*, 85 N. J. L. 544.

§ 11. **The right a substantial one; new trials.** The failure to perform a duty or contract is a legal wrong independently of actual damage to the party for whose benefit the performance of such duty or contract is due.²⁰ The omission to show actual damages and the inference therefrom that none have been sustained do not necessarily render the case trivial. The law has regard for the substantial rights of parties though it may overlook trivial things.²¹ When such a right is violated the maxim *de minimis non curat lex* has no application.²² The

²⁰ *Smith v. Woolf*, 160 Ala. 644; *State v. Dickmann*, 146 Mo. App. 396; *Spafford v. Goodell*, 3 McLean, 97; *Runlett v. Bell*, 4 N. H. 433; *Hagan v. Riley*, 13 Gray, 515; *Pond v. Merrifield*, 12 Cush. 181; *Bagby v. Harris*, 9 Ala. 173; *Clinton v. Mercer*, 3 Murph. 119; *Conger v. Weaver*, 20 N. Y. 140; *Mecklem v. Blake*, 22 Wis. 495; *Freese v. Crary*, 29 Ind. 525; *Worth v. Edmonds*, 52 Barb. 40; *French v. Bent*, 43 N. H. 448; *Johnson v. Stear*, 15 C. B. (N. S.) 330; *Steer v. Crowley*, 14 C. B. (N. S.) 337; *Brown v. Emerson*, 18 Mo. 103; *Tracy v. Buchanan*, 167 Mo. App. 432; *Lafin v. Willard*, 16 Pick. 64; *Goodnow v. Willard*, 5 Met. 517; *Browner v. Davis*, 15 Cal. 9; *Seat v. Moreland*, 7 Humph. 575; *Bond v. Holton*, 2 Jones, 149; *Craig v. Chambers*, 17 Ohio St. 254; *Dow v. Humbert*, 91 U. S. 294, 23 L. ed. 368; *Smith v. Whiting*, 100 Mass. 122; *Blot v. Boiceau*, 3 N. Y. 78; *Hickey v. Baird*, 9 Mich. 32; *Newcomb v. Wallace*, 112 Mass. 25; *Chamberlain v. Parker*, 45 N. Y. 569; *Wilcox v. Plummer*, 4 Pet. 172, 7 L. ed. 821; *Clark v. Smith*, 9 Conn. 379; *Barker v. Green*, 2 Bing. 317; *Pollard v. Porter*, 3 Gray, 312; *Marzetti v. Williams*, 1 B. & Ad. 415; *Jordan v. Gallup*, 16 Conn. 536; *Cooper v. Wolf*, 15 Ohio St. 523; *Miekles v. Hart*, 1 Denio, 548; *Carl v. Granger C. Co.*

69 Iowa, 519; *Rosser v. Timberlake*, 78 Ala. 162.

²¹ *Sloss-Sheffield Steel & I. Co. v. Stewart*, 172 Ala. 516; *Smith v. Gugerty*, 4 Barb. 614; *Hathorne v. Stinson*, 12 Me. 183; *Stowell v. Lincoln*, 11 Gray, 434; *Kimel v. Kimel*, 4 Jones, 121; *Ellieottville, etc. R. Co. v. Buffalo, etc. R. Co.*, 20 Barb. 644.

The Georgia court is not aware of any precedent authorizing a trial court to deprive a plaintiff of his right to recover nominal damages. To so hold would put it in the power of the court to prevent the recovery thereof, and render the law authorizing it inoperative. *Addington v. Western & A. R. Co.*, 93 Ga. 566; *Sappington v. Atlanta, etc. R. Co.*, 127 Ga. 178.

Hence if the right to recover such damages is shown, a judgment directing a verdict for the defendant will be reversed. *Addington v. R. Co. supra*. And so of a judgment sustaining a demurrer to the petition, only nominal damages being recoverable. *Kenny v. Collier*, 79 Ga. 743; *Sutton v. Southern R. Co.*, 101 Ga. 776, 3 Am. Neg. Rep. 784; and a judgment dismissing the action. *Roberts v. Glass*, 112 Ga. 456.

²² *Pendleton v. Atlantic L. Co.*, 3 Ga. App. 714; *Moore v. Linnemann*, 143 Ky. 231; *State v. McKinnon*, 11 Ohio N. P. (N. S.) 165, quoting the

court will add nominal damages to the finding of a jury when necessary to such rights, as to carry costs.²³ So where judgment should have been given for plaintiff for nominal damages, but was rendered for defendant, it will be reversed if such damages will entitle the plaintiff to costs;²⁴ otherwise a judgment which is erroneous only because it fails to award plaintiff nominal damages will not be reversed,²⁵ nor will a new trial be

text; *Wartman v. Swindell*, 54 N. J. L. 589, 18 L.R.A. 44.

²³ *Von Schoening v. Buchanan*, 14 Abb. Pr. 185.

If the award of nominal damages is made by a jury the plaintiff is entitled to costs. *Whitting v. Fleming*, 16 Ont. App. 263.

²⁴ *Potter v. Mellen*, 36 Minn. 122; *Enos v. Cole*, 53 Wis. 235; *Sayles v. Bemis*, 57 Wis. 315; *Eaton v. Lyman*, 30 Wis. 41; *Schweer v. Schwabacker*, 17 Ill. App. 78; *Crutcher v. Choctaw*, etc. R. Co., 74 Ark. 358; *State v. Dickmann*, 146 Mo. App. 396; *Barner v. Thompson*, 3 Ga. App. 415; *Glenn v. Western U. Tel. Co.*, 1 Ga. App. 821; *State v. Fralick*, 154 Mo. App. 690; *American S. S. Co. v. Rush* (N. Y. Misc.), 100 Supp. 1019; *Clark Mfg. Co. v. Western U. Tel. Co.*, 152 N. C. 157, 27 L.R.A.(N.S.) 643; *Cronemillar v. Duluth-S. M. Co.*, 134 Wis. 248; *Blass v. Linsley*, 78 N. Y. Misc. 422. *Contra* if an appeal does not lie to determine who is entitled to costs. *Commercial I. Co. v. National Bank*, 36 Wash. 287.

In *Wm. Foerster & Co. v. Faulk-Christian Lumber Co.*, 105 Miss. 612, judgment for the defendant was reversed and judgment entered for the plaintiff for \$1 and all costs in both courts.

²⁵ *Strait v. Wilkins*, 23 Cal. App. 774; *Adams v. Bridges*, 141 Ga. 418; *Benfield v. Croson*, 90 Kan. 661; *Fisk v. Neptune*, — Kan. —, 149

Pac. 692; *Foster v. Wagener*, 129 Minn. 11; *Braun v. Peet*, 97 Neb. 443; *Northcutt v. Hume*, — Tex. Civ. App. —, 174 S. W. 974; *Major v. Hefley-Coleman Co.*, — Tex. Civ. App. —, 164 S. W. 445, citing the text; *Cook v. Fidelity & D. Co.*, 167 Fed. 95, 92 C. C. A. 547; *United States v. Withers*, 130 Fed. 696, 65 C. C. A. 16; *DeMange v. Bloomington*, 155 Ill. App. 49; *New York, etc. R. Co. v. Rhodes*, 171 Ind. 521, 24 L.R.A.(N.S.) 1225; *White v. Sun Pub. Co.*, 164 Ind. 426; *Green v. Macy*, 36 Ind. App. 560; *Castor v. Dufur*, 133 Iowa, 535; *State v. Kelly*, 78 Kan. 42; *Cook v. Smith*, 67 Kan. 53; *Morgan v. Lexington Herald Co.*, 138 Ky. 637; *Laetz v. Tierney*, 153 Mich. 279; *Wilcox v. Morton*, 132 Mich. 63; *School Dist. v. Burress*, 2 Neb. (Unof.) 554; *Willson v. Faxon*, 138 App. Div. 366; *Seal v. Holcomb*, 48 Tex. Civ. App. 330; *Cronemillar v. Duluth, S.-M. Co.*, 134 Wis. 248; *Ladd v. Redle*, 12 Wyo. 362; *Strock v. Russell*, 148 App. Div. 483; *Griffiths v. Johnson*, 3 New South Wales St. Rep. 107; *Mortimer v. Otto*, 206 N. Y. 89; *Checkley v. Illinois Cent. R. Co.*, 257 Ill. 491, 44 L.R.A.(N.S.) 1127; *Padgett v. Atlantic C. L. R. Co.*, 63 Fla. 248; *Hickey v. Baird*, 9 Mich. 32; *Robertson v. Gentry*, 2 Bibb, 542; *Watson v. Van Meter*, 43 Iowa, 76; *Wire v. Foster*, 62 Iowa, 114; *Ely v. Parsons*, 55 Conn. 83, 101; *Platter*

granted.²⁶ A contract will not be reformed to permit the recovery of a nominal sum.²⁷ In California a distinction is taken between actions for defamation and actions for the breach of contracts; in the former a new trial may be granted though the damages recovered may be merely nominal.²⁸ If the reviewing court recognizes that substantial damages have been sustained and that the party entitled to them mistook the basis on which they should be determined, or was precluded from making proof

v. Seymour, 86 Ind. 323; Rhine v. Morris, 96 Ind. 81; Norman v. Winch, 65 Iowa, 263; Harris v. Kerr, 37 Minn. 537; Hibbard v. Western U. Tel. Co., 33 Wis. 558, 14 Am. Rep. 775; Benson v. Waukesha, 74 Wis. 31; Beatty v. Oille, 12 Can. Sup. Ct. 706; Mears v. Cornwall, 73 Mich. 78; Haven v. Manufacturing Co., 40 Mich. 286; McLean v. Wright M. Co., 96 Mich. 479; Thisler v. Hopkins, 85 Ill. App. 207; People v. Petrie, 94 Ill. App. 652; Coffin v. State, 144 Ind. 578, 55 Am. St. 188; Smith v. Parker, 148 Ind. 127; Harwood v. Lee, 85 Iowa, 622; Boardman v. Marshalltown G. Co., 105 Iowa, 445; United States Exp. Co. v. Koerner, 65 Minn. 540, 33 L.R.A. 600; Kenyon v. Western U. Tel. Co., 100 Cal. 454, quoting the text; Phillips v. Covell, 79 Hun, 210; Roberts v. Minneapolis T. M. Co., 8 S. D. 579; Ternes v. Dunn, 7 Utah, 497; Farr v. State Bank, 87 Wis. 223, 41 Am. St. 40; East Moline Co. v. Weir P. Co., 37 C. C. A. 62, 95 Fed. 250; Kelly v. Fahrney, 38 C. C. A. 103, 105, 97 Fed. 176; Scammell v. Clark, 31 New Bruns. 250; Glascock v. Rosengrant, 55 Ark. 376; Bunch v. Potts, 57 Ark. 257; Hartmann v. Burtis, 65 App. Div. 481; Briggs v. Cook, 99 Va. 273.

For refusal to reverse a judgment denying nominal damages on a counterclaim where an allowance

would not have carried costs see Busbee v. Gagnon Co., 50 Mont. 203.

Where the sole object of the action is the recovery of damages the failure to prove substantial damages is a failure to prove the substance of the issue and entitles the defendant to judgment. Woodhouse v. Powles, 43 Wash., 617, 8 L.R.A. (N.S.) 783, 117 Am. St. 1079; Hewson v. Peterman Mfg. Co., 76 Wash. 600, 51 L.R.A. (N.S.) 398; Casassa v. City of Seattle, 75 Wash. 367.

²⁶ Backburn v. Alabama G. S. R. Co., 143 Ala. 346; Beattie v. New York, etc. R. Co., 84 Conn. 555; Edwards v. Hale, 129 Ga. 302; Fulghum v. Beck D. Co., 121 Ga. 273; Central Altagracia v. Wilson, 5 Porto Rico Fed. 36; Storseth v. Folsom, 50 Wash. 456; Brantingham v. Fay, 1 Johns. Cas. 256; Jennings v. Loring, 5 Ind. 250; Walson v. Hamilton, 6 Rich. 75; Haines v. Dunlap, 33 New Bruns. 556; Ringlehaupt v. Young, 55 Ark. 128.

Costs are not taxed in the court of claims and it is not in accordance with its practice to render judgment for nominal damages. Friedenstein v. United States, 35 Ct. of Cls. 1. 9.

²⁷ Whitley v. Willingham, 176 Ala. 264.

²⁸ Schroeder v. Spreckles, 147 Cal. 186, citing local cases.

of them, the denial of his right to nominal damages, to which he was entitled, will be ground for reversing the judgment.²⁹ And if the object of the action is to determine some question of permanent right, and through error the plaintiff is deprived of the judgment he is entitled to, the fact that he can recover only nominal damages will not be reason for denying a new trial.³⁰ If the right to such damages is established the court cannot ignore it and give the defendant judgment although the jury erroneously find substantial damages in the plaintiff's favor.³¹ There is much to commend the practice adopted in some recent cases in which judgments ignoring the right to nominal damages have been reversed and judgments rendered therefor and also for the costs of the appeal;³² though this may not be done in equity where discretion may be exercised in awarding costs.³³

A cause of action may be so intrinsically trivial and vexatious that it would be almost a pardonable departure from the technical rule to apply the maxim *de minimis non curat lex* and direct a verdict for the defendant. It was so ruled in a Vermont case. The defendant as an officer had attached certain hay, straw, etc., and used a pitchfork belonging to the debtor in removing the same; he did no injury to the fork, and after its use returned it where he found it. The court held there was no

²⁹ Harman v. Washington F. Co., 228 Ill. 298; Morris v. Vulgamott, 158 Ill. App. 434; Raymond v. Yarrington, 96 Tex. 443, 62 L.R.A. 962; Canthen v. Breyer, (Tex. Civ. App.) 131 S. W. 853. See Pinkerton v. Randolph, 200 Mass. 24; Hutchinson v. Mt. Vernon W. & P. Co., 49 Wash. 469; Thomson-H. E. Co. v. Durant L. I. Co., 144 N. Y. 94; Stevens v. Amsinck, 149 App. Div. 220.

³⁰ Blackburn v. Alabama G. S. R. Co., 143 Ala. 346; Arkley v. Union S. Co., 147 Cal. 195, quoting the text; Harvey v. Mason City, etc. R. Co., 129 Iowa, 465, 3 L.R.A. (N.S.) 973, 113 Am. St. 483; Rollins v. Bowman City C. Co., 96 App. Div. 365; Merrill v. Dibble, 12 Ill.

App. 85; Ely v. Parsons, 55 Conn. 83, 101; Skinner v. Allison, 54 App. Div. 47; Olson v. Huntimer, 8 S. D. 220; Bungenstock v. Nishnabotna D. Dist., 163 Mo. 198.

³¹ Carl v. Granger C. Co., 69 Iowa, 519.

³² Jones v. Telegraph Co., 101 Tenn. 442; Foerster v. Faulk-C. L. Co., 105 Miss. 612; Bass v. Starnes, 108 Ark. 357; Dilley v. Thomas, 106 Ark. 274; Howard v. Western U. Tel. Co., 106 Ark. 559.

³³ Campbell v. Southwestern Tel. & T. Co., 108 Ark. 569.

The insignificance of a claim for damages is cause for refusing to take jurisdiction in equity. Giragosian v. Chutjian, 194 Mass. 504, 120 Am. St. 570.

liability.³⁴ It is to be observed that, though there was a technical wrong by an unauthorized intermeddling with another's property there was no assertion of an adverse right and no actual injury. The action was not necessary for the vindication of a right nor to redress a wrong deserving compensation. It was, however, a case in which, upon strict principles, nominal damages should have been given; for they are always due for the positive and wrongful invasion of another's property.³⁵ Technical rules and rules as to the forms of proceedings must be observed without regard to the consequences which may follow in particular cases; otherwise the stability of judicial decisions and the certainty of the law cannot be preserved.³⁶

³⁴ Paul v. Slason, 22 Vt. 231, 54 Am. Dec. 75; Pronk v. Brooklyn Heights R. Co., 68 App. Div. 390.

³⁵ Seneca Road Co. v. Auburn, etc. R. Co., 5 Hill 175; Heater v. Pearce, 595 Neb. 583, citing the text.

³⁶ Clark v. Swift, 3 Met. 390, 395.

In Fullam v. Stearns, 30 Vt. 443, it was said that whenever the maxim *de minimis non curat lex* is applied to take away a right of recovery it has reference to the injury and not to the resulting damage. The opinion of Bennett, J., in that

case states the result of several cases on this proposition. See Ashby v. White, 2 Ld. Raym. 938; Kidder v. Barker, 18 Vt. 454; Clifton v. Hooper, 6 Q. B. 468; Barker v. Green, 2 Bing. 317; Williams v. Mostyn, 4 M. & W. 145; Cady v. Huntington, 1 N. H. 138; Young v. Spencer, 10 B. & C. 145; Embrey v. Owen, 6 Ex. 353, 372; Williams v. Esling, 4 Pa. 486, 45 Am. Dec. 710; Glanvill v. Stacey, 6 B. & C. 543; Seneca Road Co. v. Auburn, etc. R. Co., 5 Hill, 175; Bustamente v. Stewart, 55 Cal. 115.

CHAPTER III.

COMPENSATION.

SECTION 1.

COMPENSATORY DAMAGES.

- § 12. Award of compensation the object of the law and of equity.
13. Limitation of liability to natural and proximate consequences.

SECTION 2.

DIRECT DAMAGES.

14. What these include.

SECTION 3.

CONSEQUENTIAL DAMAGES FOR TORTS.

15. Awarded for probable consequences.
16. Rule of consequential damages for torts; extension of liability by statute.
17-19. Illustrations of the doctrine of the preceding section.
20. Consequential damages under fence statutes.
21. Nervous shock without impact; the Coultas case and American cases in harmony with it.
22. Same subject; criticism of the Coultas case; nervous shock a physical injury.
23. Same subject; an earlier ruling.
23*a*. Same subject; *Dulien v. White*.
24. Same subject; miscellaneous cases.
25. Anticipation of injury as to persons; illustrations.
26. Consequential damages in highway cases.
27. Imputed negligence.
28. Particular injury need not be foreseen.
29-31. The act complained of must be the efficient cause.
32. Breach of statutory duties.
33. Injury through third person.
34. Liability as affected by extraordinary circumstances.
35. Illustrations of the doctrine of the preceding section.
36. Liability of carriers for consequential damages; extraordinary circumstances.
37-38. Intervening cause.
39. Acts of injured party; fraud and exposure to peril.
40-42. Act of third person.
43-44. Wilful or malicious injuries.

SECTION 4.

CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT

45. Recoverable only when contemplated by the parties.
46. Illustrations of liability under the rule.
47. Liability not affected by collateral ventures or financial condition of a party.
48. Distinction between consequential liability in tort and on contract.
49. Same subject; criticism of the Hobbs case.
50. Liability under special circumstances; *Hadley v. Baxendale*.
51. Same subject; illustrations and discussion of the rule.
52. Market value; resale; special circumstances.

SECTION 5.

REQUIRED CERTAINTY OF DAMAGES.

53. Must be certain in their nature and cause.
54. Liability for the principal loss extends to details and incidents.
55. Only the items which are certain are recoverable.
- 56-58. Recovery on successive consequences.
- 59-60. Required certainty of anticipated profits.
61. Warranties of seeds and breeding quality of animals.
62. Prospective growth of orchard and of animals.
63. Profits of special contracts.
64. Same subject; *Masterton v. Mayor*.
65. Violation of contract to lease.
66. Profits of labor.
67. Profits from commercial ventures.
68. Profits on dissolution of partnership.
69. Commercial and insurance agencies; proof of damages.
70. Tortious interference with business.
71. Chances for prizes and promotions.
72. Contingent advantage.
73. Uncertain mitigation of breach of marriage promise.
74. Failure to provide sinking fund.

SECTION 6.

THE CONSTITUENTS OF COMPENSATION, OR ELEMENTS OF DAMAGE.

75. Elementary limitation of damages.
76. Damages for nonpayment of or failure to loan money.
77. Greater damages than interest for failure to pay or loan money.
78. Liability for gains and losses.
79. What losses elements of damage.
80. Same subject; labor and expenditures.
81. Same subject; damages by relying on performance.
82. Same subject; liability to third persons; covenants of indemnity.
83. Same subject; indemnity to municipalities; counsel fees.

- 84. Same subject; liability for losses and expenses.
- 85. Same subject; bonds and undertakings; damages and costs.
- 86-87. Same subject; necessity of notice to indemnitor to fix liability.
- 88. Expenses incurred to prevent or lessen damages.
- 89. Same subject; between vendor and vendee.
- 90. Same subject; extent of the duty.
- 91. Same subject; employer may finish work at contractor's expense.
- 92. May damages for breach of contract include other than pecuniary elements?
- 93. Elements of damage for personal torts.
- 94. Character as affecting damages for personal injuries, and in actions for death.
- 95-96. Mental suffering.
- 97. Same subject; liability of telegraph companies.
- 98. Right to compensation not affected by motive.
- 99. Distinction made for bad motive; contracts.
- 100. Motives in tort actions.
- 101. How motive affects consequences of confusion of goods.
- 102-103. Where property sued for improved by wrong-doer.
- 104. Distinctions in the matter of proof.
- 105. Value of property.

SECTION 1.

COMPENSATION DAMAGES.

§ 12. Award of compensation the object of the law and of equity. Actions at law are usually brought to recover compensation for the wrong complained of. The law which is denominated the law of damages is principally that which defines, measures and awards compensation. Such damages as are not compensatory are either nominal or exceptional. Compensation is the redress which the law affords to all persons whose rights have been invaded; in the nature of things they must accept that by way of reparation. Therefore the principles which underlie this right, so necessary and so frequently invoked, and the rules which govern its enforcement are of the greatest importance. The law defines very precisely all personal and property rights so that every person may enjoy his own with confidence and repose. If they are infringed the extent of the encroachment is readily seen when the facts appear. The law defines the scope of responsibility with as much precision as the nature of the subject will permit, and lays down a universal measure of recompense for civil injury which the sufferer is

entitled to recover and the person who is liable is bound to pay when the injury has been done without a motive for which the law subjects him to punishment. The universal and cardinal principle is that the person injured shall receive a compensation commensurate with his loss or injury, and no more; and it is a right of the person who is bound to pay this compensation not to be compelled to pay more, except costs.¹ It is not within legislative power to deprive an individual who has been injured

¹ *Kansas City, etc. R. Co. v. Thornhill*, 141 Ala. 215; *Prestwood v. Carlton*, 162 Ala. 327; *Barker v. Lewis S. & T. Co.* 78 Conn. 198, citing the text; *Hartman v. Warner*, 75 Conn. 197; *Timmerman v. Stanley*, 123 Ga. 850, 1 L.R.A.(N.S.) 379; *People v. Schwartz*, 151 Ill. App. 190; *Chicago & M. E. R. Co. v. Krempel*, 116 id. 253; *Toledo, etc. R. Co. v. Smart*, 116 id. 523; *Mathre v. Devendorf*, 130 Iowa, 107; *Jenkins v. Kirtley*, 70 Kan. 801; *Baltimore B. R. Co. v. Sattler*, 102 Md. 595, quoting the text; *Cape Girardeau & C. R. Co. v. Wingerter*, 124 Mo. App. 426; *Rhodes v. Holladay-K. L. & L. Co.*, 105 id. 279; *Hurxthal v. Boom & L. Co.*, 53 W. Va. 87, 97 Am. St. 954, citing the text; *Baltimore & O. R. Co. v. Kahl*, 124 Md. 299; *Shoemaker v. Central R. of New Jersey*, — N. J. L. —, 89 Atl. 518; *Rockwood v. Allen*, 7 Mass. 254; *Dexter v. Spear*, 4 Mason, 115; *Walker v. Smith*, 1 Wash. C. C. 152; *Ferrer v. Beale*, 1 Ld. Raym. 692; *Allison v. Chandler*, 11 Mich. 542; *Northrup v. McGill*, 27 id. 234; *Bussy v. Donaldson*, 4 Dall. 206, 1 L. ed. 802; *Griffin v. Colver*, 16 N. Y. 494; *Milwaukee, etc. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374, 12 Am. Neg. Cas. 686; *Baker v. Drake*, 53 N. Y. 216; *United States v. Smith*, 94 U. S. 214, 24 L. ed. 115; *Robinson v. Harman*, 1 Ex. 850; *Peltz v. Eichele*, 62 Mo. 171;

Noble v. Ames Mfg. Co., 112 Mass. 492; *Buckley v. Buckley*, 12 Nev. 423; *Suydam v. Jenkins*, 3 Sandf. 614; *Parker v. Simonds*, 8 Met. 205; *Jacobson v. Poindexter*, 42 Ark. 97; *Goodbar v. Lindsley*, 51 Ark. 380, 14 Am. St. 54; *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552; *Jones v. People*, 19 Ill. App. 300; *Page v. Sumpter*, 53 Wis. 652; *Henson-H. S. Co. v. Minnesota B. Co.*, 55 Minn. 530, citing the preceding sentence of the text; *Horst v. Roehm*, 84 Fed. 565; *Alleghany I. Co. v. Teaford*, 96 Va. 372.

A charge is objectionable if the jury are told that plaintiff is entitled to "full, complete and ample" compensation. The adjectives should not be used. *Sale v. Eichberg*, 105 Tenn. 332, 352.

To say to the jury that the plaintiff's damages may be assessed at such sum as they may think he has sustained is to give them a "roving commission" to apply their own measure of damages instead of that defined by the law. *Camp v. Wabash R. Co.*, 94 Mo. App. 272. See § 1256.

An instruction authorizing the jury to find for the plaintiff damages, as they "might think proper, commensurate" with his injuries not exceeding the sum sued for, was held proper in *Yates v. Crozer Coal & Coke Co.*, — W. Va. —, 84 S. E. 626. See also, *Cheeks v. Virginia-Pocahontas Coal Co.*, 74 W. Va. 553.

in his person or estate of redress either in whole or in part. "Nothing less than the full amount of pecuniary damage which a man suffers from an injury to him in his lands, goods or person fills the measure secured to him in the declaration of rights."² The principle of just compensation is paramount. By it all rules on the subject of compensatory damages are tested and corrected. They are but aids and means to carry it out; and when in any instance such rules do not contribute to this end, but operate to give less or more than just compensation for actual injury, they are either abandoned as inapplicable or turned aside by an exception.³ There are, however, upon certain subjects some arbitrary rules, or those which have been adopted from considerations of policy, ostensibly on the basis of compensation, which really fall short of that object in a conservative deference to possible consequences to the party who must respond to the demand. With these necessary or expedient exceptions, the person who has broken his contract or caused injury by any tortious act is liable to the other party to the contract or to the sufferer from such act or neglect for such damages as will place the person so injured in as good condition as though the contract had been performed or the tort had not been committed.⁴ It is not meant by this that the party liable must answer for all consequences which may in-

Where a penalty is claimed as the damage and recovery of it is sought as measuring the damage there can not be a recovery of both. *Hughes v. Arkansas & O. R. Co.*, 74 Ark. 194. A statute imposing a penalty in favor of the party aggrieved in a case where no cause of action existed at common law may be regarded as providing for full compensation. *St. Louis, etc. R. Co. v. Busick*, 74 Ark. 589.

The damages caused by the breach of a contract should not be left to the jury without instructions as to the measure thereof. *King v. Ivanhoe G. Co.*, 7 Aust. Com. L. R. 617. It is the duty of the trial judge to

instruct the jury as to the proper measure of damages though no request to do so be made. *Burns v. Pennsylvania R. Co.*, 233 Pa. 304; *Same v. Same*, 239 id. 207.

² *Chase v. Hoosac T. & W. R. Co.*, 85 Vt. 60; *Thirteenth & F. St. P. R. Co. v. Boudron*, 92 Pa. 475, 482, 10 Am. Neg. Cas. 126.

³ The text is quoted in the following cases: *Sweeney v. Lewis C. Co.*, 66 Wash. 490; *Foss v. Heineman*, 144 Wis. 146; *Paxton v. Vadbonker*, 1 Neb. (Unof.) 776; *Hunt v. Thompson*, 19 Wyo. 523.

⁴ *Wertheim v. Chicoutini P. Co.*, [1911] App. Cas. 301.

directly and remotely ensue. The latter are, beyond a certain point, incapable of being traced; they combine with the results of other causes, and any attempt to follow and apportion them would be abortive, and any conclusion of liability based upon such consequences would rest on conjecture and lead to great injustice. If men were held to such a far-reaching responsibility they would be timid or reckless; if it were legally recognized it would be fatal to all activity and enterprise.

In suits in which equity will award damages the measure thereof will be the same as applied at law, and the same principles govern in ascertaining the scope of the natural and proximate consequences of the wrong done.⁵

§ 13. Limitation of liability to natural and proximate consequences. As before remarked, the law defines the scope of responsibility for consequences; beyond that they are supposed to cease or the injured party is presumed to counteract them by preventive measures. The legal scope is a reasonable one; in general it extends as far as the moral judgment and practical sense of mankind recognize responsibility in the domain of morals, and in those affairs of life which are not referred to the courts for regulation or adjustment. The law defines it generally by the principle which limits the recovery of damages to those which *naturally* and *proximately* result from the act complained of; or, in other words, to those consequences of which the act complained of is the natural and proximate cause.⁶ This limitation is expressed in such general terms that the distinction between those damages which are compensable and those which, because being too remote, are not, is not always very clear. On similar facts different courts have come to diverse conclusions, though equally acknowledging the principle. It is made more specific, however, by rules of an elementary character formulated under it, and by judicial exposition and

⁵ *Stewart v. Joyce*, 205 Mass. 371.

⁶ *Connorsville W. Co. v. McFadden C. Co.*, 166 Ind. 123, 3 L.R.A. (N.S.) 709, quoting the text; *Benevento v. McDougall*, 166 Cal. 405, 49 L.R.A. (N.S.) 1202; *Lisenbury v. St. Suth. Dam.* Vol. I.—4.

Louis & S. Ry. Co., 184 Ill. App. 395; *Deyo v. Hudson*, 89 Misc. (N. Y.) 525; *Smith v. Postal Telegraph-Cable Co.*, 167 N. C. 248; *Chambers v. Everding & Farrell*, 71 Ore. 521.

illustrations which impart to this legal generality a more precise and determinate import than is suggested by its words; and it is only by resort to them that the principle of this limitation can be definitely understood, explained or elucidated. Damages which are recoverable may, therefore, be conveniently divided primarily for this purpose into two classes: first, direct; second, consequential.

SECTION 2.

DIRECT DAMAGES.

§ 14. **What these include.** These include damages for all such injurious consequences as proceed immediately from the cause which is the basis of the action;⁷ not merely the consequences which invariably or necessarily result and are always provable under the general allegation of damages in the declaration, but also other direct effects which have in the particular instance naturally ensued, and must be alleged specially to be recovered for.⁸ The liability of the defendant for these, if responsible for the cause, is clear. All such damages, whether for tort or breach of contract, are recoverable without regard to his intention or motive, or any previous actual contemplation of them. A defendant is conclusively presumed to have contemplated the damages which result directly and necessarily or naturally from his breach of contract,⁹ as will be more particularly illustrated in another place: and in cases of tort his responsibility to this extent is absolute.¹⁰ An illustration of this rule is found in a

⁷ *City of Dublin v. Ogburn*, 142 Ga. 840.

⁸ *Moore v. Fredericks*, 24 Cal. App. 536.

⁹ *Hadley v. Baxendale*, 9 Ex. 341, 2 Am. Neg. Rep. 400; *Burrell v. New York, etc. Co.*, 14 Mich. 34; *Brown v. Foster*, 51 Pa. 165; *Collard v. Southeastern R. Co.*, 7 H. & N. 79; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Smith v. St. Paul, etc. R. Co.*, 30 Minn. 169, 4 Am. Neg. Cas. 218; *Agius v. Great Western C. Co.*, [1899] 1 Q. B. 413;

Cole v. Stearns, 20 N. Y. Misc. 502; *Boyden v. Hill*, 198 Mass. 477.

¹⁰ *Southern Bell Tel. & T. Co. v. McTyer*, 137 Ala. 601, 97 Am. St. 62; *Wells v. Western U. Tel. Co.*, 144 Iowa, 605, 24 L.R.A. (N.S.) 1045, 138 Am. St. 317; *Cumberland Tel. & T. Co. v. Hobart*, 89 Miss. 252, 119 Am. St. 702; *Sadlier v. New York*, 40 N. Y. Misc. 78; *Galveston, etc. R. Co. v. Averill*, (Tex. Civ. App.) 136 S. W. 98; *Cogdell v. Yett*, 1 Cold. 230; *Tally v. Ayres*, 3 Sneed, 677; *Bowas v. Pioneer T. Line*, 2

case where an administrator sold a chattel which the intestate had in his possession when he died, but which in truth belonged to another, and applied the proceeds to the payment of the debts of the intestate, in due course of administration, without notice of the right or claim of the owner; he was personally liable to such owner for the value of the property.¹¹ In another case a factor bought goods for his principal residing at W., and by mistake sent them to a third person at S., who received them in good faith and paid the freight; he was liable for the goods to the owner, but was allowed a deduction for the freight paid.¹²

SECTION 3.

CONSEQUENTIAL DAMAGES FOR TORTS

§ 15. **Awarded for probable consequences.** Consequential damages are those which the cause in question naturally, but indirectly, produced. An example: the defendant was liable for killing a mare; the plaintiff suffered injury in the loss of that animal to the extent of her value, but circumstances gave her an additional value to him; she had an unweaned colt, and was suckling the colt of another mare which had died. The direct consequence of the killing of the mare was her loss—the necessity of employing other means to raise the colts was consequential.¹³ The consequential damages which may be recovered are governed by one consideration when they are claimed for a tort, and by another when they are sued for as the result of a breach of contract.¹⁴ The latter will be the subject of the next section. The question of the remoteness of damage, if the material facts are not in dispute, is for the court. Blackburn,

Sawyer, 21; *Perley v. Eastern R. Co.*, 98 Mass. 414; *Lane v. Atlantic Works*, 111 Mass. 136; *Martachowski v. Orawitz*, 14 Pa. Super. Ct. 175, 186, citing the text. See chs. 21, 22, 36; *Lathers v. Wyman*, 76 Wis. 616.

¹¹ *Newsum v. Newsum*, 1 Leigh, 86, 19 Am. Dec. 739.

¹² *Whitney v. Beckford*, 105 Mass. 267; *Eten v. Luyster*, 60 N. Y. 252;

Keenan v. Cavanagh, 44 Vt. 288, 1 Am. Neg. Cas. 434; *Little v. Boston, etc. R. Co.*, 66 Me. 239; *Bowes v. Pioneer T. Line*, 2 Sawyer 21.

¹³ *McDonell v. Minneapolis, etc. R. Co.*, 17 N. D. 606; *Teagarden v. Hetfield*, 11 Ind. 522.

¹⁴ *Kentucky H. Co. v. Hood*, 133 Ky. 383, 22 L.R.A. (N.S.) 588, 134 Am. St. 457, citing the text.

J., has said that it never ought to be left to a jury; to do that would be in effect to say that there shall be no rule as to damages being too remote.¹⁵ On the other hand, it has been laid down that the question of proximate cause is not one of science or legal knowledge; it is to be determined as a fact in view of all the circumstances,¹⁶ and that, unless the facts are undisputed and are such that there can be no difference in the judgment of reasonable men as to the inferences they warrant, the question is for the jury.¹⁷

§ 16. Rule of consequential damages for torts; extension of liability by statute. In an action for a tort, if no improper motive is attributed to the defendant, the injured party is entitled to recover such damages as will compensate him for the injury received so far as it might reasonably have been expected to follow from the circumstances; such as, according to common experience and the usual course of events, might have been reasonably anticipated.¹⁸ The damages are not limited or affected, so far as they are compensatory, by what was in fact in contemplation by the party in fault. He who is responsible

¹⁵ *Hobbs v. London & S. R.*, L. R. 10 Q. B. 111, 122; *Hammond v. Bussey*, 20 Q. B. Div. 79, 89; *Read v. Nichols*, 118 N. Y. 224, 7 L.R.A. 130; *Cuff v. Newark, etc. R. Co.*, 35 N. J. L. 17, 16 Am. Neg. Cas. 668, 10 Am. Rep. 205; *Behling v. Southwest Pipe Lines*, 160 Pa. 359, 40 Am. St. 724; *Goodlander M. Co. v. Standard O. Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L.R.A. 583; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71; *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 4 Am. Neg. Rep. 490, 41 L.R.A. 794; *Deisenrieter v. Kraus-M. M. Co.*, 97 Wis. 279; *Consolidated E. L. & P. Co. v. Koepp*, 64 Kan. 735, 1 Am. Neg. Rep. 404; *Ultima Thule, etc. R. Co. v. Benton*, 86 Ark. 289 (if the facts are undisputed); *Haskell & B. C. Co. v. Przewdziankowski*, 170 Ind. 1, 14 L.R.A.(N.S.) 972, 127 Am. St. 352; *Roots Co. v. Meeker*,

165 Ind. 132; *Home O. & G. Co. v. Dabney*, 79 Kan. 820. But see *New Castle v. Grubbs*, 171 Ind. 482 (if the facts are in dispute).

¹⁶ *Milwaukee, etc. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Schwarzschild & S. Co. v. Weeks*, 72 Kan. 190, 4 L.R.A.(N.S.) 515, 19 Am. Neg. Rep. 242; *St. Louis, etc. R. Co. v. Hook*, 83 Ark. 584.

¹⁷ *Illinois Cent. R. Co. v. Siler*, 229 Ill. 390, 15 L.R.A.(N.S.) 819, citing local cases; *Waschow v. Kelly C. Co.*, 245 Ill. 516; *Beiser v. Cincinnati, etc. R. Co.*, 152 Ky. 522. See *Gulf, etc. R. Co. v. Hayter*, 93 Tex. 239, 7 Am. Neg. Rep. 359, 47 L.R.A. 325; *Kelly v. Lembeck & Belz Eagle Brewing Co.*, 86 N. J. L. 471.

¹⁸ *J. B. Carr & Co. v. Southern Ry. Co.*, 12 Ga. App. 830; *Ross v. St. Louis, I. M. & S. R. Co.*, 185 Mo. App. 154.

for a negligent act must answer "for all the injurious results which flow therefrom, by ordinary natural sequence, without the interposition of any other negligent act or overpowering force. Whether the injurious consequences may have been 'reasonably expected' to have followed from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom. Such reasonable expectation bears more clearly upon the intent with which the act was committed than upon the liability of the doer for the injurious consequences. If he might reasonably have expected that the injurious consequences which did flow from the act would flow from its commission, the *prima facie* legal presumption would be that he intended the consequences, and the action should be trespass rather than case. It is the unexpected rather than the expected that happens in the great majority of the cases of negligence." ¹⁹ Mr. Wharton says that a man may be negligent in a particular matter

¹⁹ Stevens v. Dudley, 56 Vt. 158, 166.

"When negligence is established it imposes liability for all the injurious consequences that flow therefrom, whatever they are, until the intervention of some diverting force that makes the injury its own, or until the force set in motion by the negligent act has so far spent itself as to be too small for the law's notice. But in administering this rule care must be taken to distinguish between what is negligence and what the liability for its injurious consequences. On the question of what is negligence, it is material to consider what a prudent man might reasonably have anticipated, but when negligence is once established that consideration is entirely immaterial on the question of how far that negligence imposes liability." Isham v. Dow's Est., 70 Vt. 588, 5 Am. Neg. Rep. 106, 67 Am. St. 691, 45 L.R.A. 87; Home Tel. Co. v.

Fields, 150 Ala. 306. Compare Renner v. Canfield, 36 Minn. 90.

But see City of Dublin v. Ogburn, 142 Ga. 840, holding that where a municipal corporation operated an electric light plant, furnishing power and light to its customers, and installing necessary appliances for that purpose, and where it placed a switch within a building so carelessly that a fire resulted, and the building was destroyed, it was liable for property so destroyed, but in the absence of anything to indicate that such damage was in the contemplation of the parties, or that the duty so omitted was with the knowledge and for the purpose of depriving the party injured of such benefits, the cost of renting another building while the owner rebuilt that which was burned, and damage to the business of the owner by reason of being without a building for two months after the fire were too remote to be recovered.

"a thousand times without mischief; yet, though the chance of mischief is only one to a thousand, we would continue to hold that the mischief, when it occurs, is imputable to the negligence. Hence it has been properly held that it is no defense that a particular injurious consequence is 'improbable,' and 'not to be reasonably expected,' if it really appear that it naturally followed from the negligence under examination."²⁰ Continuing, the same author says: "Nor, when we scrutinize the cases in which the test of 'reasonable expectation' is applied, do we find that the 'expectation' spoken of is anything more than an expectation that some such disaster as that under investigation

²⁰ Wharton on Neg. § 77, referring to *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *White v. Ballou*, 8 Allen, 408; *Luce v. Dorchester Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522; *Lewis v. Smith*, 107 Mass. 334, and several English cases. See, also, *Stevens v. Dudley*, 56 Vt. 158; *Brown v. Chicago, etc. R. Co.*, 54 Wis. 342, 7 Am. Neg. Cas. 203; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 3 Am. Neg. Cas. 148, 49 Am. Rep. 168; *Winkler v. St. Louis, etc. R. Co.*, 21 Mo. App. 99, 9 Am. Neg. Cas. 497; *Evans v. Same*, 11 id. 463, 8 Am. Neg. Cas. 486; *Baltimore City P. R. v. Kemp*, 61 Md. 74, 3 Am. Neg. Cas. 655; *Hoadley v. Northern T. Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Ehrgott v. Mayor*, 96 N. Y. 264, 281, 48 Am. Rep. 622; *Milwaukee, etc. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 529; *Wygant v. Crouse*, 127 Mich. 158, 53 L.R.A. 626; *Cutter v. Des Moines*, 137 Iowa, 643; *Missouri, etc. R. Co. v. Hawkins*, 50 Tex. Civ. App. 128; *Holledge v. Duncan*, 199 Mass. 121, 17 L.R.A. (N.S.) 982; *Hunter v. Southern R. Co.*, 152 N. C. 682, 29 L.R.A. (N.S.) 851; *Winters v. Baltimore & O. R. Co.*, 177 Fed. 44, 100 C. C. A. 462; *Green v. Shoemaker*, 111 Md. 69, 23 L.R.A. (N.S.) 667.

Where there was a fraudulent increase of the mortgage indebtedness of a corporation which had issued stock to the amount of \$21,000,000 from \$2,579,149 to \$4,299,000 and the value of the stock was depreciated \$6,580,000, it was held that such result was not to have been expected. *Rockefeller v. Merritt*, 22 C. C. A. 608, 76 Fed. 909, 35 L.R.A. 633. The test applied seems to indicate that the wrongdoer, even in a case of fraud, must anticipate, approximately at least, the extent of the injury his act may do. Such a rule would add another large element of uncertainty as to what constitutes proximate cause. It ought to be enough to make the wrongdoer liable for all the financial loss resulting from a fraudulent transaction if it appears that such loss, to any considerable extent, would be reasonably sure to follow.

The fact that the licensee of a barn which was torn down was obliged to sell his horses is not the natural and proximate result of the tortious act, but of his financial situation. *Chandler v. Smith*, 70 Ill. App. 658, citing the first edition of this work.

will occur on the long run from a series of such negligences as those with which the defendant is charged.”²¹ This doctrine is fully approved by the supreme court of Vermont,²² and is logically sustained by other recent adjudications in this country, some of which are cited in the preceding note; others will be referred to in the pages devoted to this branch of the law of damages.

The correct doctrine, as we conceive, is that if the act or neglect complained of was wrongful, and the injury sustained resulted in the natural order of cause and effect, the person injured thereby is entitled to recover. There need not be in the mind of the individual whose act or omission has wrought the injury the least contemplation of the probable consequences of his conduct; he is responsible therefor because the result proximately follows his wrongful act or non-action. All persons are imperatively required to foresee what will be the natural consequences of their acts and omissions according to the usual course of nature and the general experience. The lawfulness of their acts and the degree of care required of them depend upon this foresight.²³ An apt illustration of this principle is

²¹ § 78. See *Bryant v. Beebe & R. F. Co.*, 78 Neb. 155; *Johnston v. New Omaha T. H. E. L. Co.*, 78 Neb. 24, 17 L.R.A.(N.S.) 435; *Douglass v. New York Cent. etc. R. Co.*, 209 Pa. 128.

²² *Stevens v. Dudley*, 56 Vt. 158.

²³ *Witham v. Cohen*, 100 Ga. 670, 676, citing the text; *Murdock v. Walker*, 43 Ill. App. 590; *Chicago, etc. R. Co. v. Mochell*, 96 id. 178; *Coy v. Indianapolis G. Co.*, 146 Ind. 655, 663, 1 Am. Neg. Rep. 222, 36 L.R.A. 535, quoting the major portion of the section; *Licking R. M. Co. v. Fischer*, 8 Ky. L. Rep. 89, 95 (Ky. Super. Ct.); *Hughes v. Austin*, 12 Tex. Civ. App. 178, citing the text; *Hardaker v. Idle Dist. Council*, [1896] 1 Q. B. 335; *McHugh v. Schlosser*, 159 Pa. 480, 39 Am. St. 699, 23 L.R.A. 574; *McPeck v. Western U. Tel. Co.*, 107 Iowa, 356, 70

Am. St. 205, 43 L.R.A. 214; *Bradshaw v. Frazier*, 113 Iowa, 579, 15 Am. Neg. Rep. 700, 55 L.R.A. 258; *Wallin v. Eastern R. Co.*, 83 Minn. 149, 54 L.R.A. 481, 10 Am. Neg. Rep. 517; *King v. Cooney-Eckstein Co.*, 66 Fla. 246; *Burles v. Oregon Short Line R. Co.*, 49 Mont. 129; *Nirdlinger v. American Dist. Tel. Co.*, 245 Pa. 453; *Bigbee F. Co. v. Scott*, 3 Ala. App. 333; *Birmingham W. Co. v. Martini*, 2 Ala. App. 652; *Silberblatt v. Brooklyn Tel. & M. Co.*, 73 N. Y. Misc. 38; *Moore S. Co. v. Boston I. Co.*, 210 Mass. 364; *Anderson v. Evansville B. Ass'n*, 49 Ind. App. 403; *Lopes v. Connolly*, 210 Mass. 487, 38 L.R.A.(N.S.) 986; *Helena G. Co. v. Rogers*, 104 Ark. 59; *Davis v. Big Muddy C. & I. Co.*, 173 Ill. App. 162; *Whittemore v. Boston & M. R.*, (N. H.) 86 Atl. 824; *Carson v. Ft. Smith L. & T. Co.*, 108

afforded by the rule of law which compels a person who is insane, unless his condition was caused by the unlawful violence

Ark. 452; Chicago, etc. R. Co. v. Word, (Tex. Civ. App.) 158 S. W. 561, citing the text; San Antonio T. Co. v. Cassanova, (Tex. Civ. App.) 154 S. W. 1190; Carmichael v. Southern Bell Tel. & T. Co., 162 N. C. 333, quoting the text; Western U. Tel. Co. v. Lawson, 182 Fed. 369, 5 N. C. C. A. 337, 105 C. C. A. 451; Armour v. Kollmeyer, 161 Fed. 78, 88 C. C. A. 242, 16 L.R.A.(N.S.) 1110; Eisele v. Oddie, 128 Fed. 941; Pulaski G. L. Co. v. McClintock, 97 Ark. 576, 32 L.R.A.(N.S.) 825; St. Louis, etc. R. Co. v. Buckner, 89 Ark. 58, 20 L.R.A.(N.S.) 458, quoting the text; Sacchi v. Bayside L. Co., 13 Cal. App. 72; Hawkey v. Ketchum, 39 Colo. 353; Brennan C. Co. v. Cumberland, 29 App. Cas. D. C. 554, 15 L.R.A.(N.S.) 535; Savannah E. Co. v. Wheeler, 128 Ga. 550, 10 L.R.A.(N.S.) 1176; Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 15 L.R.A.(N.S.) 819; Metropolitan S. Co. v. Garden City B. B. & T. Co., 114 Ill. App. 318; Chicago, etc. R. Co. v. Willard, 111 id. 225; Pittsburgh, etc. R. Co. v. Sudhoff, 173 Ind. 314; Flint & W. Mfg. Co. v. Beckett, 167 Ind. 491, 12 L.R.A.(N.S.) 924; Evansville & I. R. Co. v. Allen, 34 Ind. App. 636; Central Union Tel. Co. v. Sokola, 34 id. 429, 19 Am. Neg. Rep. 517; Black v. Minneapolis, etc. R. Co., 122 Iowa, 32; Cowan v. Western U. Tel. Co., 122 Iowa, 379, 101 Am. St. 268, 64 L.R.A. 545; Walbridge v. Walbridge, 80 Kan. 567; Kentucky H. Co. v. Hood, 133 Ky. 383, 22 L.R.A.(N.S.) 588, 134 Am. St. 457, quoting the major part of this section, and saying the general rule is very well stated; Payne v. Georgetown L. Co., 117 La. 983;

Marsh v. Great Northern P. Co., 101 Me. 489; D'Almeida v. Boston & M. R., 209 Mass. 81; Fottler v. Moseley, 185 Mass. 563; Johnson v. Oakes, 110 Minn. 94; McDowell v. Preston, 104 Minn. 263, 18 L.R.A.(N.S.) 190; Paquin v. Wisconsin Cent. R. Co., 99 Minn. 170, 20 Am. Neg. Rep. 607; Emerson v. Pacific Coast & N. P. Co., 96 Minn. 1, 1 L.R.A.(N.S.) 445, 113 Am. St. 603; Temple v. McComb City E. L. & P. Co., 89 Miss. 1, 11 L.R.A.(N.S.) 449, 119 Am. St. 698; Murrell v. Smith, 152 Mo. App. 95; Bouillon v. Laeiede G. L. Co., 148 Mo. App. 462; Gillespie v. Louisville & N. R. Co., 144 id. 508; Foley v. McMahon, 114 id. 442, 19 Am. Neg. Rep. 393; Mize v. Rocky Mountain Bell Tel. Co., 38 Mont. 521, 129 Am. St. 659; Powell v. Nevada, etc. R. Co., 28 Nev. 40, 17 Am. Neg. Rep. 628; Challis v. Lake, 71 N. H. 90; Kuelling v. Lean Mfg. Co., 183 N. Y. 78, 2 L.R.A.(N.S.) 303; May v. Western U. Tel. Co., 157 N. C. 416, 37 L.R.A.(N.S.) 912; Cordell v. Same, 149 N. C. 402, 22 L.R.A.(N.S.) 540, citing the text; Horne v. Consolidated R., L. & P. Co., 144 N. C. 375; Johnson v. Railroad Co., 140 N. C. 574, quoting the first two sentences of this section; Lothian v. Western U. Tel. Co., 25 S. D. 319; Southwestern P. C. Co. v. Reitzer, (Tex. Civ. App.) 135 S. W. 237; Vicksburg, etc. R. Co. v. Jackson, (Tex. Civ. App.) 133 S. W. 925; El Paso S. R. Co. v. Barrett, 46 Tex. Civ. App. 14; Missouri, etc. R. Co. v. Raney, 44 Tex. Civ. App. 517; Stone v. Union Pac. R. Co., 32 Utah, 185; Fisher v. Western U. Tel. Co., 119 Wis. 146, citing the text. See Freeman v. Macon G. L. & W. Co., 126 Ga. 843, 7 L.R.A.(N.S.) 917;

of the plaintiff,²⁴ to make recompense for his torts in any case in which the intent is not material. This is rested, it is true, on grounds of public policy;²⁵ and the liability of all persons

McGowan v. Chicago, etc. R. Co., 91 Wis. 147, 154, 17 Am. Neg. Cas. 910; Sydnor v. Arnold, 122 Ky. 557.

A person who places a man whom he has made helplessly drunk in charge of a horse is presumed to know that injury may result, because horses require management by persons who are possessed of mental and physical capacities. Dunlap v. Wagner, 85 Ind. 529, 44 Am. Rep. 42; Mead v. Stratton, 87 N. Y. 493, 41 Am. Rep. 386; Bertholf v. O'Reilly, 8 Hun, 16, 74 N. Y. 509, 30 Am. Rep. 323; Aldrich v. Sager, 9 Hun, 537; Mulcahey v. Givens, 115 Ind. 286; Brink v. Kansas City, etc. R. Co., 17 Mo. App. 177, 199. See Smith v. Bolles, 132 U. S. 125, 33 L. ed. 279.

A man who is engaged to be married and who is examined by a physician employed by the father of his fiancée for the purpose of ascertaining whether he is diseased or not may maintain an action against the physician for a negligent diagnosis; the breaking of the marriage engagement is not too remote a damage. Harriott v. Plimpton, 166 Mass. 585.

One who negligently causes a fire which endangers property is bound to know that the owner may take means to preserve it, and if, in doing so, he is personally injured, without negligence on his part, may recover. Berg v. Great Northern R. Co., 70 Minn. 272, 68 Am. St. 524.

A wife who endeavors to preserve her husband's property from a fire so set is not a mere volunteer, and the damage she sustains in so doing is not too remote. Edwards v. Mel-

bourne & M. Board of Works, 19 Vict. L. R. 432.

This measure of liability may be limited by statute, as under the Indian Depredation Act of 1891, which provided for the recovery of property "taken or destroyed;" claims for consequential damages were not recoverable. Price v. United States, 33 Ct. of Cls. 106.

If the act which produced the injury was lawful, liability depends upon the ability of a prudent man, exercising ordinary care, to foresee that injury will naturally or probably result. Drum v. Miller, 135 N. C. 204, 65 L.R.A. 890, 16 Am. Neg. Rep. 215.

²⁴ Jenkins v. Hankins, 98 Tenn. 545.

²⁵ Central R. Co. v. Hall, 124 Ga. 322, 4 L.R.A.(N.S.) 898, 110 Am. St. 170; Young v. Young, 141 Ky. 76; Bindell v. Kenton County A. F. Ins. Co., 128 Ky. 389, 17 L.R.A.(N.S.) 189, 129 Am. St. 303; Feld v. Borodfski, 87 Miss. 727, citing the text; Moore v. Horne, 153 N. C. 413, 138 Am. St. 675; Williams v. Hays, 143 N. Y. 442, 47 Am. St. 743, 26 L.R.A. 153; Donaghy v. Brennan, 19 New Zeal. L. R. 289; McIntyre v. Sholty, 121 Ill. 660, 2 Am. St. 140; Krom v. Schoonmaker, 3 Barb. 647; Behrens v. McKenzie, 23 Iowa, 333, 92 Am. Dec. 428; Ward v. Conatser, 4 Baxter, 64; Cross v. Kent, 32 Md. 581; In re Heller, 3 Paige, 199. See § 394.

A master is liable for the tort of an insane servant. Chesapeake & O. R. Co. v. Francisco, 149 Ky. 307, 42 L.R.A.(N.S.) 83.

may be rested there as well as on the principles of natural justice. The injury, however, must proceed from and be caused by the wrongful act of the defendant; but the causation is not to be tested metaphysically or by any occult principles of science, but rather as persons of ordinary intelligence apprehend cause and effect. The law is practical, and courts do not indulge refinements and subtleties as to causation if they tend to defeat the claims of natural justice. They rather adopt the practical rule that the efficient and predominating cause in producing a given effect or result, though subordinate and dependent causes may have operated, must be looked to in determining the rights and liabilities of the parties.²⁶ Hence if the defendant's negligence greatly multiplied the chances of accident and was of a character naturally leading to its occurrence, the possibility that it might have happened without such negligence is not sufficient to break the chain of cause and effect.²⁷ An act of negligence will be regarded as the cause of an injury which results unless the consequences were so unnatural and unusual that they could not have been foreseen and prevented by the highest practicable care.²⁸ An attorney whose negligence causes his client the loss of a right of action for slander may not escape

²⁶ *Thompson v. Seaboard Air Line R.*, 165 N. C. 377, 52 L.R.A.(N.S.) 97; *Waschow v. Kelly C. Co.*, 245 Ill. 516; *Bessler v. Laughlin*, 168 Ind. 387, quoting the text; *Shepherd v. Templeman*, 143 Ky. 334; *Phaar v. Morgan's etc. Co.*, 115 La. 138, 10 L.R.A.(N.S.) 710; *Consolidated G. Co. v. Getty*, 96 Md. 683, 94 Am. St. 603; *Lawrence v. Heidbreder I. Co.*, 119 Mo. App. 316; *Lancaster & J. E. L. Co. v. Jones*, 75 N. H. 172, citing the text; *Batton v. Public Service Co.*, 75 N. J. L. 857, 18 L.R.A.(N.S.) 640, 127 Am. St. 855; *Bush v. Independent M. Co.*, 54 Wash. 212; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117, 136; *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 4 Am. Neg. Rep. 490, 41 L.R.A. 794.

²⁷ *Reynolds v. Texas & P. R. Co.*, 37 La. Ann. 694, 3 Am. Neg. Cas. 528; *Windeler v. Rush County F. Ass'n*, 27 Ind. App. 92, 12 Am. Neg. Rep. 487; *Howe v. Ashland L. Co.*, 110 Me. 14; *Phillips v. St. Louis, etc. R. Co.*, 211 Mo. 419, 17 L.R.A.(N.S.) 1167; *Hudson v. Railroad*, 142 N. C. 198; *Railey v. Hopkins* (Tex. Civ. App.), 131 S. W. 624, citing the text. See *Foley v. McMahon*, 114 Mo. App. 442, 19 Am. Neg. Rep. 393.

²⁸ *Kimberly v. Howland*, 143 N. C. 398, 7 L.R.A.(N.S.) 545; *Louisville, etc. R. Co. v. Lucas*, 119 Ind. 583, 3 Am. Neg. Cas. 240, 6 L.R.A. 193.

But see *Board of Chosen Freeholders v. Paxson Co.*, 196 Fed. 156, holding in a case where a county bridge was negligently injured that

liability for the damages which might reasonably have been expected to have been recovered, including such as were punitive, because they cannot be measured with certainty; the damages were not too remote.²⁹

It is competent for the legislature to change the rule of the common law, which looks only to the proximate cause of the mischief so far as legal responsibility is concerned, and allow a recovery to be had against those whose acts contributed, although remotely, to produce the wrong.³⁰ This is the effect of statutes making the vendor of intoxicants, who sells them contrary to law, liable to any person who shall sustain injury or damage to person, property or means of support by reason of such violation. Such a statute includes both direct and consequential injuries and creates a right of action unknown to the common law.³¹ The rule is laid down in many cases that an action may be maintained under similar statutes for loss of means of support, when occasioned in whole or in part by such sales. If the means of support are lessened, and this result

the expense connected with resulting meetings of the freeholders, the cost of advertising for bids and other incidental expenses were too remote. Presumably these expenses were incurred in pursuance of law, and if so or they were otherwise necessary to the restoration of the bridge they seem to the writer to be clearly elements of recoverable damage.

²⁹ *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Beers v. Walhizer*, 43 Hun, 254; *Homire v. Halfman*, 156 Ind. 470. See *Riley v. New England Tel. & T. Co.*, 184 Mass. 150, 14 Am. Neg. Rep. 566.

³⁰ *Patterson v. Frazer*, (Tex. Civ. App.) 93 S. W. 146.

³¹ *Currier v. McKee*, 99 Me. 364; *Shepard v. Platt*, 158 Mich. 181; *Montross v. Alexander*, 152 Mich. 513; *Dice v. Sherberneau*, 152 Mich. 601, 16 L.R.A.(N.S.) 765; *Carpenter v. Hyman*, 67 W. Va. 4; *Duckworth v. Stalnaker*, 68 W. Va. 197;

Volans v. Owen, 74 N. Y. 528, 30 Am. Rep. 337; *Meade v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386; *Homire v. Halfman*, *supra*; *Neu v. McKeehnie*, 95 N. Y. 632, 47 Am. Rep. 89; *De Struve v. McGuire*, 25 Ont. L. R. 87, *id.* 491.

A minor may show that he was deprived of school books. *Strattman v. Moore*, 134 Ill. App. 275.

Under a statute which provides that every child injured in means of support by any intoxicated person, or in consequence of the intoxication of any person, shall have a right of action against any person who, by selling or giving liquor contrary to law shall cause the intoxication of such person, where the injury is caused by an intoxicated person it need not be shown that it was in consequence of his intoxication. *Lee v. Hederman*, 158 Iowa, 719.

can be traced to the sale of intoxicants, there is a right of recovery for such loss, as in case of lessened ability to labor and loss of attention to business.³² The connection between the wrongful act and the injury exists where the person to whom liquor was sold assaulted another who injured him in self defense.³³ So, where accident, sickness, death, or insanity is the result of intoxication³⁴ and where expenses are incurred for care and medical attention.³⁵ Where the husband was robbed while intoxicated the wife was allowed to sue;³⁶ and, so, where he spent his wife's money for drink.³⁷ And a mother recovered where her son overdrove her horse because he was intoxicated.³⁸ The mere spending by the husband of his own money, it has been said, will give a right of action by the wife.³⁹ And so a widow, dependent on her son, may maintain an action for the sale of liquors to him if injury results to her means of support;⁴⁰ and a father, if dependent.⁴¹ Where a husband became so crazed by liquor that he committed murder and was sent to the penitentiary his wife had a cause of action against the person who sold the liquor to him,⁴² and, so, where a husband was in-

³² *Selders v. Brothers*, 88 Neb. 61; *Acken v. Tinglehoff*, 83 Neb. 296; *Wiese v. Gerndorf*, 75 Neb. 826; *Wightman v. Devere*, 33 Wis. 570; *Hutchinson v. Hubbard*, 21 Neb. 33; *Volans v. Owen*, *supra*; *Schneider v. Hosier*, 21 Ohio St. 98.

³³ *Currier v. McKee*, *supra*.

³⁴ *Neu v. McKechnie*; *Duckworth v. Stalnaker*, *supra*; *Garrigan v. Kennedy*, 19 S. D. 11, (plaintiff's husband committed suicide while sober); *Nelson v. State*, 32 Ind. App. 88, 17 Am. Neg. Rep. 257; *Bistline v. Ney*, 134 Iowa, 172, 13 L.R.A. (N.S.) 1158, (suicide of the plaintiff's husband); *Mulford v. Clewell*, 21 Ohio St. 191. See *Temme v. Schwindt*, 210 Pa. 507.

³⁵ *Wightman v. Devere*, *supra*; *Aldrich v. Sager*, 9 Hun, 537 (plaintiff's wife injured by his reckless driving while he was intoxicated).

³⁶ *Franklin v. Schermerhorn*, 8

Hun, 112. *Contra*, *Gage v. Harvey*, 66 Ark. 68, 43 L.R.A. 143 (action by person robbed).

³⁷ *McEvoy v. Humphrey*, 77 Ill. 388.

³⁸ *Bertholf v. O'Reilly*, 8 Hun, 16, 74 N. Y. 509, 30 Am. Rep. 323; *Morenus v. Crawford*, 51 Hun, 89.

³⁹ *Quain v. Russell*, 8 Hun, 319; *Mulford v. Clewell*, *supra*; *Woolheather v. Risley*, 38 Iowa, 486; *Hackett v. Smelsley*, 77 Ill. 109.

⁴⁰ *McClay v. Worrall*, 18 Neb. 44.

⁴¹ *Stevens v. Cheney*, 36 Hun, 1; *Volans v. Owen*, *Bertholf v. O'Reilly*, *supra*.

⁴² *Homire v. Halfman*, *supra*; *Beers v. Walhizer*, 43 Hun, 254; *Zibold v. Rener*, 73 Kan. 312; *Seahill v. Aetna Ind. Co.*, 157 Mich. 310; *Woodring v. Jacobino*, 54 Wash. 504; *American S. Co. v. Souers*, 50 Ind. App. 475.

jured by the accidental discharge of a revolver during a fight by persons who were intoxicated.⁴³ But if the statute does not give a wife an action for an injury to the person or property of her husband she cannot recover because he has been imprisoned for a crime committed while under the influence of liquor unlawfully sold to him. His imprisonment is not the proximate consequence of the dealer's act, but is the act of the law, the direct result of the intervention of an independent agency.⁴⁴ The Pennsylvania act provides that any person furnishing liquor to another in violation of law shall be civilly responsible for any injury to person or property in consequence thereof, and that any person aggrieved may recover full damages. This does not extend the common-law rule as to proximate cause, and there was no liability for the death of a man to whom liquors were sold while intoxicated where death resulted in an attempt to evade arrest for violating the law after deceased left the place where the liquors were sold him.⁴⁵

Under a statute providing that if a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, unless the person injured, etc., was guilty of gross or wilful negligence, the liability of the company does not depend upon whether its negligence was the proximate or efficient cause of the injury.⁴⁶

§ 17. Illustrations of the doctrine of the preceding section. It is a misfeasance to go through a militia drill in the public

⁴³ Judson v. Parry, 38 Wash. 37.

⁴⁴ Bradford v. Boley, 167 Pa. 506; disapproving Beers v. Walhizer, *supra*; Dennison v. Van Wormer, 107 Mich. 461.

⁴⁵ Roach v. Kelly, 194 Pa. 24, 75 Am. St. 685; Schulte v. Schleeper, 210 Ill. 357, 17 Am. Neg. Rep. 279. See Stecher v. People, 217 Ill. 348. Some early cases in Indiana are in harmony with this view, but they are overruled by Homire v. Half-

man, *supra*. In Illinois the cases appear to be in harmony with the Pennsylvania view. See Shugart v. Egan, 83 Ill. 56, 25 Am. Rep. 359; Schmidt v. Mitchell, 84 Ill. 195, 25 Am. Rep. 446; Schulte v. Schleeper, *supra*.

⁴⁶ Wragge v. Railroad Co., 47 S. C. 105, 58 Am. St. 870, 33 L.R.A. 191; Chattanooga R. T. Co. v. Walton, 105 Tenn. 415.

squares and business resorts of towns or villages; the officer under whose command it is done is responsible for consequential damages; if a team hitched to a wagon and standing in the usual place takes fright at the exercises, the discharge of small arms, and the "pomp and circumstance" of mimic war, and runs away, and one of the horses is thereby killed, the officer is responsible for its value.⁴⁷ This case is a fair exemplification of the rule under consideration. Drilling the militia was lawful, but doing it in an improper manner or in an unsuitable place was a legal wrong to any person who in consequence thereof received injury. In ordering it to take place in a public square the officer may not have considered the effect of frightening horses, but such an effect was natural; horses have to be trained to witness such a spectacle without being frightened; they were to be expected where the drill was appointed to take place, and if one or a team, with or without a driver or attendant, got frightened it would naturally run away, and in running away the usual collisions and casualties might occur. The officer who gave the command was bound to consider all these probabilities. Giving the command, which no subordinate could decline to obey, made the drill at the place appointed the act of the officer, whether he was present or not; the frightening of the horses which ensued was probable from their known characteristics, and from their being where horses were likely to be; their breaking loose and running off in a state of fright, with or without a driver, made the usual collisions and casualties a natural sequence. Here were a series of acts so concatenated that the final damage from killing a horse was a result which the officer was bound to consider as likely to ensue; all the

⁴⁷ *Childress v. Yourie*, Meigs, 561; *Forney v. Geldmacher*, 75 Mo. 113, 1 Am. Neg. Cas. 319.

In *O'Gorman v. O'Gorman* [1903] 2 Irish, 573, the parties resided on adjoining farms. The defendant kept a large number of beehives at the boundary fence beside the plaintiff's yard. On the occasion in question the defendant was engaged in

removing honey from the hives, and smoked them for that purpose, being protected from the assaults of the bees. The plaintiff was then harnessing his horse, as the defendant knew or ought to have known. The plaintiff and his horse were stung by the bees, and the horse, in consequence, injured the plaintiff. A recovery was sustained.

effects of the drill were an entirety and therefore proceeded naturally and proximately from his act.

In a Massachusetts case this subject was well illustrated and explained. By careless driving the defendant's sled was caused to strike against the sleigh of one Baker with such violence as to break it in pieces, throwing Baker out, frightening his horse, and causing the animal to escape from the control of his driver, and to run violently along Fremont street, round a corner near by into Eliot street, where he ran over the plaintiff and his sleigh, breaking that in pieces and dashing him on the ground. "Upon this statement," says Foster, J., delivering the opinion, "indisputably the defendant would be liable for the injuries received by Baker and his horse and sleigh. Why is he not also responsible for the mischief done by Baker's horse in its flight? If he had struck that animal with his whip and so made it run away, would he not be liable for an injury like the present? By the fault and direct agency of his servant the defendant started the horse in uncontrollable flight through the streets. As a natural consequence it was obviously probable that the animal might run over and injure persons traveling in the vicinity. Every one can plainly see that the accident to the plaintiff was one very likely to ensue from the careless act. We are not, therefore, dealing with remote or unexpected consequences, not easily foreseen nor ordinarily unlikely to occur; and the plaintiff's case falls clearly within the rule already stated as to the liability of one guilty of negligence for the consequential damages resulting therefrom. . . . Here the defendant is alleged to have been guilty of culpable negligence. And his liability depends, not upon any contract or statute obligation, but upon the duty of due care which every man owes to the community, expressed by the maxim *sic utere tuo ut alienum non ledas*. Where a right or duty is created wholly by contract it can only be enforced between the contracting parties. But where the defendant has violated a law it seems just and reasonable that he should be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. In our opinion this is the well established and ancient doctrine of the common law; and such a liability extends to

consequential injuries by whomsoever sustained, so long as they are of a character likely to follow and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is not too remote if, according to the usual experience of mankind, the result was to be expected. This is not an impracticable or unlimited sphere of accountability extending indefinitely to all possible contingent consequences. An action can be maintained only where there is shown to be, first, a misfeasance or negligence in some particular as to which there was a duty towards the party injured or the community generally; and secondly, where it is apparent that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omission complained of. . . . It is clear from numerous authorities that the mere circumstance that there have intervened between the wrongful cause and the injurious consequence acts produced by the volition of animals or of human beings does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable the legal liability continues. There can be no doubt that the negligent management of horses in the public street of a city is so far a culpable act that any party injured thereby is entitled to redress. Whoever drives a horse in a thoroughfare owes the duty of due care to the community or to all persons whom his negligence may expose to injury. Nor is it open to question that the master in such a case is responsible for the misconduct of his servant.”⁴⁸

⁴⁸ McDonald v. Snelling, 14 Allen, 292; Weick v. Lander, 75 Ill. 93; Clowdis v. Fresno F. & I. Co., 118 Cal. 315, 3 Am. Neg. Rep. 326, 62 Am. St. 238; Clark v. Chambers, 3 O. B. Div. 327, 7 Cent. L. J. 11;

Corona C. & I. Co. v. White, 158 Ala. 627, 20 L.R.A. (N.S.) 958.

In Clark v. Chambers, *supra*, the defendant was liable for an injury caused by a dangerous thing put by him in a carriage way, although it

§ 18. **Further illustrations.** Where a teamster's wagon, while being loaded at a depot, was injured by a train of cars, he recovered for damage done thereto, for the loss of the trip in which he was engaged and for the loss of the use of the wagon until it could be repaired.⁴⁹ A similar measure is applied in cases of collision of boats; a reasonable sum for the damage the injured boat has received; the expense of raising it, if sunk, and of repairing it, and compensation for the loss of the use during the time it is being refitted, with interest on such items.⁵⁰ In an action of trespass by forcibly invading a plantation, carrying off some slaves and frightening others away, it was proper for the plaintiff to give in evidence the consequential damages which resulted to his wood and crops—to the former for want of the assistance of the slaves to preserve it from a subsequent flood, and to the latter to protect them against animals.⁵¹ The wrong included leaving a plantation with growing crops and other property exposed to injury from any cause which might arise; there being no force of laborers to meet any exigency, the wrongdoer was bound to take notice at his peril of any exposure to injury thus created by flood, marauding cattle or otherwise; whether an action would lie against the owner of trespassing cattle or not for the damage done by them was immaterial.⁵² The owner of sheep which had a contagious disease suffered them to trespass on another's land and to mingle with his sheep, to which the disease was

was afterwards removed to a foot-path by a third person and was there when the plaintiff was injured.

⁴⁹ *Shelbyville, etc. R. Co. v. Newark*, 4 Ind. 471.

Damages for loss of use of an automobile used for pleasure only are recoverable. *Cook v. Packard Motor Car Co. of New York*, 88 Conn. 590, L.R.A.1915C, 319.

⁵⁰ *Mailler v. Express Propeller Line*, 61 N. Y. 312; *Brown v. Beatty*, 35 Up. Can. Q. B. 328; *Steamboat Co. v. Whilldin*, 4 Harr. 228; *New Haven, etc. Co. v. Vanderbilt*, 16 Suth. Dam. Vol. I.—5.

Conn. 420; *Williamson v. Barrett*, 13 How. 101, 14 L. ed. 68. See ch. 39.

⁵¹ *McAfee v. Crofford*, 13 How. 447, 14 L. ed. 217; *Hobbs v. Davis*, 30 Ga. 423; *Johnson v. Courts*, 3 Har. & McHen. 510; *Crane v. Patton*, 57 Ark. 340, 346.

⁵² Where a dog went onto plaintiff's land and barked at his horse grazing in an inclosed field, and the horse ran, tried to leap a fence and fell and broke its neck the owner of the dog was liable. *Doyle v. Vance*, 6 Vict. L. R. (law) 87.

communicated, causing the death of many of the latter. He was liable for the breach of the close, also for the loss of the sheep that so died.⁵³ A railroad company's servant left bars down between the plaintiff's field and the railroad track; horses escaped through the opening to the railroad and were killed by the engine; the company was liable.⁵⁴ Plaintiff's horses escaped into the defendant's close by reason of the latter not keeping his fence in repair, and were there killed by the falling of a hay stack; he was responsible.⁵⁵ The defendant's cow escaped from his enclosure without fault on his part, passed to the plaintiff's premises and entered his barn; her weight broke the sleepers and floor at a point over a cistern and she fell into it. Soon after this the plaintiff went to his barn and fell into the cistern through the hole made by the cow. It was conceded that the defendant was liable for the trespass by the cow,⁵⁶ but the damages resulting to the plaintiff from his fall were too remote.⁵⁷ The proximate cause of a personal injury produced by the running away of a horse which left a race track through an opening in the fence surrounding the same is not the running away of the horse, but the opening.⁵⁸

The lessee of a wharf was guilty of negligence in not keeping it in repair; he suffered the railing to become dilapidated, and in consequence a horse backed into the river with a wagon, and both were lost. This loss was the natural and proximate effect of the negligence.⁵⁹ A gas company, having contracted to supply plaintiff with a service pipe from its main to the

⁵³ *Barnum v. Vandusen*, 16 Conn. 200; *Fultz v. Wycoff*, 25 Ind. 321. See *Gilman v. Noyes*, 57 N. H. 627. See, as to liability under the Act of Congress of 1884, 23 Stats. 31; *Croff v. Cresse*, 7 Okla. 408; *Lynch v. Grayson*, 5 N. M. 487, affirmed *sub nom.* *Grayson v. Lynch*, 163 U. S. 468, 41 L. ed. 230.

⁵⁴ *White v. McNett*, 33 N. Y. 371; *Henly v. Neal*, 2 Humph. 551; *Hawkey v. Ketchum*, 39 Colo. 353.

⁵⁵ *Powell v. Salisbury*, 2 Y. & J. 391; *Gilbertson v. Richardson*, 5 C.

B. 502; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; *Couch v. Steel*, 3 El. & B. 402; *Lee v. Riley*, 18 C. B. (N. S.) 722.

⁵⁶ *Dickson v. McCoy*, 39 N. Y. 400, 1 Am. Neg. Cas. 321.

⁵⁷ *Hollenbeck v. Johnson*, 79 Hun, 499.

⁵⁸ *Windeler v. Rush County F. Ass'n*, 27 Ind. App. 92, 97, 12 Am. Neg. Rep. 487.

⁵⁹ *Radway v. Briggs*, 37 N. Y. 256, 35 How. Pr. 422.

meter on his premises, laid a defective pipe from which gas escaped. A workman, in the employ of a gas-fitter engaged by the plaintiff to lay pipes leading from the meter over his premises, negligently took a lighted candle for the purpose of finding out where the gas escaped. An explosion took place damaging the plaintiff's premises; he brought an action against the gas company and it was held that the damages were not too remote.⁶⁰ The failure of a natural-gas company to supply gas to a consumer in accordance with its contract is a tort, the agreement being a mere statement of the reasonable conditions under which the duty was to be performed. If there is a failure to supply gas during cold weather and the company has been notified of its customer's inability to procure fuel elsewhere, and of the sickness of his children, and as a result of such failure the sick children take a relapse and die, the company is responsible for their death.⁶¹ In consequence of the negligence of a contractor for a public body in constructing a sewer a gas main was broken, and the gas escaped from it by percolation into the plaintiffs' house, and an explosion followed which injured one of them and damaged the furniture of the other. The damages were not too remote, and the contractor's negligence was that of the public body because he failed to do what it was its duty to do.⁶² A railroad company by wrongfully excavating in a public street destroyed the lateral support of the soil to the foundation of a house, and thereby plaintiff's adjoining house, depending on the other for support, was injured; the company was liable for the injury.⁶³ By the weight

⁶⁰ *Burrows v. March G. Co.*, 39 L. J. (Ex.) 33, L. R. 5 Ex. 67; *Lannen v. Albany G. L. Co.*, 44 N. Y. 459; *Louisville G. Co. v. Gutenkuntz*, 82 Ky. 432; *Koelsch v. Philadelphia Co.*, 152 Pa. 355, 34 Am. St. 653, 18 L.R.A. 759; *Consolidated G. Co. v. Getty*, 96 Md. 683, 94 Am. St. 603.

The injury resulting to the business reputation of a florist from the sale of plants injured by escaping gas and which were sold as sound, but were not, is too remote. *Dow v.*

Winnepesaukee G. & E. Co., 69 N. H. 312, 42 L.R.A. 569.

⁶¹ *Coy v. Indianapolis G. Co.*, 146 Ind. 655, 1 Am. Neg. Rep. 222, 36 L.R.A. 535; *Hoehle v. Allegheny H. Co.*, 5 Pa. Super. 21. In the last case the defendant had no knowledge of the illness of the person who died.

⁶² *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335.

⁶³ *Baltimore, etc. R. Co. v. Reaney*, 42 Md. 118.

of authority a person who negligently sets a fire is not only liable for the first building consumed, but for all subsequently destroyed by the same continuous conflagration, without regard to the distance the fire runs or the time it is in progress.⁶⁴

In New York the liability is much more restricted on the ground that the loss of the first building which is negligently set on fire was to be anticipated; its destruction was the ordinary and natural result of its being fired. But this does not hold good as to buildings on other property which became ignited from the building first taking fire; that the fire should spread and other buildings be consumed is not a necessary or the usual result. That result depends, not upon any necessity of a further communication of the fire, but upon a concurrence of accidental circumstances, such as the degree of the heat, the state of the atmosphere, the condition and materials of the adjoining structures and the direction of the wind. These are said to be accidental and varying circumstances over which the party responsible for the loss of the first building has no control, and is not liable for their effect.⁶⁵ The same rule has been applied where two buildings owned by one person were burned—the recovery was limited to the one to which the fire was directly carried from the engine.⁶⁶ It applies to fires on

⁶⁴ *Atkinson v. Goodrich T. Co.*, 60 Wis. 141, 50 Am. Rep. 352; *Adams v. Young*, 44 Ohio St. 80; *Small v. C.*, R. I. & P. R. Co., 55 Iowa, 582; *Kellogg v. Chicago*, etc. R. Co., 26 Wis. 223, 7 Am. Rep. 69; *Hart v. Western R. Co.*, 13 Met. 99; *Milwaukee*, etc. R. Co. v. *Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Perley v. Eastern R. Co.*, 98 Mass. 414; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *Pennsylvania R. Co. v. Hope*, 80 Pa. 373, 21 Am. Rep. 100; *St. Joseph*, etc. R. Co. v. *Chase*, 11 Kan. 47; *Atchison*, etc. R. Co. v. *Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Same v. Bales*, 16 Kan. 252; *Dougherty v. Smith*, 5 New Zeal. (Supreme Ct.) 374; *Chicago & E.*

R. Co. v. Luddington, 10 Ind. App. 636; *Chicago*, etc. R. Co. v. *Williams*, 131 Ind. 30; *Louisville*, etc. R. Co. v. *Nitsche*, 126 Ind. 229, 9 L.R.A. 750; *Wyant v. Crouse*, 127 Mich. 158, 53 L.R.A. 626.

One who sets fire to grass on the land of another is liable for injuries to animals caused thereby. *Chicago*, etc. R. Co. v. *Willard*, 111 Ill. App. 225.

⁶⁵ *Ryan v. New York Cent. R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49; *Webb v. Rome & O. R. Co.*, 49 N. Y. 420, 10 Am. Rep. 389. See *Lowery v. Manhattan R. Co.*, 99 N. Y. 158.

⁶⁶ *Frace v. New York*, etc. R. Co., 143 N. Y. 182; *Read v. Nichols*, 118 N. Y. 224, 7 L.R.A. 130.

woodlands as well as to fires in villages or cities.⁶⁷ This restriction seems very arbitrary, and to be out of harmony with the general principle of the law governing proximate cause. It has not become the rule in New York without vigorous dissent from individual members of the court of appeals, extending to the latest case cited. The burning of property is not the natural and proximate result of an engineer running a train of oil-tanks into a mass of earth which had come on the track as a result of a landslide, the obstruction being unexpected and an engine having passed over a clear track only ten minutes before the accident. He was not bound to anticipate the bursting of the tanks, the taking fire of the oil, the burning oil being carried down the stream into which the tanks rolled, the sudden rise of the water and the setting fire of property on the bank of the stream.⁶⁸ One who makes a fire on his own land is not bound to guard against extraordinary winds that may arise.⁶⁹

The fall of a negligently constructed tower, the overturning of a lighted lamp and the consequent death of a person are the proximate result of the negligent construction.⁷⁰ The maintenance of a culvert in a condition to hold a large pool of water in close proximity to the street and sidewalk is the cause of death of a child who falls therein while playing along the edge thereof.⁷¹ The negligent operation of a defective locomotive which emits sparks is the proximate cause of the death of an infant asleep in the house of its parents when a fire occurs from such sparks.⁷² If a train is stopped on a mountain side and the engineer leaves his engine, and during his absence the fireman, accidentally or otherwise, sets the engine in motion and the train moves downward, the violation of the rules of the company by the engineer will authorize a finding that his

⁶⁷ Hoffman v. King, 160 N. Y. 618, 73 Am. St. 715, 17 Am. Neg. Rep. 277, 46 L.R.A. 672.

⁶⁸ Hoag v. Lake Shore, etc. R. Co., 85 Pa. 293, 27 Am. Rep. 653.

⁶⁹ Boek v. Grooms, 2 Neb. (Unof.) 803; Sweeney v. Merrill, 38 Kan. 216, 5 Am. St. 734.

⁷⁰ Rigdon v. Temple, W. W. Co., 11 Tex. Civ. App. 542.

⁷¹ Elwood v. Addison, 26 Ind. App. 28.

⁷² Gulf, etc., R. Co. v. Johnson, 51 S. W. 531, (Tex. Civ. App.) 6 Am. Neg. Rep. 719; Birmingham R., L. & P. Co. v. Hinton, 158 Ala. 470

act was the proximate cause of the injury to the conductor, who was thrown off the train.⁷³

§ 19. Further illustrations. The owner of a horse and cart who leaves them unattended in a public street is liable for any damage to children resorting there and meddling with either.⁷⁴ The owner of a loaded gun, who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned thereby.⁷⁵ It is negligence for a dealer to unlawfully sell dangerous explosives to children. When this is done with knowledge that the purchasers are not familiar with their use he is held to know that the probable consequences will be injury to them or to their associates; and is liable to the party injured although the injuries were the result of the natural conduct of a child who did not purchase the article which produced them.⁷⁶ But the mere fact that the law forbids the sale of fire-arms to a minor does not make the vendor liable for the consequences unless he knew the purchaser was ignorant of their character, inexperienced in the use of them, or that there was something in his character or disposition which rendered it unsafe for him to have them.⁷⁷ Leaving an iron truck with a hot iron casting upon it in a street where children are accustomed to go and in a condition

⁷³ Mexican National R. Co. v. Mussette, 86 Tex. 708, 24 L.R.A. 642, 7 Tex. Civ. App. 169.

⁷⁴ Lynch v. Nurdin, 1 Q. B. 29; Illidge v. Goodwin, 5 C. & P. 190; Dickson v. McCoy, 39 N. Y. 400, 1 Am. Neg. Cas. 321; Mills v. Bunke, 59 App. Div. 39; Mahoney v. Dwyer, 84 Hun, 34.

⁷⁵ Dixon v. Bell, 5 M. & S. 198; Meers v. McDowell, 23 Ky. L. Rep. 461, 53 L.R.A. 789.

⁷⁶ Binford v. Johnston, 82 Ind. 426, 42 Am. Rep. 508.

In Fishburn v. Burlington & N. R. Co., 127 Iowa, 483, 17 Am. Neg. Rep. 270, the defendant erected under a license a snow fence upon the premises of the plaintiff's father; after it blew down the plaintiff, of

tender years, and a younger brother set it up, after which it again blew over and injured the plaintiff. The intervening act did not relieve the defendant from liability for its negligence in erecting the fence.

⁷⁷ Poland v. Earhart, 70 Iowa, 285; Meyer v. King, 72 Miss. 1, 7, 35 L.R.A. 474, citing the text, and disapproving a criticism of the Iowa case in 36 Am. St. 807, 817. See Harris v. Cameron, 81 Wis. 239, 29 Am. St. 891; Stark v. Muskegon T. & L. Co., 141 Mich. 575, 1 L.R.A.(N.S.) 822, 19 Am. Neg. Rep. 514, and compare McDowell v. Great Western R. Co., [1903] 2 K. B. 331, reversing S. C. [1902] 1 K. B. 618, cited to this section in the 3d ed.

to do injury by slight interference is negligence, which will be regarded as the proximate cause of any injury to a child which results therefrom.⁷⁸ The rule is the same when lumber is so carelessly piled on an unfenced lot abutting upon a street as to fall upon children playing near it.⁷⁹ The defendant's servant left a truck standing near a sidewalk in a public street, with the shafts shored up by a plank in the usual way. Another truckman temporarily left his loaded truck directly opposite on the other side of the same street, after which a third person tried to drive his truck between those two. In attempting to do so with due care he hit the defendant's truck in such a manner as to whirl its shafts round on the sidewalk so that they struck the plaintiff, who was walking by, and broke her leg. For this injury she maintained her action, the only fault imputable to the defendant being the careless position in which the truck was left by his servant. This was treated as the sole cause of the plaintiff's injury, and deemed sufficiently proximate to render the defendant responsible.⁸⁰ He was liable for the act of his servant, for the latter was engaged in his master's work; it was negligence to leave the truck in the street when not in use; the driver of the truck, who was the immediate agent of the force which injured the plaintiff, had a right to attempt to pass between the two trucks, if he conducted himself with due care and exercised a sound discretion in determining whether the attempt could be made with safety to persons lawfully using the street. And as the jury found that in the exercise of such care, prudence and discretion he made the attempt which resulted in the injury sustained by the plaintiff, the defendant was liable inasmuch as his truck was unlawfully in the street, and that was regarded as the natural and proximate cause of the injury. The decision imports that a danger not apparent enough to deter the driver from attempting to pass the truck of the defendant could legally be apparent

⁷⁸ Lane v. Atlantic Works, 107 Mass. 104; Osake v. Larkin, 40 Kan. 206, 2 L.R.A. 56, 15 Am. Neg. Cas. 709; Travell v. Bannerman, 71 App. Div. (N. Y.) 439.

⁷⁹ Bransom v. Labrot, 81 Ky. 638.

⁸⁰ Powell v. Deveney, 3 Cush. 300,

50 Am. Dec. 738.

enough to render the injury proximate to the illegal use of the street by leaving the truck there.

The jury may find that the injury was probable, although brought about by a new agency, when heavy articles left near an opening in the floor of an unfinished building or in the deck of a vessel were accidentally jostled so that they fell upon persons below.⁸¹

A man who negligently sets and keeps a fire on his own land is liable for any injury done by its direct communication to his neighbor's land, whether through the air or along the ground, and whether or not he might reasonably have anticipated the particular manner and direction in which it was communicated,⁸² and he is not *per se* absolved therefrom because the fire traversed the land of adjoining owners before it reached the premises of the plaintiff.⁸³ The defendants moored their boats in the channel and entrance to the locks at a dam across a river so that the boats of others were stopped outside and exposed to the current, then rapidly rising, until by its force such boats were carried over the dam and lost without any fault of the owners; the defendants negligently or wantonly caused this injury and were liable for it.⁸⁴ The plaintiff's boat had anchored at a wharf when the water was low. The river rose afterwards, covering certain piles of pig iron negligently left by the defendant on the wharf about a foot above low-water mark. To avoid these piles the boat was compelled to back out into the stream, where she was struck by some floating body, stove and sunk. The defendant was liable for the loss of the boat.⁸⁵ The defendant broke and entered the plaintiff's close adjacent to a river and carried away gravel from a bank, near to a dam

⁸¹ *McCauley v. Norcross*, 155 Mass. 584, 15 Am. Neg. Cas. 582; *The Joseph B. Thomas*, 81 Fed. 578, 20 C. C. A. 33, 46 L.R.A. 58.

⁸² *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *Martin v. New York, etc. R. Co.*, 62 Conn. 331; *East Tennessee, etc. R. Co. v. Heaters*, 90 Ga. 11; *Craig v. Parker*, 8 West Aust. L. R. 161; *Alabama & V.*

R. Co. v. Baldwin, (Miss.) 52 So. 358; *Hunter v. Pennsylvania R. Co.*, 45 Pa. Super. 468. See *Mahaffey v. Rumbarger L. Co.*, 61 W. Va. 571, 8 L.R.A.(N.S.) 1263; § 18.

⁸³ *Phillips v. Railroad*, 138 N. C. 12.

⁸⁴ *Scott v. Hunter*, 46 Pa. 192.

⁸⁵ *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65.

across the river, in consequence of which a flood in the river three weeks afterward swept away a portion of the close and a cider mill. It was held that the whole damage might be recovered.⁸⁶ A harbor company which had been in the habit of keeping a light on the end of one of its piers to enable vessels to safely enter the harbor at night discontinued the light without public notice. A vessel was afterwards lost in attempting to enter in the absence of the light. The company was liable for the value of the vessel lost and also for certain moneys expended in good faith, with a reasonable expectation of success, in attempting to raise her.⁸⁷ One who maliciously causes the arrest of an engineer while he is engaged in running a train is liable to his employer for the damage resulting from the delay.⁸⁸

It cannot be affirmed that it is not the natural and reasonable consequence of the sale of liquors to an intoxicated person between whose home and the place where the sale is made there are railroad tracks that such person should in a dark night meet with injury or death from a train of cars.⁸⁹ If weeds or brush are allowed to grow upon the right of way of a railroad company to such a height as to obstruct the view of a highway crossing and animals are injured by a train the company will be liable;⁹⁰ and so if cattle concealed in such weeds or brush cause the wrecking of a train and injury of a person thereon.⁹¹ If the unlawful speed of a train upon station grounds stampedes animals at large there and they run upon the track, either by breaking down fences or otherwise, and are killed by the negligent running of the train, such speed is the direct cause of the killing.⁹² It is not the natural consequence of the intoxication of a man to whom liquors are sold in violation of law that his wife, while following him in

⁸⁶ *Dickinson v. Boyle*, 17 Pick. 78, 28 Am. Dec. 281.

⁸⁷ *Sweeney v. Port Burwell H. Co.*, 17 Up. Can. C. P. 574.

⁸⁸ *St. Johnsbury, etc. R. Co. v. Hunt*, 55 Vt. 570, 45 Am. Rep. 639.

⁸⁹ *Schroeder v. Crawford*, 94 Ill. 357.

⁹⁰ *Indianapolis, etc. R. Co. v. Smith*, 78 Ill. 112.

⁹¹ *Eames v. T. & N. O. R. Co.*, 63 Tex. 660.

⁹² *Story v. Chicago, etc. R. Co.*, 79 Iowa, 402.

the street for the purpose of ascertaining where he procures liquor, shall fall and injure herself, and the seller is not liable for such injury.⁹³ The neglect to fence a railroad and track is not the proximate cause of an injury to an animal sustained by putting its foot into a small hole while running along the track; such an occurrence is so unusual as not to be expected by a reasonable man.⁹⁴ There is no connection between the failure of a railroad company to provide separate accommodations for white and colored passengers, where that is required, and an assault made upon one of the latter by a fellow passenger, without the knowledge or consent of the company's servants, after the removal of the passenger assaulted from the ladies' car to a smoking car;⁹⁵ nor between the act of a mortgagee who takes possession of property under his mortgage before default and injury to crops because a mule needed to work them was taken;⁹⁶ nor between threats made to arrest a debtor and a miscarriage by his wife, no physical violence being used;⁹⁷ nor between a like result and the false imprisonment of a husband;⁹⁸ nor as a result of the wrongful finding of an indictment against him.⁹⁹ One who invites a person to drink liquor with him is not responsible for an assault made by the person who accepts such invitation upon a third individual, although the liquor so drank made him intoxicated.¹

§ 20. **Consequential damages under fence statutes.** When a new right is conferred by statute and a corresponding duty is thereby enjoined the liability of the defaulting party to the other is confined to the limits prescribed by the statute. Hence, when a statute concerning division fences provides that the party who shall neglect to maintain such fences shall be liable to the party injured by his default for "such damages as shall accrue to his lands, crops, fruit-trees, shrubbery and fixtures,"

⁹³ *Johnson v. Drummond*, 16 Ill. App. 641.

⁹⁴ *Nelson v. Chicago, etc. R. Co.*, 30 Minn. 74.

⁹⁵ *Royston v. Illinois Cent. R. Co.*, 67 Miss. 376, 8 Am. Neg. Cas. 453.

⁹⁶ *Jackson v. Hall*, 84 N. C. 489.

⁹⁷ *Wulstein v. Mohlman*, 57 N. Y. Super. Ct. 50.

⁹⁸ *Ellis v. Cleveland*, 55 Vt. 358; *Huxley v. Berg*, 1 Starkie, 98.

⁹⁹ *Hampton v. Jones*, 58 Iowa, 317; *Hutchinson v. Stern*, 115 App. Div. 145.

¹ *Swinfin v. Lowry*, 37 Minn. 345.

there is no liability for injuries which may be sustained by animals while trespassing on the lands of the party who has failed to maintain his fence.² It has been attempted, in order to restrict the liability of railroad companies for neglect to fence their tracks, to apply this principle. The duty is for the protection of the public as well as for the benefit of persons who stand in other relations to the party upon whom it is enjoined, and the neglect of the duty entitles the party who is thereby injured to all the relief due him in either or both relations.³ But this view is not accepted in some jurisdictions, or at least the strict construction given such statutes is not in harmony with it, though the question in the aspect stated is not considered. Under a statute requiring railroad companies to fence and declaring them liable for all damages resulting from their neglect to do so which may be done by their "agents, engines or cars," liability does not extend to consequential injuries to an animal which gets upon the track by reason of the failure to fence, as where it is injured after being frightened by an approaching train, either by jumping a cattle-guard or by coming in contact with a wire fence, or both, no wilful misconduct being charged against the train-men.⁴ The injuries

² *Crandall v. Eldridge*, 46 Hun, 411.

³ *Graham v. President, etc.*, 46 Hun, 386; *Galveston, etc. R. Co. v. Salisbury*, (Tex. Civ. App.) 143 S. W. 252.

Under a statute imposing liability for all damages done to persons on the road in any manner, in whole or part, by the absence of a fence it is not necessary that proximate causal relation exist between the absence of the fence and the injury, but merely that the omission to fence shall be the *causa sine qua non*. *Schwind v. Chicago, etc. R. Co.*, 140 Wis. 1, 133 Am. St. 1055. But liability does not extend to the consequences of the acts of third persons, as where cars are set in motion by a trespasser who entered

upon the right of way at a place where a fence should have been, but was not, and injury was done a third person by the cars. *Paquin v. Wisconsin Cent. R. Co.*, 99 Minn. 170.

Under a statute providing that the failure to keep a fence in repair should be attended with liability for all damages done to or suffered by another party because thereof, such neglect is attended with liability for injury to animals which enter upon the premises of the defendant because of a defective fence by being gored by a vicious bull he owned, regardless of his knowledge of his propensity. *Saxton v. Bacon*, 31 Vt. 540.

⁴ *Schertz v. Indianapolis, etc. R. Co.*, 107 Ill. 577; *Knight v. New*

contemplated by such language are only those which result from a direct or actual collision of the engines or cars with the animal injured.⁵ The same conclusion has been reached from language which imposed liability if animals "shall be killed or injured by the cars, or locomotive, or other carriages."⁶ Where it is provided that railroad companies shall be liable for animals killed or injured by their negligence and that a "failure to build and maintain fences shall be deemed an act of negligence," such a construction as was given in the above cases is unwarranted.⁷ Under a statute which provides that on neglect to fence the road the company shall be liable for all damages sustained by any person in consequence, damages may be recovered for injury done to a farm by rendering it less fit for pasturage because of such neglect.⁸ The same liability has been declared to exist under a statute which employs the words "shall be liable for all damages which shall be done by their agents or engines to cattle, horses or other animals;"⁹ and under that statute a railroad company has been held liable where a horse fell into a cut made by the company along a pasture, which cut was not fenced.¹⁰ The failure to fence a railroad track or to construct cattle guards is attended with liability for the loss of the rental value of land to the extent and for the time the owner is deprived of its use.¹¹

York, etc. R. Co., 99 N. Y. 25, reversing 30 Hun, 415, distinguished in *Leggett v. Rome*, etc. R. Co., 41 Hun, 80.

⁵ *Ibid.*; *Lafferty v. Hannibal*, etc. R. Co., 44 Mo. 291; *Foster v. St. Louis*, etc. R. Co., 90 Mo. 116, and other Missouri cases cited therein, *Hires v. St. Louis R. Co.*, 157 Mo. App. 46; *McKellar v. Canadian Pac. R. Co.*, 14 Manitoba, 614.

⁶ *Peru & I. R. Co. v. Hasket*, 10 Ind. 409, 71 Am. Dec. 335; *Jeffersonville, etc. R. Co. v. Downey*, 61 Ind. 287.

In the last case one of two animals, which were tied together, was struck by the train; both were

killed. A recovery was allowed for but one.

The construction given the Missouri statute is forcibly criticised in 25 Am. L. Rev. 114, 264.

⁷ *Nelson v. Chicago, etc. R. Co.*, 30 Minn. 74.

⁸ *Emmons v. Minneapolis, etc. R. Co.*, 35 Minn. 503; *Nelson v. Same*, 41 Minn. 131.

⁹ *Leggett v. Rome, etc. R. Co.*, 41 Hun, 80. It is doubtful whether this case is in harmony with *Knight v. New York, etc. R. Co.*, 99 N. Y. 25.

¹⁰ *Graham v. President, etc.*, 46 Hun, 386.

¹¹ *Gould v. Great Northern R.*

In the absence of a statutory declaration concerning the damages recoverable for default in maintaining fences common-law principles apply, and there is liability for the injury to or loss of animals which, without the fault of their owner, pass through, over or under a defective fence and thus get on the track of a railroad company.¹² The damage done the land of an adjoining owner by the animals of a neighbor trespassing thereon because of the defective fence of such a company may be recovered in an action for the killing of them.¹³

§ 21. Nervous shock without impact; the Coultas case and American cases in harmony with it. In 1888 the question whether damages for a nervous shock or injury caused by the defendant's negligence in permitting the plaintiff to cross its track when it was dangerous to do so, and its servant had knowledge of the danger, came before the English privy council on appeal from the supreme court of Victoria. The latter court was of the opinion that the damages were not too remote.¹⁴ Its judgment was reversed, and the rule declared to be that damages arising from mere sudden terror, unaccompanied by actual physical injury, cannot be considered a consequence which, in the ordinary course of things, would flow from such negligence.¹⁵ The court observed that it was remarkable that

Co., 63 Minn. 37, 30 L.R.A. 590, 56 Am. St. 453; Louisville & N. R. Co. v. Timmons, 116 Tenn. 29.

¹² Crawford v. Southern R., 153 Ky. 812, 6 N. C. C. A. 38.

¹³ Lizotte v. Tennessean R. Co., 37 New Bruns. 397.

¹⁴ Coultas v. Victorian Ry. Com'rs, 12 Vict. L. R. 895.

¹⁵ Victorian Ry. Com'rs v. Coultas, 13 App. Cas. 222. The facts are stated in the next section.

The doctrine of the Coultas case, though repeatedly dissented from in England (see § 23*a*) and denied in Ireland, is favored by several American courts. Braum v. Craven, 175 Ill. 401, 5 Am. Neg. Rep. 15, 42 L.R.A. 199, affirming Craven v. Braum, 73 Ill. App. 401; Mitchell

v. Rochester R. Co., 151 N. Y. 101, 1 Am. Neg. Rep. 21, 34 L.R.A. 781, 56 Am. St. 604, reversing 77 Hun, 607; Hack v. Dady, 142 App. Div. 510; Gulf, etc. R. Co. v. Trott, 86 Tex. 412, 40 Am. St. 866; San Antonio, etc. R. Co. v. Corley, 87 Tex. 432, (see § 24 for Texas cases allowing recovery, under some circumstances, for nervous injury); Denver, etc. R. Co. v. Roller, 41 C. C. A. 22, 100 Fed. 738, 49 L.R.A. 77; Spade v. Lynn & B. R. Co., 172 Mass. 488, 70 Am. St. 298, 168 Mass. 285, 60 Am. St. 393, 38 L.R.A. 512; Ewing v. Pittsburgh, etc. R. Co., 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. 709; Wyman v. Leavitt, 71 Me. 227; Haile v. Texas & P. R. Co., 60 Fed. 557, 9 C. C. A.

no precedent was cited of a similar action having been maintained or even instituted. It has since come to the knowledge

134, 23 L.R.A. 774; *Kalen v. Terre Haute & I. R. Co.*, 18 Ind. App. 202; *Gaskins v. Runkle*, 25 Ind. App. 548; *Lee v. Burlington*, 113 Iowa, 356, 86 Am. St. 379; *Nelson v. Crawford*, 122 Mich. 466, 80 Am. St. 577; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224, 3 Am. Rep. 245; *Atchison, etc. R. Co. v. McGinnis*, 46 Kan. 109; *St. Louis, etc. R. Co. v. Bragg*, 69 Ark. 402, 86 Am. St. 206; *Same v. Taylor*, 84 Ark. 42, 13 L.R.A.(N.S.) 159; *Chicago, etc. R. Co. v. Moes*, 89 Ark. 187; *Pierce v. St. Louis, etc. R. Co.*, 94 Ark. 489; *Reed v. Ford*, 129 Ky. 471, 19 L.R.A.(N.S.) 225; *Reed v. Maley*, 115 Ky. 816, 17 Am. Neg. Rep. 275, 62 L.R.A. 900; *Morse v. Chesapeake & O. R. Co.*, 117 Ky. 11; *McGee v. Vanover*, 148 Ky. 737; *Chesapeake & O. R. Co. v. Robinett*, 151 Ky. 778, 45 L.R.A.(N.S.) 433; *Kyle v. Chicago, etc. R. Co.*, 182 Fed. 613, 105 C. C. A. 151; *Western U. Tel. Co. v. Sklar*, 126 Fed. 295, 61 C. C. A. 281; *Tiller v. St. Louis, etc. R. Co.*, 189 Fed. 994; *Indianapolis St. R. Co. v. Ray*, 167 Ind. 236; *Crutcher v. Big Four R. Co.*, 132 Mo. App. 311; *Morris v. Lackawanna, etc. R. Co.*, 228 Pa. 198, citing local cases; *Chittick v. Philadelphia R. T. Co.*, 224 Pa. 13, 22 L.R.A.(N.S.) 1073; *Huston v. Freemansburg*, 212 Pa. 548, 3 L.R.A.(N.S.) 49; *Reardon v. Philadelphia R. T. Co.*, 43 Pa. Super. 344; *Norris v. Southern R.*, 84 S. C. 15 (except under statute imposing liability therefor on telegraph companies); *Taylor v. Atlantic C. L. R. Co.*, 78 S. C. 552; *Geiger v. Grand Trunk R. Co.*, 10 Ont. L. R. 511 (slight bruises were inflicted on the plaintiff); *Kentucky Traction & Termi-*

nal Co. v. Bain, 161 Ky. 44; *Shellabarger v. Morris*, 115 Mo. App. 566, (the presiding justice of the Kansas City court of appeals said: The Missouri rule is that where there has been no bodily impact, no damages are recoverable for mental anguish, but such damages are recoverable for injuries received in connection with such impact. There can be no good reason for the distinction. It is merely arbitrary). See § 95.

The principal case is recognized as binding in Ontario (*Henderson v. Canada Atlantic R. Co.*, 25 Ont. App. 437), as it doubtless is in all the other British colonies. It has been said of it in New South Wales that it is binding there, "and when we are called upon to decide a case in which the facts are identical we shall be compelled to follow it. But I," said the chief justice, "do not feel inclined to extend the principle of the decision in any way." *Rea v. Balmain New F. Co.*, 17 New South W. (law) 92. See *Pelmothe v. Phillips*, 20 id. 61, and 1 Beven on Neg. (2d ed.) p. 76 *et seq.* In a recent case in Ontario it was observed: "The Coultas case, as the decision of our ultimate court of appeal, is still, of course, a binding authority in this province, although it is impossible not to feel that the situation is not satisfactory, and that the decision is to be applied with careful discrimination." *Toms v. Toronto R. Co.*, 22 Ont. L. R. 204. See *Toronto R. Co. v. Toms*, 44 Can. Sup. Ct. 268.

The American cases which deny redress for nervous shock and its results do not all rest upon the same ground, though most of them

of the legal world that such an action had been maintained before that time. In 1890 substantially the same question

take the view that the damages are too remote. It is said in Massachusetts: "The logical vindication of this rule is, that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met." The rule is thus limited there: "It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been on the actor's mind." *Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 5 Am. Neg. Rep. 367, 60 Am. St. 393, 38 L.R.A. 512. See *Homans v. Boston E. R. Co.*, 180 Mass. 456, 11 Am. Neg. Rep. 248, 57 L.R.A. 291, stated in last paragraph of § 22; *Crutcher v. Big Four R. Co.*, *supra*. The rule of the *Spade* case "is confined strictly to cases where the connection of the physical illness with the fright is wholly internal. When the fright reasonably induces action which results in external injury the defendant may be liable, as well when the impact is brought about without the intervention of the plaintiff's consciousness." *Cameron v. New England Tel. & T. Co.*, 182 Mass. 310, 13 Am. Neg. Rep. 86.

In a Wisconsin case the rule was

applied under conditions which make it particularly noticeable, and lead to some doubt as to whether the decision is right if damages for mental suffering are recoverable at all as an independent head of damage. A combination of liverymen was formed to limit their services to persons patronizing them exclusively and to monopolize the livery business in Milwaukee, including service for funerals. Such combination, the court held, was unlawful, and any member of it who acted in accordance with the regulations was liable for compensatory damages to a person specially injured by an overt act. A member of such association let a hearse and carriage to the plaintiff for the funeral of his child, but upon learning that the person in charge was an undertaker and liveryman doing an independent business, joined with the association in sending the vehicles away from the plaintiff's house just as they were about to be used. Here, then, is an unlawful combination, doing or causing the doing of an act wilfully, with knowledge that the natural result will be to cause plaintiff mental distress or nervous shock. It is said in the opinion: "There was no physical injury to plaintiff, and no personal injury to him of any kind save to his feelings. The case does not fall within the few exceptions to the rule,—which prevails in this state and in most jurisdictions,—that mental distress alone is too remote and difficult of measurement to be the subject of an assessment of damages. The true idea is that, under the general principle applicable to tort actions that recoverable damages are lim-

came, for the second time, before the courts of Ireland, and they reached a conclusion squarely opposed to that arrived at

ited to such as are the natural and proximate result of the act complained of, some physical injury is necessary to a definite causal connection between the wrongful act and the mental condition, to render the former, in a legal sense, the cause of the latter, and such condition, with its immediate cause, sufficiently significant to be comprehended and measured in a money standard by average human wisdom with a reasonable degree of certainty." *Gatzow v. Buening*, 106 Wis. 1, 20, 49 L.R.A. 475, 80 Am. St. 17. Compare *Browning v. Fies*, 4 Ala. App. 580, stated in § 92.

In the New York case the plaintiff was standing upon a crosswalk awaiting an opportunity to board one of the defendant's cars which had stopped there. While there, and as she was about to step upon the car, a vehicle of the defendant's came down the street, and as the team attached to it drew near it turned and came so close to the plaintiff that she stood between the horses' heads when they were stopped. The fright and excitement rendered her unconscious, and there was a miscarriage and consequent illness. Because there could be no recovery for the fright, there could be none for the illness consequent upon it. The miscarriage was not the proximate result of the defendant's negligence, but the result of an accidental or unusual combination of circumstances which could not have been reasonably anticipated. Another reason for denying the right of action was that a flood of litigation might be anticipated, with a wide field opened for fictitious or speculative claims. *Mitchell v.*

Rochester R. Co., 151 N. Y. 107, 56 Am. St. 604, 34 L.R.A. 781; *Hack v. Dady*, 134 App. Div. 253; *Cook v. Mohawk*, 207 N. Y. 311.

In *Hutchinson v. Stern*, 115 App. Div. 791, a husband was denied a recovery for the loss of his wife's services caused by a fright resulting from an assault made upon him in her presence.

The difficulty of testing the statements of the plaintiff, the remoteness of the damages and the metaphysical character of the injury, considered apart from physical pain, are the reasons assigned in *Reed v. Maley* and *McGee v. Vanover*, *supra*. See § 44 as to the effect of wilfulness.

"The reason that mental suffering, unaccompanied by physical injury, is not considered an element of recoverable damages is that it is deemed to be too remote, uncertain and difficult of ascertainment." *St. Louis, etc. R. Co. v. Taylor*, *supra*.

See 15 *Harvard L. Rev.* 304, for an answer to some of the foregoing objections to recovery in such cases.

The Minnesota cases on this question are reviewed in *Sanderson v. Northern Pac. R. Co.*, 88 Minn. 162, 60 L.R.A. 403. In that case the plaintiff sought to recover for personal injuries, due solely to fright and grief, because an attempt was made to put her children off the car, she not having been interfered with, nor having been put in fear of any physical injury or personal violence. The rule was declared to be that there can be no recovery for fright which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, unless the fright is the

by the privy council, and one which is supported by better reasoning and is more in harmony with justice.¹⁶ The action was brought by a husband and his wife, and arose out of the following facts: The female plaintiff was a passenger in an excursion train on the defendant's railway. The train was too heavy to be drawn up an incline, and was divided, the car in which the plaintiff was remaining attached to the engine. The rear part of the train descended the incline with great velocity; the engine was thereafter reversed and with the car the plaintiff occupied followed at a high rate of speed, until stopped with a violent jerk. The proof showed that A. was put in great fright by the occurrence, and suffered from nervous shock in consequence that she was incapacitated from performing her ordinary avocations, and medical witnesses expressed the opinion that paralysis might result. The jury were charged that if great fright was, in their opinion, a reasonable and natural consequence of the circumstances in which the defendant had placed the plaintiff, and she was actually put in great fright by the circumstances, and if injury to her health was, in their opinion, a reasonable and natural consequence of such fright and was actually occasioned thereby, damages for such injury would not be too remote. The mate-

proximate result of a legal wrong against the plaintiff by the defendant. See *Bucknam v. Great Northern R. Co.*, 76 Minn. 373, 6 Am. Neg. Rep. 302. An earlier case in that state is contrary to the *Coultras* case.

In *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 16 L.R.A. 203, the plaintiff, who was pregnant, was a passenger on one of the defendant's cars. By its negligence in their management a collision seemed inevitable, and the plaintiff was put in a position of such peril as to cause fright, which produced a miscarriage. Though there was no collision and no impact the negligence was the cause of the plain-

Suth. Dam. Vol. I.—6.

tiff's injury and entitled her to recover.

In *Miller v. Baltimore & O. S. R. Co.*, 78 Ohio St. 309, 18 L.R.A. (N.S.) 949, 125 Am. St. 699, it was alleged that the defendant negligently and with great force pushed cars off the end of its switch track across a public street and into the plaintiff's dwelling, and that in consequence the plaintiff suffered a severe nervous shock which caused bodily pain, mental anguish and injury to health, and that actual bodily injury was sustained or that the negligence was wilful or wanton. The right to recover was denied.

¹⁶ See § 23.

rial facts were found in the plaintiff's favor. In considering the objections to the refusal of the court to charge, as requested by the defendant, that if damages or injury were the result of, or arose from, mere fright, not accompanied by actual physical injury, even though there might be a nervous or mental shock occasioned by the fright, such damages would be too remote, Palles, C.B., said: "This objection presupposes that the plaintiff sustained, by reason of the defendant's negligence, 'injury' of the class left to the consideration of the jury by the summing-up, i. e., injury to health, which is bodily or physical injury; and the proposition presented is that damages for such injury are not recoverable if two circumstances occur: (1) if the only connection between the negligence and this bodily injury is that the former caused fright, which caused nervous or mental shock, which shock caused the bodily injury complained of; and (2) that this so-called bodily injury did not accompany the fright, which I suppose means that the injury, although in part occasioned by the fright, assumed the character of bodily injury subsequently to, and not at, the time of the negligence or fright. To sustain this contention, it must be true whether the shock which it assumed to have been caused was either mental or nervous; and as the introduction of the word 'mental' may cause obscurity, by involving matter of a wholly different nature, unnecessary to be taken into consideration here, I eliminate it from the question. If there be a distinction between mental shock and nervous shock, then the objection cannot be sustained. It is then to be observed: (1) that the negligence is a cause of the injury, at least in the sense of a *causa sine qua non*; (2) that no intervening independent cause of the injury is suggested; (3) that jurors, having regard to their experience of life, may hold fright to be a natural and reasonable consequence of such negligence as occurred in the present case. If, then, such bodily injury as we have here may be a natural consequence of fright, the chain of reasoning is complete. But the medical evidence here is such that the jury might from it reasonably arrive at the conclusion that the injury, similar

to that which actually resulted to the plaintiff from the fright, might reasonably have resulted to any person who had been placed in a similar position. It has not been suggested that there was anything special in the nervous organization of the plaintiff which might render the effect of the negligence or fright upon her different in character from that which it would have produced in any other individual. I do not myself think that proof that the plaintiff was of an unusually nervous disposition would have been material to the question; for persons, whether nervous or strong-minded, are entitled to be carried by railway companies without unreasonable risk of danger; and my only reason for referring to the circumstance is to show that, in this particular case, the jury might have arrived at the conclusion that the injury which did in fact ensue was a natural and reasonable consequence of the negligence which actually caused it.

“Again, it is admitted that, as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage would not be too remote. The distinction insisted upon is one of time only. The proposition is that, although, if an act of negligence produces such an effect upon particular structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause and effect exists between such negligence and the injury, yet such relation *cannot* in law exist in the case of a similar act producing upon the same structures an effect which, at a subsequent time—say a week, a fortnight, or a month—must result, without any intervening cause, in the same physical injury. As well might it be said that a death caused by poison is not to be attributed to the person who administered it because the mortal effect is not produced contemporaneously with its administration. This train of reasoning might be pursued much farther; but in consequence of the decision to which I shall hereafter refer, I deem it unnecessary to do so.”

§ 22. **Same subject; criticism of the Coultas case; nervous shock a physical injury.** The chief baron then proceeded to review the English case cited in the opening paragraph of the previous section: "In support of their contention the defendants relied upon the *Victorian Railway Commissioners v. Coultas*. That was a remarkable case. The statement of claim alleged that through the negligence of the servants of the defendants, in charge of a railway gate at a level crossing, the plaintiffs, while driving over it, were placed in imminent peril of being killed by a train, and by reason thereof the plaintiff, Mary, received a shock and suffered personal injuries. It appeared that the female plaintiff, whilst returning with her husband and brother in the evening, from Melbourne to Hawthorn, in a buggy, had to cross the defendant's line of railway at a level crossing. When they came to it the gates were closed; the gate-keeper opened the gates nearest to the plaintiffs and then went across the line to those on the opposite side. The plaintiffs followed him, and were partly onto the up-line (the further one), when the train was seen approaching on it. The gate-keeper directed them to go back, but James Coultas, who was driving, shouted to him to open the opposite gate, and went on. He succeeded in getting the buggy across the line, so that the train, which was going at a rapid speed, did not touch it, although it passed close at the back of it. As the train approached the plaintiff, Mary, fainted. The medical evidence showed that she received a severe *nervous shock* from the fright, and that the illness from which she afterward suffered (and which is stated in Mr. Beven's book on Negligence to have included a miscarriage) was the consequence of the fright. One of the plaintiffs' witnesses said she was suffering from profound impression on the nervous system—*nervous shock*; and that the shock from which she suffered would be a natural consequence of the fright. Another said he was unable to detect any physical damage; he put down her symptoms to *nervous shock*. It is to be observed from this evidence the jury might have inferred that physical injury was sustained by the female plaintiff at the time of the occurrence in question. Although one witness spoke of nervous shock as

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contradistinguished from physical damage, the question would still have been open for the jury whether the nervous shock was not—as in the generality of, if not indeed all, cases it necessarily must be—physical injury. The jury found for the plaintiffs. Upon an appeal the privy council, without deciding that an impact was necessary to sustain the action, not only set aside the verdict, but entered judgment for the defendants. In delivering judgment Sir R. Couch says: ‘Her fright was caused from seeing the train approaching, and thinking she was going to be killed. Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot, *under such circumstances* (their lordships think), be considered a *consequence* which, in the ordinary course of things, would flow from the negligence of the gate-keeper.’

“Amongst the reasons stated in the judgment in support of this conclusion are: 1, that a contrary doctrine would involve damages on account of *mental* injury being given in every case where the accident caused by the negligence had given the person a severe nervous shock; 2, that no decision of an English court had been produced in which, upon such facts, damages were recovered; 3, that a decision, of the supreme court of New York (*Vandenburgh v. Truax*)¹⁷ which was relied upon, was distinguishable as being a case of *palpable* injury. Of these reasons, the first seems to involve that injuries other than mental cannot result from nervous shock; and the third implies that injuries resulting from such a shock cannot be ‘palpable.’ I am unable (I say it with deference) to follow this reasoning; and further, it seems to me that even were the proposition of law upon which the judgment is based sustainable, the privy council were not warranted in assuming as a fact, against the verdict of the jury, and without any special finding in regard to it, that the fright was, in *that* particular case, unaccompanied by any actual physical injury. Further, the judgment assumes, as a matter of law, that nervous shock is something which affects merely the mental functions, and is not in itself a peculiar physical state of the body.

¹⁷ 4 Denio, 464.

This error pervades the entire judgment. Mr. Beven states in his recent work on Negligence,¹⁸ and I entirely concur with him, that 'the starting point of the reasoning there is that nervous shock and mental shock are identical; and that they are opposed to actual physical injury.' "

This view is in accord with that favored by the California court, which has thus expressed itself in a case in which there was a nervous shock without physical impact: "The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright or an exposure to imminent peril has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves or the entire nervous system is thus affected there is a physical injury thereby produced, and if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect through some action upon the mind."¹⁹

¹⁸ P. 67 (1st ed.).

¹⁹ *Sloane v. Southern California R. Co.*, 111 Cal. 668, 680, 8 Am. Neg. Cas. 76, 32 L.R.A. 193. To the same effect, *Rea v. Balmain New F. Co.*, 17 New South Wales (law) 92; *Hickey v. Welch*, 91 Mo. App. 4, 10; *Watkins v. Kaolin Mfg. Co.*,

131 N. C. 536, 60 L.R.A. 617, 13 Am. Neg. Rep. 197; *Mack v. South Bound R. Co.*, 52 S. C. 323, 40 L.R.A. 679; *Louisville & N. R. Co. v. Ritchel*, 148 Ky. 701, 41 L.R.A. (N.S.) 958; *Arthur v. Henry*, 157 N. C. 438 (it seems); *Weatherford, etc. R. Co. v. Crutcher*, (Tex. Civ.

A satisfactory discussion of the question may be found in a recent Rhode Island case sustaining a recovery for the physical consequences arising from nervous disturbances caused by fright. The rule of the Coultas case and of the cases in harmony with it is disapproved, and that of the California court, the Irish cases and *Dulien v. White* is approved.²⁰ In a recent Wisconsin case the plaintiff while riding in a carriage was frightened or shocked by the negligent steering of an automobile directly into the horses attached to the carriage, throwing or pushing the horses off the road, and causing the carriage to move with such force and violence that the plaintiff received a fright and shock, causing bodily injury which resulted in a miscarriage. The allegation as to shock was construed not to mean external violence or physical inconvenience, but as signifying an abnormal condition either of mind or body, or of both, resulting from the imminent apparent danger of injury or death. On these facts this principle was announced: When physical injury flows directly from extreme fright or shock, caused by the ordinary negligence of one who owes the duty of care to the injured person, such fright or shock is a link in the chain of proximate causation as efficient as physical impact from which like results flow.²¹ The Alabama court of appeals has taken a step in advance of any of the cases which

App.) 141 S. W. 137; St. Louis S. R. Co. v. Alexander, (Tex. Civ. App.) 141 S. W. 135; Georgia S. & F. R. Co. v. Ransom, 5 Ga. App. 740; Green v. Shoemaker, 111 Md. 69, 23 L.R.A. (N.S.) 667; Philadelphia, etc. R. Co. v. Mitchell, 107 Md. 600, 17 L.R.A. (N.S.) 974; Bouillon v. Laclede G. L. Co., 148 Mo. App. 462; Dreyfus v. St. Louis & S. R. Co., 124 id. 585; Kimberly v. Howland, 143 N. C. 398, 7 L.R.A. (N. S.) 545; Fernandez v. Valdes, 4 Porto Rico Fed. 48; Chicago, etc. R. Co. v. Barnes, 50 Tex. Civ. App. 46; Kirkpatrick v. Canadian Pac. R. Co., 35 New Bruns. 598; St. Louis S. R. Co. v. Murdock, 54 Tex. Civ. App.

249. See 1 Beven on Neg. (2d ed.), p. 76 *et seq.*

A wife may recover damages for sickness resulting from nervousness occasioned by the verbal abuse of her by her husband while intoxicated, the liquor which caused him to be so having been unlawfully sold him by the defendant. *Kear v. Garison*, 15 Ohio C. C. 447.

²⁰ *Simone v. Rhode Island Co.*, 28 R. I. 186, 9 L.R.A. (N.S.) 740.

²¹ *Pankopf v. Hinkley*, 141 Wis. 146, 24 L.R.A. (N.S.) 1159. The opinion cites the *Sloane* case, *supra*. *Bell v. R. Co.*, *Dulien v. White*, *infra*, and other cases.

have come to the notice of the writer. The plaintiff was frightened or shocked by the wrongful conduct of the defendant in the operation of his automobile on a highway which caused the plaintiff's mule, attached to a buggy from which the plaintiff and her husband had just alighted and which contained their small children, to run away. The plaintiff was not physically injured otherwise than by the shock or fright which caused her to faint and become ill; her right to recover was sustained.²² But this seems contrary to a later case in the supreme court of that state in which it is said: If, from mere fright or excitement, the plaintiff fell and was not touched by the defendant, then the defendant was not liable.²³ As appears elsewhere,²⁴ the injury which will sustain a recovery for the resulting mental suffering need not be severe; it is sufficient if it will support an action, and this though it does not leave any visible sign.²⁵ The court will not inquire whether the mental suffering or shock came through the injury or along with it. The arbitrary exception, based on a notion of what is practicable,²⁶ that prevents a recovery for visible illness resulting from nervous shock alone will not be pressed further to exclude a recovery where there has been a battery and the shock results from the same wrongful management as the battery.²⁷

²² *Spearman v. McCrary*, (Ala. App.) 58 So. 927.

²³ *Bachelder v. Morgan*, 179 Ala. 339, 4 N. C. C. A. 2. This case does not notice the one previously cited.

²⁴ § 1245.

²⁵ *Driscoll v. Gaffey*, 207 Mass. 102, 4 N. C. C. A. 54.

²⁶ Expediency is recognized in other cases as cause for denying redress. *Huston v. Freemansburg*, 212 Pa. 548, 3 L.R.A.(N.S.) 49; *Linn v. Duquesne*, 204 Pa. 551, 93 Am. St. 800; *Reardon v. Philadelphia R. & T. Co.*, 43 Pa. Super. 344.

"It is not only an assault, but a battery by the actor, where a dangerous physical force which he has intentionally put in motion comes

in contact with the clothing of the person against whom it is directed, although he may neither be bruised nor wounded." If an external injury accompanied with severe nervous shock, causing pain, accompanies such a battery they are the direct result of it. *Steverman v. Boston E. R. Co.*, 205 Mass. 508.

²⁷ *Homans v. Boston E. R. Co.*, 180 Mass. 456, 57 L.R.A. 291, 11 Am. Neg. Rep. 248; *Heiberger v. Missouri & K. Tel. Co.*, 133 Mo. App. 452; *Toronto R. Co. v. Toms*, 44 Can. Sup. Ct. 268; *Toms v. Toronto R. Co.*, 22 Ont. L. R. 204. See *Cassady v. Old Colony St. R. Co.*, 184 Mass. 156, 14 Am. Neg. Rep. 559, 63 L.R.A. 285.

§ 23. **Same subject; an earlier ruling.** Continuing the discussion in the case in the Irish court, the chief baron said: "Possibly, were there no decision the other way, I should from courtesy defer my opinion to that of the privy council, and leave it to the plaintiff to test our decision upon appeal. The very point, however, had been, four years before the decision of the privy council in the *Victorian Railway Commissioners v. Coultas*, decided in this country, first in the common pleas division, then presided over by the present Lord Morris, and afterwards in the court of appeal, in the judgment delivered by the late Sir Edward Sullivan; and it is a sad commentary upon our present system of reporting that a decision so important and so novel has never found its way into our law reports. The case I refer to is *Byrne v. Great Southern and Western Railway Company*. It was tried before me on the 5th and 6th of December, 1882; and a motion to enter a verdict for the defendants was heard in 1883 by the common pleas division; and by the court of appeal in February, 1884. It was an action by the superintendent of the telegraph office at the Limerick Junction station of the defendant's railway. His office consisted of a small building at the end of one of the defendant's sidings, between which and the office there was a permanent buffer strongly fixed. On the 7th December, 1881, through some railway points having been negligently left open, a train entered this siding, broke down the permanent buffer and the wall of the telegraph office. The plaintiff's case was that by hearing the noise and seeing the wall falling he sustained a nervous shock which resulted in certain injuries to his health. . . . A verdict having been found for the plaintiff with £325 damages, a motion to set it aside, and enter a verdict for the defendant, on the ground that there was no evidence of injury sufficient to sustain the action, was refused by the common pleas division; and this refusal was affirmed by the court of appeal. That case goes much further than is necessary to sustain the direction here, as in it there was nothing in the nature of impact. As between it, by which we are bound, and the decision of the privy council, by which we are not, I must prefer the former. I desire, however, to

add that I entirely concur in the decision in *Byrne v. Great Southern and Western Railway Co.* and that I should have been prepared to have arrived at the same conclusion, even without its high authority. . . . In conclusion, then, I am of opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down, as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence, unless such injury 'accompany such negligence in point of time.' ”²⁸

§ 23a. **Same subject; *Dulien v. White*.** In 1901 practically the same question came before Kennedy and Phillimore, justices of the king's bench division, and was decided in accordance with the rule of the Irish case. The plaintiff's case was that when she was behind the bar of her husband's public house, being then pregnant, the defendant's servant negligently drove a van into the public house; that plaintiff in consequence sustained a severe shock and was seriously ill, and at a later time gave premature birth to a child, which, in consequence of the shock sustained by plaintiff, was born an idiot. This last claim was abandoned as a ground for damages because untenable. The action was held sustainable, the result being reached by somewhat different courses of reasoning. Kennedy said, in part: This is an action on the case for negligence, that is to say, for a breach on the part of defendant's servant

²⁸ *Bell v. Great Northern R. Co.*, 26 L. R. Ire. 428 (1890). The opinion of the chief baron was concurred in by Andrews and Murphy, JJ.

The general doctrine of the Irish court is recognized in *Mack v. South Bound R. Co.*, 52 S. C. 323, 40 L.R.A. 679; *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 16 L.R.A. 203; *Fitzpatrick v. Great Western R. Co.*, 12 Up. Can. Q. B. 645; *Sloane v. Southern California R. Co.*, *supra*, 8 Am.

Neg. Cas. 76; *Hickey v. Welch*, 91 Mo. App. 4, 10; *Watkins v. Kaolin Mfg. Co.*, 131 N. C. 536, 60 L.R.A. 617, 13 Am. Neg. Rep. 197; *Cooper v. Caledonian R. Co.*, 9 Scotch L. T. Rep. 273, 10 id. 104; *Gulf, etc. R. Co. v. Luther*, 40 Tex. Civ. App. 517, Missouri, etc. R. Co. v. Dickson, (Tex. Civ. App.) 153 S. W. 933. To much the same effect is *Green v. Shoemaker*, 111 Md. 69, 29 L.R.A.(N.S.) 667.

of the duty to use reasonable and proper care and skill. In order to succeed the plaintiff has to prove resulting damage to herself, and a natural and continuous sequence uninterruptedly connecting the breach of duty with the damage as cause and effect. . . . The only question here is whether there is an actionable breach of those obligations if the man in either case is made ill in body by negligent driving which does not break his ribs, but shocks his nerves. As regards the facts we must, for the purposes of this argument, assume all that, consistently with the allegations of the statement of claim, can be assumed in plaintiff's favor. Now, what are defendant's arguments against her right to recover damages in this action? First of all, it is argued, fright caused by negligence is not itself a cause of action; *ergo*, none of its consequences can give a cause of action—*Mitchell v. Rochester R. Co.*²⁹ With all respect to the learned judges who decided that case, I feel a difficulty in following their reasoning. No doubt damage is an essential element in a right of action for negligence. "Fear taken alone,"—as Sir Frederick Pollock has stated in his work on Torts³⁰—"falls short of being actual damage, not because it is a remote or unlikely consequence, but because it can be proved and measured only by physical effects."

That fright, where physical injury is directly produced by it, cannot be a ground of action merely because of the absence of any accompanying impact appears to me to be unreasonable and contrary to the authorities. We have, as reported, decisions which go far, at any rate in my judgment, to negative the correctness of any such contentions.³¹ Further, we have

²⁹ 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. 604.

³⁰ 6th ed., p. 51.

³¹ Referring to *Jones v. Boyce*, 1 Stark. 493, where it was ruled that if through the fault of a coach proprietor in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will

be liable although the coach was not turned over. Also to *Harris v. Mobbs*, 3 Ex. Div. 268. The facts were that a house-van attached to a steam-plow was left for the night on the side of a highway, four or five feet from the metaled part. During the evening the plaintiff's testator drove his horse attached to a cart along the metaled road; the horse was a kicker, but he did not know it. Passing the van he

directly in point the decision of the court of appeal and common pleas division in Ireland in the unreported case of *Byrne v. Great Southern & Western R. Co.*,³² approved of in *Bell v. Great Northern R. Co.*³³ In *Victorian Ry. Commissioners v. Coultas*,³⁴ which was much relied upon by defendants in the argument before us, the privy council expressly declined to decide that "impact" was necessary. It is not to be taken that, in my view, every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I think, one important limitation. The shock, in order to give a cause of action, must be one which arises from a reasonable fear of immediate personal injuries to the plaintiff. This limitation was applied by *Bruce and Wright, JJ.*, in the unreported case of *Smith v. Johnson & Co.*, where a man was killed negligently by the defendant in the sight of the plaintiff, and the plaintiff became ill, not from shock produced by fear of harm to himself, but from the shock of seeing another person killed. The court held that this harm was too remote a consequence of the negligence.³⁵ . . . It remains to consider the second form in which defendant's counsel put his objection to the right of the plaintiff to maintain this action. He contends that the damages are too remote, and

shied at it, kicked, and galloped kicking for 140 yards, got one leg over the shaft, fell and kicked the driver as he rolled out of the cart; he died from the effects of the kick. A verdict having been found in favor of the executor of the deceased on the question of defendant's negligence, it was ruled that such use of the highway was the proximate cause of the injury. The third case referred to is *Wilkins v. Day*, 12 Q. B. D. 110, the facts being similar to those in *Harris v. Mobbs*, and the ruling in accordance with that therein.

These cases are referred to in *Wilkinson v. Downton*, [1897] 2 Q. B. 6, by *Wright, J.*, in respect to their being inconsistent with the *Coultas*

case. He said: But I think that those cases are to be explained on a different ground, namely, that the damage which immediately resulted from the act of the passenger or of the horse was really the result, not of that act, but of a fright which rendered that act involuntary, and which therefore ought to be regarded as itself the direct and immediate cause of the damage.

³² § 23.

³³ §§ 21, 22.

³⁴ See § 21.

³⁵ To the same effect. *Cleveland, etc. R. Co. v. Stewart*, 24 Ind. App. 374; *The Rigel*, [1912] Prob. 99. See also, *Crawford v. McMickens*, — Ala. —, 66 So. 712, quoting the text.

relies upon the decision of the privy council in *Victorian Ry. Commissioners v. Coultas*. The principal ground of their judgment is formulated in the following sentence: "Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a mental or nervous shock, cannot under such circumstances, their lordships think, be considered a consequence which in the ordinary course of things would flow from the negligence of the gatekeeper." A judgment of the privy council ought, of course, to be treated by this court as entitled to very great weight indeed; but it is not binding upon us; and in venturing, most respectfully, not to follow it in the present case I am fortified by the fact that its correctness was treated by Lord Esher, M. R., in his judgment in *Pugh v. London, etc. R. Co.*³⁶ as open to question; that it was disapproved of in *Bell v. Great Northern R. Co.* . . . I prefer the decisions of the Irish courts; they seem to me strong and clear authorities for the plaintiff's contention. It is suggested on the part of the defendants that the applicability of the judgment in *Bell v. Great Northern R. Co.* is impaired by the fact that the female plaintiff in that action was a passenger on the defendants' railway and as such had contractual rights. It appears to me that this fact makes no practical difference whatever. There was no special contract; no notice to the railway when they accepted her as a passenger that she was particularly delicate or liable to fright.³⁷

³⁶ [1896] 2 Q. B. 248. In this case the plaintiff, while discharging his duty as a signalman in the defendant's employment, endeavored to prevent an accident to a train by signaling to the driver, and the excitement and fright arising from the danger to the train produced a nervous shock which incapacitated him from employment. It was held that he had been incapacitated by "accident" within the meaning of a policy of accident insurance.

³⁷ *Dulien v. White*, [1901] 2 K. B. 669. *Contra*, *Miller v. Baltimore & O. S. R. Co.*, 78 Ohio St.

309, 125 Am. St. 699, 18 L.R.A. (N.S.) 949.

In *Philadelphia, etc. R. Co. v. Mitchell*, 107 Md. 600, 17 L.R.A. (N.S.) 974, it was shown that the plaintiff was passing on a street under a bridge in course of construction: a hammer fell therefrom and broke her umbrella. She was thrown back by the blow on the umbrella and sustained injury in consequence of a wrench caused by the fright. There was a physical impact and therefore, liability for the physical consequences of the wrench and of the fright. The opinion cites

Before *Dulien v. White* was decided a different conclusion from that reached therein was arrived at in Massachusetts upon a state of facts less favorable to the defendant than existed in the English case. The declared purpose of the defendant was to damage a house in which the plaintiff was, though it was not her house. In her presence he threw a large stone against the house, after which the plaintiff went into the front room of the house with her little child, and thereafter the defendant wilfully threw a large stone at the house which passed through one of the blinds covering a window in that room and greatly frightened the plaintiff, who was not touched or struck. The defendant was not liable for the fright or the consequent injury to the plaintiff's health because he had no intention to injure her or her property, did not know of her delicate condition, or that she was in that room.³⁸ As between these cases the better reason lies with the English case. The Massachusetts case seems a departure from the established principle respecting remote and proximate cause. A later case favors the right of a pupil unlawfully excluded from the public schools to recover for his suffering because of the disgrace inflicted upon him.³⁹

§ 24. **Same subject; miscellaneous cases.** Though denying the right of recovery for mere fright, neither attended nor followed by any other injury,⁴⁰ the supreme court of Texas has sustained a recovery where a miscarriage was caused by a mental shock unaccompanied by any physical violence whatever to the person of the injured woman, the defendant having knowledge of her condition and being chargeable with the probable result of his act.⁴¹ Substantially the same rule has been favored elsewhere, though there is disagreement concerning it.⁴² In a later Texas case it was alleged by the plaintiff

Dulien v. White and Bell v. Great Northern R. Co., *supra*.

³⁸ *White v. Sander*, 168 Mass. 296, 2 Am. Neg. Rep. 573

³⁹ *Morrison v. Lawrence*, 181 Mass. 127. See last paragraph of § 22.

⁴⁰ *Gulf, etc. Co. v. Trott*, 86 Tex.

412, 40 Am. St. 866; *San Antonio, etc. R. Co. v. Corley*, 87 Tex. 432.

⁴¹ *Hill v. Kimball*, 76 Tex. 210, 7 L.R.A. 618, as explained in *Denison, etc. R. Co. v. Barry*, 98 Tex. 248.

⁴² *Engle v. Simmons*, 148 Ala. 92, 121 Am. St. 59, 7 L.R.A. (N.S.) 96;

that as the result of a nervous shock or physical injury, or both, caused by the collision of two trains there was developed a nervous affection known as traumatic neurasthenia; as a matter of fact the plaintiff was not physically damaged by the collision in the sense that he sustained visible bodily injury. The conclusion reached was that where a physical injury results from a fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover his damages, provided the act or omission is the proximate cause of the injury in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof, which questions are for the jury.⁴³ Proof that a woman was negligently carried beyond her destination and thereby suffered from fright and want of food warrants a finding that the occurrence was the proximate cause of a sickness which immediately followed.⁴⁴ In such a case substantial damages may be recovered though there was no physical injury.⁴⁵ Where the defendant, executing what he thought was a practical joke, said to the plaintiff that her husband had met with an accident,

Stewart v. Arkansas S. R. Co., 112 La. 764, (a shock preceded the fright); *Purell v. St. Paul City R. Co.*, 48 Minn. 134, 16 L.R.A. 203; *Kimberly v. Howland*, 143 N. C. 398, 7 L.R.A.(N.S.) 545. *Contra*, *Morris v. Lackawanna, etc. R. Co.*, 228 Pa. 198.

In a recent case the Kansas City Court of Appeals held that a fall on a defective crossing of a street railway, followed by fright because of the approach of a car, gave the right to recover for the resulting nervous shock though no actual physical injury resulted from the fall. *Lowe v. Metropolitan St. R. Co.*, 145 Mo. App. 248.

It is said in a recent Georgia case: There, of course, may be instances where fright may be considered as an element of damages, but they should be restricted to where there is some physical injury

attending the cause of the fright, or, in the absence of physical injury, where the fright is of such a character as to produce some physical or mental impairment directly and naturally resulting from the wrongful act. Under any other conditions fright should be regarded as a mere emotion, and not sufficiently substantive to be the basis of a recovery for damages. *Williamson v. Central R. Co.*, 127 Ga. 125; *Sappington v. Atlanta, etc. R. Co.*, 127 Ga. 178.

⁴³ *Gulf, etc. R. Co. v. Hayter*, 93 Tex. 239, 47 L.R.A. 325; *Alexander v. St. Louis S. R. Co.*, 57 Tex. Civ. App. 407.

⁴⁴ *Texas & P. R. v. Gott*, 20 Tex. Civ. App. 335.

⁴⁵ *Pullman Co. v. Lutz*, 154 Ala. 517, 14 L.R.A.(N.S.) 907, 129 Am. St. 67.

and that his legs were broken, such statement being made with intent that it should be believed, as it was, and the plaintiff became ill in consequence of the resulting nervous shock, and not because of previous ill-health, weakness of constitution, predisposition to nervous shock or any other idiosyncrasy, the injury was not too remote.⁴⁶ The rule that no recovery can be had for injuries due solely to fright and excitement, unaccompanied by actual, immediate, personal injury, does not apply to cases of wilful tort.⁴⁷ If the act or default which causes a nervous shock produces physical injuries and other such injuries result from the nervous shock, there may be a recovery for the latter as well as for the others.⁴⁸ In Massachusetts a different view was taken where a passenger upon a street car suffered physical injury from fright caused by the removal of a drunken man, and a slight, unintentional battery of the person resulted. The court said of an instruction to the effect that if there was a fright which operated to the injury of the plaintiff in body or mind and also a physical injury, the jury might take all that happened as one whole, that the defendant was not liable for all the consequences, but only for those of its wrong, which began with the battery, and the consequences thereof were all for which a recovery could be had. This was said with recognition of the difficulty of discriminating.⁴⁹ Mental suffering is the natural result of an assault and is ground for recovery though no physical harm was sustained.⁵⁰

⁴⁶ *Wilkinson v. Downton*, [1897] 2 Q. B. 57. The case was admitted to be without precedent, and was distinguished from *Victorian Ry. Commissioners v. Coultas*, *supra*, on the ground that therein was no element of wilful wrong, "nor perhaps was the illness so direct and natural a consequence of the defendant's conduct as in this case."

⁴⁷ *Bouillon v. Laeclde G. L. Co.*, 148 Mo. App. 462; *Gillespie v. Brooklyn Heights R. Co.*, 178 N. Y. 347, 102 Am. St. 503, 66 L.R.A. 618; *Preiser v. Wielandt*, 48 App. Div. 569, 7 Am. Neg. Rep. 558; *Hall v.*

Jackson, 24 Colo. App. 225. See §§ 43, 44.

⁴⁸ *Rea v. Balmain New F. Co.*, 17 New South Wales (law) 92; *Heiberger v. Missouri & K. Tel. Co.*, 133 Mo. App. 452; *Kirkpatrick v. Canadian Pac. R. Co.*, 35 New Bruns. 598. See *Sullivan v. Old Colony St. R. Co.*, 197 Mass. 512, 125 Am. St. 378.

⁴⁹ *Spade v. Lynn & B. R. Co.*, 172 Mass. 488, 5 Am. Neg. Rep. 367, 43 L.R.A. 832; *Hack v. Dady*, 134 App. Div. 253.

⁵⁰ *Lutterman v. Romey*, 143 Iowa, 233.

A miscarriage resulting from threats to arrest a debtor husband,⁵¹ by the unlawful imprisonment of a husband,⁵² or by wrongfully procuring him to be indicted, is not the reasonable or natural result of such acts.⁵³ One who engages in a quarrel with the husband of a woman who is *enceinte*, the quarrel being carried on in her hearing without knowledge of her presence or condition, is not liable for a miscarriage.⁵⁴ A complaint which alleges that in a collision on the defendant's railroad the cars were thrown off the track and fell on the plaintiff's premises and against her dwelling, whereby plaintiff was subjected to great fright, nervous excitement and distress and her life endangered, does not state a cause of action.⁵⁵ An inexperienced youth, without money through defendant's neglect to deliver a message, and compelled to remain penniless among strangers for a week, cannot recover for the anxiety and mortification endured because of his belief that he was looked upon with suspicion.⁵⁶

In a North Carolina case⁵⁷ it was ruled: We are of the opinion that an action will lie for *physical* injury or disease resulting from fright or nervous shocks caused by negligent acts. From common experience we know that serious consequences frequently follow violent nervous shocks caused by fright, often resulting in spells of sickness, and sometimes in sudden death. Whether the physical injury was the natural and proximate result of the fright or shock is a question to be determined by the jury upon the evidence, showing the conditions, circumstances, occurrences, etc. But it must also ap-

⁵¹ *Wulstein v. Mahlman*, 57 N. Y. Super. 50; *Alexander v. St. Louis S. R. Co.*, 57 Tex. Civ. App. 407.

⁵² *Ellis v. Cleveland*, 55 Vt. 358. See *Huxley v. Berg*, 1 Starkie, 98.

⁵³ *Hampton v. Jones*, 58 Iowa, 317.

⁵⁴ *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *Gaskins v. Runkle*, 25 Ind. App. 584, (though defendant knew plaintiff was in delicate health and easily excited); *Crawford v. McMickens*, — Ala. —, Suth. Dam. Vol. I.—7.

⁵⁵ So. 712, quoting the text. See, *Chicago & N. R. Co. v. Hunerberg*, 16 Ill. App. 387.

⁵⁶ *Ewing v. Pittsburgh, etc. R. Co.*, 147 Pa. 40, 14 L.R.A. 666.

⁵⁷ *Voegler v. Western U. Tel. Co.*, 10 Tex. Civ. App. 229.

⁵⁸ *Watkins v. Kaolin Mfg. Co.*, 131 N. C. 536, 540, 60 L.R.A. 617, 13 Am. Neg. Rep. 197; *Lesch v. Great Northern R. Co.*, 97 Minn. 503, 7 L.R.A.(N.S.) 93.

pear that the defendant could or should have known that such negligent acts would, with reasonable certainty, cause such result, or that the injury resulted from gross carelessness or recklessness, showing utter indifference to the consequences when they should have been contemplated by the party doing such acts. As a condition precedent to recovery in such cases it must appear that the defendant must or ought to have known of the plaintiff's perilous position or condition against which he should have to exercise care. It has been ruled that a mother who has been separated from her children because not allowed time to board a train on which they were placed may recover for her mental anguish, and that such liability was not dependent upon the knowledge of the defendant's agent as to the degree of relationship existing between the plaintiff and the children, he knowing they were in her custody and that she had bought tickets for them.⁵⁸ Mental suffering caused by unlawful expulsion from a union is ground of damage.⁵⁹ In Washington punitive damages are not recognized; but when mental suffering is the result of a wrongful act against the sufferer, though there is no physical injury, it may be considered in the allowance of damages, as where there is a violation of the right to be allowed to remain in a public place,⁶⁰ and where a landlord wrongfully enters upon leased premises.⁶¹ In Colorado substantial damages are not recoverable by a widow for mental suffering against an undertaker who, through mere negligence, fails to prepare the body of her husband for shipment so that it will be in good condition when its contemplated destination is reached. The court said it would be otherwise if the breach of contract were accompanied by willful, insulting or wanton conduct.⁶²

§ 25. *Anticipation of injury as to persons; illustrations.* It has already been stated that though consequential damages to be recovered must be the natural and probable effect of the act

⁵⁸ *International, etc. R. Co. v. Anchonda* (Tex. Civ. App.), 68 S. W. 743.

⁵⁹ *Schneider v. Local Union*, 116 La. 270, 5 L.R.A.(N.S.) 891, 114 Am. St. 549.

⁶⁰ *Davis v. Tacoma R. & P. Co.*, 35 Wash. 209, 66 L.R.A. 802.

⁶¹ *Nordgren v. Lawrence*, 74 Wash. 305. See § 865.

⁶² *Hall v. Jackson*, 24 Colo. App. 225.

complained of, yet it is not requisite that the wrong-doer should be able to anticipate who the sufferer will be.⁶³ If his act has a tendency to injure some person, or many persons, and finally does in the manner which was beforehand probable cause such injury it is proximate.⁶⁴ This is cogently illustrated by the case of a spring gun set so as to be unwittingly discharged by the first comer.⁶⁵ A dealer in drugs, for negligently bottling a poisonous drug and putting it in market labeled as a harmless medicine, or omitting to label it, is liable to all persons who, without their fault, are injured by using it though it may have been the subject of many intermediate sales or it was put within the reach of an innocent user by a third party.⁶⁶ So a person who, knowing another to be a retailer of illuminating fluids, and that naphtha is explosive and dangerous to life for such use, sells that article to him to be retailed to his customers, he being ignorant of its dangerous properties, is liable to any person buying it of such retailer if injured by its explosion or ignition.⁶⁷ A manufacturer and vendor of cylinders

⁶³ *Bouillon v. Laclede G. L. Co.*, 148 Mo. App. 462, citing the text.

⁶⁴ *Cleveland, etc. R. Co. v. Tauer*, 176 Ind. 621, 39 L.R.A.(N.S.) 20, citing the text; *Nelson v. State*, 32 Ind. App. 88, quoting the text.

⁶⁵ *Jay v. Whitfield*, 4 Bing. 644; *Bird v. Holbrook*, 4 id. 628; *Forney v. Geldmacher*, 75 Mo. 113, 1 Am. Neg. Cas. 319; *The Annie*, [1909] Prob. Div. 176. See § 17.

⁶⁶ *Thomas v. Winchester*, 6 N. Y. 397; *Langridge v. Levy*, 2 M. & W. 519; *Levy v. Langridge*, 4 id. 337; *Norton v. Sewall*, 106 Mass. 143; *George v. Skivington*, L. R. 5 Ex. 1; *Burk v. Creamery P. Mfg. Co.*, 126 Iowa, 730, 106 Am. St. 377; *Darks v. Seudder-G. G. Co.*, 146 Mo. App. 246; *Tomlinson v. Armour*, 75 N. J. L. 748, 19 L.R.A.(N.S.) 923; *Kuelling v. Lean Mfg. Co.*, 183 N. Y. 78, 2 L. R.A.(N.S.) 303; *Peaslee-G. Co. v. McMath*, 148 Ky. 265, 39 L.R.A.(N.S.) 465.

⁶⁷ *Wellington v. Downer K. O. Co.*, 104 Mass. 64, 8 Am. Rep. 298. See *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682, 103 Mass. 507.

The sale of an article in itself harmless and which becomes dangerous only by being used in combination with some other substance, without any knowledge by the vendor that it is to be used in such combination, does not render him liable to an action by one who purchases the article from the original vendee, and who is injured while using it in a dangerous combination with another article, although by mistake the article actually sold is different from that which was intended to be sold. *Davidson v. Nichols*, 11 Allen, 514. See *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *Longmeid v. Holliday*, 6 Ex. 761; *Langridge v. Levy*, *Levy v. Langridge*, *supra*.

Persons who form a combination

intended for storing gases and liquids must answer to any one free from fault who sustains injuries therefrom proximately resulting from negligence in their manufacture.⁶⁸ A vendor who delivers an article with a concealed defect rendering it dangerous, without giving notice thereof, must answer to any person who suffers such an injury therefrom as might reasonably have been anticipated.⁶⁹ But this measure of responsibility is conditioned upon knowledge of the defect if the article is not inherently dangerous.⁷⁰ One who knowingly delivers an apparently harmless package containing a dangerous and explosive substance to a common carrier for transportation without giving him notice of its contents is liable for damages caused by its explosion while the carrier is transporting it without knowledge thereof, with such care as is adapted to its apparent nature.⁷¹ The keeping a large quantity of gunpowder in a wooden building insufficiently secured and situate near other buildings, thereby endangering the lives of persons in the vicinity, will subject the person so doing to damages for injuries suffered by any person from its explosion though the fire which causes the explosion is accidental or results from the negligence of a third person.⁷² A carrier who places a car containing explosives in a position in its yard where it is subject to impact from other cars must answer for the death of a fireman called out with the department to subdue the fire caused by an explosion resulting from such impact.⁷³ A person who by public false representations causes another reasonably to act upon

to enhance the price of a commodity which is the subject of interstate commerce must answer for the difference between the price a purchaser was compelled to pay and its reasonable price under natural competitive conditions, regardless of the locality in which the plaintiff did business. *Atlanta v. Chattanooga, F. & Pipeworks*, 64 L.R.A. 721, 61 C. C. A. 387.

⁶⁸ *Keep v. National T. Co.*, 154 Fed. 121.

⁶⁹ *Ward v. Pullman Co.*, 138 Ky. 554.

⁷⁰ *Peaslee-G Co. v. McMath*, 148 Ky. 265, 39 L.R.A.(N.S.) 465.

⁷¹ *Boston, etc. R. Co. v. Shanly*, 107 Mass. 568; *Farrant v. Barnes*, 11 C. B. (N. S.) 553.

⁷² *Myers v. Malcolm*, 6 Hill, 292; *Kinney v. Koopman*, 116 Ala. 310, 37 L.R.A. 497; *Rudder v. Koopman*, 116 Ala. 332, 37 L.R.A. 489.

⁷³ *Houston B. & T. R. Co. v. O'Leary*, (Tex. Civ. App.) 136 S. W. 601.

them as true in a matter of business is liable to make good any loss the latter may sustain from their falsity.⁷⁴ The servants of a railroad company ran its cars, after due warning, over a hose being used to convey water to a burning building, thereby severing it and preventing the extinguishment of the fire. The company was liable though the hose did not belong to the plaintiffs and the men in charge of it were not their servants—the severing of the hose was the proximate cause of the loss.⁷⁵ The plaintiff engaged with the defendant to serve on board the latter's vessel as a common seaman on a specified voyage; breach, that defendant neglected to supply and keep on board a proper supply of medicines as required by a statute, whereby plaintiff's health suffered; held a good cause of action.⁷⁶ The sale of a saltpetre cave was rescinded on the ground of the vendor's fraud; the vendee claimed compensation for erections on the premises, for their improvement and use made prior to the discovery of the fraud. The court held that these expenditures were not a loss naturally and proximately resulting from the fraud; they were not part of the contract, but were made by the complainant of his own choice in consequence of the bargain; that damages could not be given upon the first conse-

⁷⁴ *Morse v. Swits*, 19 How. Pr. 275; *Gerhard v. Bates*, 2 El. & B. 476; *Polhill v. Walter*, 3 B. & Ad. 114; *Davidson v. Montgomery Ward & Co.*, 171 Ill. App. 355. See *Ches-ter v. Dickerson*, 52 Barb. 349.

⁷⁵ *Metallic, etc. Co. v. Fitchburg R. Co.*, 109 Mass. 277, 12 Am. Rep. 689; *Atkinson v. Newcastle, etc. Co.*, L. R. 6 Ex. 404; *Little Rock T. & E. Co. v. McCaskill*, 75 Ark. 133, 112 Am. St. 48, 70 L.R.A. 680. But see *Mott v. Hudson River R. Co.*, 1 Robert. 593.

There is no connection between the wrongful occupation of the bank of a river and a fire, although such occupation may render it impossible for the fire department to obtain water with which to subdue the fire.

Bosch v. Burlington, etc. R. Co., 44 Iowa 402, 25 Am. Rep. 754. See *Brown v. Wabash, etc. R. Co.*, 20 Mo. App. 222; *Jackson v. Nashville, etc. R. Co.*, 13 Lea 491, 49 Am. Rep. 663; *Railway Co. v. Staley*, 41 Ohio St. 118, 52 Am. Rep. 754.

⁷⁶ *Conch v. Steel*, 3 El. & B. 402. In this case it was contended that as the act of parliament imposing the duty to keep a proper supply of medicine provided a penalty for neglect of that duty and that it might be sued for and collected by a common informer, no action at common law would lie for damages resulting from the breach of the statutory duty; but the court sustained the action. *Rowning v. Goodchild*, 2 W. Bl. 906

quence and then upon successive subsequent consequences.⁷⁷ But it is obvious that the expenditures were a proper item of damages for the fraud, if, as a fact, they were expenditures likely to be made by a purchaser; for then they were a loss which was the natural and proximate consequence of the wrong done.⁷⁸ In a case in Illinois the defendant contracted, without authority as agent, to sell land belonging to the plaintiff, and the latter was put to the expense of defending an unsuccessful suit on that contract for specific performance. He recovered as damages for his trouble and the expense in making such defense.⁷⁹ Where a horse was driven from the stable of its owner and passed from a highway to a vacant lot adjoining his premises, and there killed one of a number of children at play the owner was liable.⁸⁰

§ 26. **Consequential damages in highway cases.** The general rule is that municipal corporations are bound to keep their streets in a reasonably safe condition for travel. But *quasi*-municipal corporations, such as counties, townships and New England towns, are not under such obligation unless it is imposed by statute,⁸¹ and clearly expressed therein.⁸² Such

⁷⁷ *Peyton v. Butler*, 3 Haywood, 141.

⁷⁸ In *Peyton v. Butler*, *supra*, the court say: "The failure of a postmaster to deliver a letter giving liberty by a certain day to pay for a lottery ticket, price one dollar, would make him liable for \$20,000 should the ticket afterward turn out to be a prize of \$20,000. In short, the absurdity of such damages is well elucidated by the story of the crockeryware peddler who intended by the sale and profits to become a merchant and then a nobleman of the first order, and afterwards to marry the princess." See *Bishop v. Williamson*, 11 Me. 495, where it was held that a postmaster was liable to an action for refusing to deliver a letter according to its address, but delivering it to another, it containing a list of lottery prizes

or statement of the drawing; and it appearing that the person receiving the letter, availing himself of the information contained therein, purchased of the plaintiff, who was a vendor of lottery tickets, a ticket that had drawn a prize; the injury was held to be the immediate consequence of the unlawful withholding of the letter, and the proper measure of damages the net amount of the prize.

⁷⁹ *Philpot v. Taylor*, 75 Ill. 309, 20 Am. Rep. 241.

⁸⁰ *Mills v. Bunke*, 59 App. Div. (N. Y.) 39.

⁸¹ 2 Dillon, Mun. Corp., § 996; *Silver v. Clay County*, 76 Kan. 228; *Blue Grass T. Co. v. Grover*, 135 Ky. 685, 135 Am. St. 498.

⁸² *Barnett v. Contra Costa County*, 67 Cal. 77.

statutes are strictly construed in some states and the right of recovery is denied, especially in Maine and Massachusetts, under circumstances which do not prevent a recovery in other jurisdictions.⁸³ This, it is probable, has been the result of the language employed in the statutes of those states, which are construed to relieve from liability if the accident was not directly and solely the effect of the insufficiency of the highway.⁸⁴ It is said⁸⁵ that "some portion of the harness or carriage may be defective and unsafe, and the accident may be the combined result of the defect in the harness or carriage and the defect in the way; in such case there is an efficient co-operating cause, in connection with the defect in the way, that produces the injury, and the town is not liable."⁸⁶ The same principle applies where a horse, becoming frightened at an object for which the town is not responsible, breaks away from his driver and escapes from control while traveling on the way, and afterwards, while thus free from management and control, meets with an injury through a defect in the way.⁸⁷

⁸³ The construction given the statutes in those states is approved in a Connecticut case, it being held that the consequence of the failure of a town to keep its highway in repair is to impose upon it the statutory penalty, and that the right to recover it may be defeated by any concurring wrong of a third person and a defect in the way. In such a case the injury is not caused by the defect. *Bartram v. Sharon*, 71 Conn. 686, 71 Am. St. 225, 46 L.R.A. 144. *Contra*. *Ouverson v. Grafton*, 5 N. D. 281.

⁸⁴ *Marble v. Worcester*, 4 Gray, 395; *Aldrich v. Gorham*, 77 Me. 287; *Moulton v. Sanford*, 51 Me. 127; *Davis v. Dudley*, 4 Allen, 557.

Liability is limited to the direct and immediate results of the injury, and the common-law rule that a recovery may be had for the natural and proximate result does not apply. Hence where an injury resulted from a defect in a highway, and

the person injured sustained a subsequent injury by undertaking to use the limb injured on the highway, such later injury could not be recovered for. *Raymond v. Haverhill*, 168 Mass. 382. *Contra*. *Wieting v. Millston*, 77 Wis. 523. The Massachusetts court refused to follow this case, and it has been disapproved in *Watters v. Waterloo*, 126 Iowa, 199. In this case the plaintiff was injured by a fall on a defective walk, which produced occasional attacks of dizziness; later, he became dizzy and fell on the walk and was again injured; the latter injury was not the natural and proximate consequence of the former.

⁸⁵ *Aldrich v. Gorham*, 77 Me. 287.

⁸⁶ *Contra*. *Vogel v. West Plains*, 73 Mo. App. 588, citing *Bassett v. St. Joseph*, 53 Mo. 300; *Brennan v. St. Louis*, 92 Mo. 482; *Vogelgesang v. Same*, 139 Mo. 127.

⁸⁷ *Davis v. Dudley*, *supra*; *Moulton v. Sanford*, 51 Me. 127; *Marble*

* * * But whether the fright or misconduct of the horse is such as to be regarded as the true and proximate cause of the injury, in any given case, is to be governed by the extent of such misconduct. It may in some remote degree even bear upon or influence, though not in any legal sense be said to cause it. 'Everything which induces or influences an accident does not necessarily and legally cause it.'⁸⁸ And not only is it the doctrine of the court in our own state, but also in Massachusetts, that if a horse, well broken and adapted to the road, while being properly driven, suddenly swerves or shies from the direct course, he is not in any just sense to be considered as escaping from the control of the driver or becoming unmanageable if he is in fact only momentarily not controlled; and that if, while thus momentarily swerving or shying, he is brought in contact with a defect in the road and an injury is thereby sustained such conduct of the horse will not be considered as the proximate cause of the accident, though it may be one of the agencies or mediums through which it was produced, and a recovery may be had for such injury.'⁸⁹ This is also the rule in Wisconsin⁹⁰ and in other states.⁹¹ The Wisconsin case first cited appears to go beyond the cases in Maine and Massachusetts. The fright of the horses was caused by

v. Worcester, 4 Gray, 395; Digman v. Spokane County, 43 Wash. 419.

⁸⁸ Spaulding v. Winslow, 74 Me. 534.

⁸⁹ *Id.*; Titus v. Northbridge, 97 Mass. 258, 93 Am. Dec. 91; Stone v. Hubbardston, 100 Mass. 55; Bemis v. Arlington, 114 Mass. 508; Wright v. Templeton, 132 Mass. 50; Morsman v. Rockland, 91 Me. 264, 6 Am. Neg. Rep. 85.

⁹⁰ Olson v. Chippewa Falls, 71 Wis. 558; Houfe v. Fulton, 29 Wis. 296, 9 Am. Rep. 568.

⁹¹ Strange v. Bodcaw L. Co., 79 Ark. 490, 116 Am. St. 92; James v. Tampa, 52 Fla. 292, 120 Am. St. 203; Goldstein v. East Fallowfield, 43 Pa. Super. 158; Alice, etc. Tel. Co. v. Billingsley, 33 Tex. Civ. App.

452; Rucker v. Huntington, 66 W. Va. 104, 25 L.R.A. (N.S.) 143; Rockford v. Russell, 9 Ill. App. 229; Joliet v. Verley, 35 Ill. 58; Denver v. Johnson, 8 Colo. App. 384; Kennedy v. New York, 73 N. Y. 365, 29 Am. Rep. 169; Burns v. Yonkers, 83 Hun, 211 (the horse balked and backed the vehicle off the highway down a steep and unguarded bank); Dillon v. Raleigh, 124 N. C. 184; Chacey v. Fargo, 5 N. D. 173; Ouverson v. Grafton, 5 N. D. 281; Cage v. Franklin, 8 Pa. Super. 89; Yoders v. Amwell, 172 Pa. 447, 51 Am. St. 750; Davis v. Snyder, 196 Pa. 273, 14 Am. Neg. Rep. 654; Stone v. Pendleton, 21 R. I. 332; Rohrbough v. Barbour County Court, 39 W. Va. 472, 45 Am. St. 925; Knouff v.

something not in the highway and for which the authorities were not responsible. Nevertheless the absence of a railing to a bridge was held the proximate cause of the accident.⁹² The distinction made in Maine and Massachusetts as to the duration of the loss of control of a horse by its driver does not appear to be taken in many states⁹³ nor in Ontario.⁹⁴ The rule in these jurisdictions is that when an accident happens from a defect existing in a highway as the result of negligence the fact that the horse was at the time uncontrollable or running away is not a defense to an action to recover for the injury. The Connecticut court say: "The failure of a traveler to be continually present with his team up to the time and place of injury, when that failure proceeds from some cause entirely beyond his control, and not from any negligence on his part, ought not to impose upon him the loss from such injury, particularly when the direct cause of the same is the negligence of some other party; the loss should be charged upon the party guilty of the first and only negligence. If the plaintiff is in the exercise of ordinary care and prudence and the injury is attributable to the negligence of the defendants, combined with some accidental cause to which the plaintiff has not negligently contributed, the defendants are liable." Nor will the fact that the horse of the plaintiff was uncontrollable for some distance

Logansport, 26 Ind. App. 202. *Contra*, Brown v. Laurens County, 38 S. C. 282.

Where the plaintiff was driving over a defective bridge and, without his fault, his horse broke through the bridge and plaintiff, in trying to extricate him, was injured by a blow from the horse, the defect was the proximate cause of the injury. Page v. Bucksport, 64 Me. 51, 18 Am. Rep. 239; Stickney v. Maidstone, 30 Vt. 378, 73 Am. Dec. 312; McKelvin v. Loudon, 22 Ont. 70.

⁹² *Contra*, Nichols v. Pittsfield, 209 Pa. 240.

⁹³ Lannon v. Chicago, 159 Ill. App. 595; Baltimore & H. T. Co. v. Bate-

man, 68 Md. 389, 6 Am. St. 449; Ring v. Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Putman v. New York, etc. R. Co., 47 Hun, 439, 442; Baldwin v. Greenwoods T. Co., 40 Conn. 238, 16 Am. Rep. 33; Hull v. Kansas, 54 Mo. 598, 14 Am. Rep. 487; Hunt v. Pownal, 9 Vt. 411; Winship v. Enfield, 42 N. H. 197; Hey v. Philadelphia, 81 Pa. 44, 22 Am. Rep. 733; Byerly v. Anamosa, 79 Iowa, 204; Mandershid v. Dubuque, 25 Iowa 108; Ward v. North Haven, 43 Conn. 148; Campbell v. Stillwater, 32 Minn. 308.

⁹⁴ Sherwood v. Hamilton, 37 Up. Can. Q. B. 410.

before arriving at the place of injury affect the liability of the defendant.⁹⁵ But this principle is not to be extended to a case in which the horse is left tied to a post, breaks away therefrom and goes over an unguarded bank where he would not have been driven by a prudent driver.⁹⁶ It may, however, apply where the first cause leading to the injury happened outside of the defendant's road, as where the horse became uncontrollable through fright upon a road for which the defendants were not responsible and ran from there upon private property, thence to the original road and finally and without a driver upon the defendants' turnpike.⁹⁷ In a Wisconsin case⁹⁸ the injured horse took fright and escaped from his driver while in a field and ran from thence to the highway, which was out of repair. The court held that towns are not bound to provide roads for runaway horses; but if the highway is so defective as to cause a team to become frightened the town is liable.⁹⁹ In Minnesota a municipality is liable for an injury sustained where a horse becomes frightened at a structure erected and maintained in a street by a third party and comes in contact with a defect in the street for which the defendant is responsible.¹ If a traveler, using due care, is exposed to imminent danger by a defect in the highway and to avoid the probable consequences of coming in contact with it and as a reasonable precaution turns his horse, whereby his vehicle is brought into collision with another vehicle, which would not have happened if the horse had not been turned, the defect may be regarded as the sole cause of the injury.² The restiveness of a horse does not break the connection between a hole in the highway

⁹⁵ *Baldwin v. Greenwoods T. Co.*, *supra*, approved in *Ring v. Cohoes*, 77 N. Y. 83, 88, 12 Am. Neg. Rep. 481, 33 Am. Rep. 574; *Joliet v. Shufeldt*, 144 Ill. 403, 18 L.R.A. 750, 36 Am. St. 453; *Judd v. Caledonia*, 150 Mich. 480 (defendant responsible for the cause of the fright of a horse.)

⁹⁶ *Moss v. Burlington*, 60 Iowa, 438, 46 Am. Rep. 82.

⁹⁷ *Baldwin v. Greenwoods T. Co.*, *supra*.

⁹⁸ *Jackson v. Bellevien*, 30 Wis. 250; *Schillinger v. Verona*, 96 Wis. 456.

⁹⁹ *Kelley v. Fond du Lac*, 31 Wis. 179; *Hodge v. Bennington*, 43 Vt. 451; *Laporte v. Osborn*, 43 Ind. App. 100.

¹ *McDowell v. Preston*, 104 Minn. 263, 18 L.R.A. (N.S.) 190.

² *Flagg v. Hudson*, 142 Mass. 280, 56 Am. Rep. 674. See *Quinlan v. Philadelphia*, 205 Pa. 309.

and its fright.³ If there is negligence in failing to erect a barrier for the protection of pedestrians one injured may recover though the primary cause of his injury was the sudden going out of the lights in the street lamps,⁴ or the occasion of his coming into contact with an obstruction was fright arising from another cause.⁵ A traveler who knows of an unguarded excavation and tries to avoid it, but through mistake falls into it, cannot recover.⁶ It is not a defense to a city that another innocently or accidentally, contributed, either before or after its default, or concurrently therewith, in producing the damage.⁷ Expense reasonably incurred to effect the cure of an injured person is a direct injury.⁸

§ 27. Imputed negligence. It was formerly the law in England that the negligence of the driver of a public conveyance was imputable to a passenger therein although the latter exercised no control over the former.⁹ This doctrine was not authoritatively disapproved, although it was much commented on and shaken, until 1888, when it came before the House of Lords in *Mills v. Armstrong*¹⁰ with the result that the foundation on which it rested was removed. The theory has but little support in recent American cases: except in three or four states all the recent adjudications which have come to notice are hostile

There appears to be some inconsistency in the Massachusetts cases on the question of consequential damages in highway actions. Compare *Palmer v. Andover*, 2 Cush. 600, and *Davis v. Dudley*, 4 Allen, 557; and see the discussion of these and other Massachusetts cases in *Toms v. Whitby*, 35 Up. Can. Q. B. 195.

³ *Hubbard v. Montgomery County*, 140 Iowa, 520.

⁴ *Clay Centre v. Jevons*, 2 Kan. App. 568. See *Burrell v. Greenville*, 133 Mich. 235.

Where a team was being driven along a road and the tugs became loosened and fell from the whiffletrees, the pole fell to the ground, the horses ran away and the wagon

went down an unguarded slope, the primary cause of the resulting injury was the detaching of the tugs, and not the absence of a barrier. *Card v. Columbia*, 191 Pa. 254.

⁵ *Mayronne v. Keegan*, 117 La. 661.

⁶ *Lyons v. Watt*, 43 Colo. 238, 18 L.R.A.(N.S.) 1135.

⁷ *Van Camp v. Keokuk*, 130 Iowa, 716; *Louisville v. Hart*, 143 Ky. 171, 35 L.R.A.(N.S.) 207; *Block v. Worcester*, 186 Mass. 526; *McClure v. Sparta*, 84 Wis. 269, 36 Am. St. 924. See *Hayes v. Hyde Park*, 153 Mass. 514, 12 L.R.A. 249.

⁸ *Barron v. Watertown*, 211 Mass. 46.

⁹ *Thorogood v. Bryan*, 8 C. B. 115.

¹⁰ 13 App. Cas. 1.

to it.¹¹ The principle deducible from these decisions, say the supreme court of Indiana, is that one who sustains an injury without any fault or negligence of his own, or of some one subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his negligent conduct, may look to any other person for compensation whose neglect of duty occasioned the injury, even though the negligence of some third person with whom the injured person was not identified may have contributed thereto.¹² But this is not the rule if the person who is riding with another knows of and acquiesces in the other's purpose to commit a wrong against a third party. In such a

¹¹ *Prideaux v. Mineral Point*, 43 Wis. 513; *Otis v. Janesville*, 47 id. 422; *Hampel v. Detroit*, etc. R. Co., 138 Mich. 1, 17 Am. Neg. Rep. 84. See *McKernan v. Detroit Citizens' R. Co.*, 138 Mich. 519, 68 L.R.A. 347.

¹² *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652; *Wabash*, etc. R. Co. v. *Shacklet*, 105 Ill. 364, 11 Am. Neg. Cas. 429, 44 Am. Rep. 791; *Carlisle v. Brisbane*, 113 Pa. 544; *Railway Co. v. Eadie*, 43 Ohio St. 91, 12 Am. Neg. Cas. 510, 54 Am. Rep. 802; *Philadelphia*, etc. R. Co. v. *Hogeland*, 66 Md. 149, 12 Am. Neg. Cas. 3, 59 Am. Rep. 159, 6 Am. Neg. Rep. 168; *New York*, etc. R. Co. v. *Steinbrenner*, 47 N. J. L. 161, 12 Am. Neg. Cas. 258; *Nesbit v. Garner*, 75 Iowa, 314, 1 L.R.A. 152, 9 Am. St. 486; *Masterson v. New York Cent. etc. R. Co.*, 84 N. Y. 247, 12 Am. Neg. Cas. 365; *Knightstown v. Musgrove*, 116 Ind. 121, 9 Am. St. 827; *Sheffield v. Central U. Tel. Co.*, 36 Fed. 164; *Strauss v. Newburgh E. R. Co.*, 6 App. Div. (N. Y.) 264; *Hennessey v. Brooklyn City R. Co.*, 6 App. Div. (N. Y.) 206, 12 Am. Neg. Cas. 295; *Zimmerman v. Union R. Co.*, 28 App. Div. (N. Y.) 445, 4 Am. Neg. Rep. 665; *Ouverson v. Grafton*, 5 N. D. 281; *Faust v. Phil-*

adelphia & R. R. Co., 191 Pa. 420, 6 Am. Neg. Rep. 11; *Bamberger v. Citizens' St. R. Co.*, 95 Tenn. 18, 12 Am. Neg. Cas. 594, 28 L.R.A. 486, 49 Am. St. 909; *Missouri*, etc. R. Co. v. *Rogers*, 91 Tex. 52, 4 Am. Neg. Rep. 82; *Ploof v. Burlington T. Co.*, 70 Vt. 509, 43 L.R.A. 108; *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 267, 29 Am. St. 718; *Atlantic & D. R. Co. v. Ironmonger*, 95 Va. 625; *Roth v. Union D. Co.*, 13 Wash. 525, 12 Am. Neg. Cas. 638, 12 Am. Neg. Rep. 638, 31 L.R.A. 855; *Turnpike Co. v. Yates*, 108 Tenn. 428, 438; *Union Pac. R. Co. v. Lapsley*, 51 Fed. 174, 2 C. C. A. 149, 16 L.R.A. 800; *Dudley v. Wabash R. Co.*, 171 Mo. App. 652; *Dudley v. Peoria R. Co.*, 153 Ill. App. 619; *Bird T. Co. v. Krug*, 30 Ind. App. 602; *Tennien v. Chase*, 201 Mass. 497; *Mattson v. Minnesota*, etc. R. Co., 95 Minn. 477, 18 Am. Neg. Rep. 511, 111 Am. St. 483, 70 L.R.A. 503, overruling *Fitzgerald v. St. Paul*, etc. R. Co., 29 Minn. 336; *Petersen v. St. Louis T. Co.*, 199 Mo. 331; *Sluder v. Same*, 189 Mo. 107, 5 L.R.A. (N.S.) 186; *Connor v. Wabash R. Co.*, 149 Mo. App. 675; *Noakes v. New York Cent. etc. R. Co.*, 121 App. Div. 716;

case, in the absence of exculpatory evidence, the passenger will be presumed to be co-operating with the driver.¹³ It is said, *arguendo*, in Vermont and is held in some states that the rule does not apply to an action for the benefit of a parent to recover for the death of a child, the statute providing for the recovery of such damages as are just.¹⁴ Other courts hold the contrary view where the action for the death of the child is brought by his personal representative¹⁵ and where the child sues to recover for a personal injury it has sustained.¹⁶ The Connecticut court refused to apply the rule in an action to recover for

Baker v. N. & S. R. Co., 144 N. C. 36; Duval v. Railroad Co., 134 N. C. 331, 65 L.R.A. 722, 101 Am. St. 830; Shearer v. Buckley, 31 Wash. 370, 14 Am. Neg. Rep. 218. See Lundergan v. New York Cent. etc. R. Co., 203 Mass. 460, and Jones v. Scullard, [1898] 2 Q. B. 565, for the rule where the servant of one person is hired by another.

¹³ Knightstown v. Musgrove, 116 Ind. 121, 9 Am. St. 827; Baltimore v. State, 166 Fed. 641, 92 C. C. A. 335; St. Louis S. R. Co. v. Cochran, 77 Ark. 398; St. Louis, etc. R. Co. v. Colum, 72 Ark. 1, 15 Am. Neg. Rep. 684; Jacksonville E. Co. v. Adams, 50 Fla. 429; Southern R. Co. v. King, 128 Ga. 383, 11 L.R.A.(N.S.) 829, 119 Am. St. 390 (applying the rule in favor of a wife injured while riding with her husband); Herrington v. Macon, 125 Ga. 58; New York, etc. R. Co. v. Robbins, 38 Ind. App. 172; Louisville & N. R. Co. v. Wilkins, 143 Ky. 572; Same v. McCarthy, 129 Ky. 814, 130 Am. St. 494, 19 L.R.A.(N.S.) 230; Devis v. Vanceburg Tel. Co., 121 Ky. 177; United R. & E. Co. v. Biedler, 98 Md. 564, 15 Am. Neg. Rep. 333; Peabody v. Haverhill, etc. R. Co., 200 Mass. 277; Chadbourne v. Springfield St. R. Co., 199 Mass. 574; Cotton v. Willmar, etc. R. Co., 99 Minn.

366, 8 L.R.A.(N.S.) 643, 116 Am. St. 422; Burleigh v. St. Louis T. Co., 124 Mo. App. 724.

¹⁴ Brannen v. Kokomo, etc. Co., 115 Ind. 115, 7 Am. St. 411.

¹⁵ Ploof v. Burlington T. Co., 70 Vt. 509, 43 L.R.A. 108; Tucker v. Draper, 62 Neb. 66, 54 L.R.A. 321, 10 Am. Neg. Rep. 307; Atlanta & C. A. L. R. Co. v. Gravitt, 93 Ga. 369, 26 L.R.A. 553; St. Louis S. R. Co. v. Cochran, 77 Ark. 398; Davis v. Railroad Co., 136 N. C. 115; Scherer v. Schlager, 18 N. D. 421, 24 L.R.A.(N.S.) 520; Gress v. Philadelphia & R. R. Co., 228 Pa. 482, 32 L.R.A.(N.S.) 409.

¹⁶ Berry v. St. Louis, etc. R. Co., 214 Mo. 593; Neff v. Cameron, 213 Mo. 350, 18 L.R.A.(N.S.) 320, 127 Am. St. 606; Southern R. Co. v. Shipp, 169 Ala. 327; Stotler v. Chicago & A. R. Co., 200 Mo. 107; Flaherty v. Butte E. R. Co., 40 Mont. 454, 135 Am. St. 630; Norfolk & W. R. Co. v. Groseclose, 88 Va. 267, 7 Am. Neg. Cas. 51, 29 Am. St. 718; Wyomere v. Mahaska County, 78 Iowa, 396, 6 L.R.A. 545, 16 Am. St. 449; Love v. Detroit, etc. R. Co., 170 Mich. 1 (under the survival statute, but not under the death act); Atchison, etc. R. Co. v. Calhoun, 18 Okla. 75.

injuries sustained in consequence of a defective highway, the statute authorizing a recovery by any person injured by means of a defect therein. It is said that the liability is penal in its nature and does not extend to a case in which the injuries resulted to a traveler from the defect and the culpable negligence of a fellow traveler.¹⁷ There is probably no dissent from the doctrine that one who is bound to care for and protect a child cannot profit because of the neglect of his duty,¹⁸ if that was the proximate cause of the injury.¹⁹ Where damages when recovered for an injury to the wife of the plaintiff become community property and they necessarily join in an action therefor, his negligence, if it proximately contributed to the injury, will bar a recovery.²⁰ The right of a mother as a statutory distributee to one-half the sum recovered for the death of a child is not affected by the contributory negligence of her husband in bringing about such death though the action is brought by him alone.²¹

§ 28. **Particular injury need not be foreseen.** It will appear from a perusal of the cases in which consequential damages have been allowed and from the principle on which they are recovered, that at the time omission of duty occurs or the wrongful act is done it need not be certain such damages will ensue. It is only essential that the act have a tendency and be likely to cause such damages, not that they be certain to follow; in this respect they are generally contingent and by possibility may not happen.²² If one remove or destroy a fence inclosing

¹⁷ *Bartram v. Sharon*, 71 Conn. 686, 71 Am. St. 225, 46 L.R.A. 144. See *Ouverson v. Grafton*, 5 N. D. 281.

¹⁸ *Atlanta & C. A. L. R. Co. v. Gravit*, *supra*, and cases cited; *St. Louis, etc. R. Co. v. Colum*, 72 Ark. 1, 15 Am. Neg. Rep. 684; *Illinois Cent. R. Co. v. Warriner*, 229 Ill. 91; *Indianapolis St. R. Co. v. Antrobus*, 33 Ind. App. 663; *Feldman v. Detroit United R.*, 162 Mich. 486; *Mattson v. Minnesota, etc. R. Co.*, *supra*; *Pollack v. Pennsylvania R. Co.*, 210 Pa. 634, 105 Am. St. 846;

Richmond, etc. R. Co. v. Martin, 102 Va. 201; *Vinnette v. Northern Pac. R. Co.*, 47 Wash. 320, 18 L.R.A. (N.S.) 328. See *Boehm v. Detroit*, 141 Mich. 277.

¹⁹ *Danna v. Monroe*, 129 La. 138.

²⁰ *Basler v. Sacramento G. & E. Co.*, 158 Cal. 514.

²¹ *Phillips v. Denver City T. Co.*, 53 Colo. 458.

²² *Louisville, etc. R. Co. v. Wood*, 113 Ind. 544, 565, 3 Am. Neg. Cas. 197; *Wabash, etc. R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. 193; *Brown v. Chicago, etc. R. Co.*, 54 Wis. 342,

a field, or open a gap in it there is a possibility that animals confined there may not escape so as to encounter danger outside,²³ or subject the owner to expense in recovering them;²⁴

7 Am. Neg. Cas. 203; *Hill v. Winsor*, 118 Mass. 251; *Barbee v. Reese*, 60 Miss. 906; *Christianson v. Chicago, etc. R. Co.*, 67 Minn. 94, 16 Am. Neg. Cas. 344; *Rea v. Bailmain* New F. Co., 17 New South Wales (law) 92; *Henderson v. O'Halaran*, 114 Ky. 186, 59 L.R.A. 718; *Corona C. & I. Co. v. White*, 158 Ala. 627, 20 L.R.A.(N.S.) 958; *Moore v. Lanier*, 52 Fla. 353; *Davis v. Mercer L. Co.*, 164 Ind. 413; *Cincinnati, etc. R. Co. v. Acrea*, 42 Ind. App. 127, citing the text; *Tucker & D. Mfg. Co. v. Staley*, 40 Ind. App. 63; *Murphy v. Chicago, etc. R. Co.*, 140 Iowa 332; *Coleman v. Perry*, 28 Mont. 1 (the code so declares); *Bowen v. King*, 146 N. C. 385; *Kimberly v. Howland*, 143 N. C. 398, 7 L.R.A.(N.S.) 545; *Gulf C. Co. v. Abernathy*, 54 Tex. Civ. App. 137. Compare *Rosan v. Big Muddy C. & I. Co.*, 128 Ill. App. 128.

✓ "The test is whether a reasonably prudent man, in view of all the facts, would have anticipated, not necessarily the precise actual injury, but some like injury." *Vicksburg, etc. R. Co. v. Jackson* (Tex. Civ. App.), 133 S. W. 925; *Texas & P. R. Co. v. Bigham*, 90 Tex. 223.

• In *Sneesby v. Lancashire & Y. R. Co.*, 1 Q. B. Div. 42, a herd of plaintiff's cattle were being driven along an occupation road to some fields. The road crossed a siding of defendant's railway on a level, and when the cattle were crossing the siding the defendant's servants negligently sent some trucks down the siding amongst them, which separated them from the drovers and so frightened them that a few rushed away

from the control of the drovers, fled along the occupation road to a garden some distance off, got into the garden through a defective fence, and thence on to another track of the defendant's railway and were killed. The result was not too remote. The court said that the result of the negligence was twofold: first, that the trucks separated the cattle, and second, that the cattle were frightened and became infuriated and were driven to act as they would not have done in their natural state; that everything that occurred or was done after that must be taken to have occurred or been done continuously; and that it was no answer to say that the fence was imperfect, for the question would have been the same had there been no fence there. Compare *West Mahanoy v. Watson*, 116 Pa. 344, 2 Am. St. 604. See *Rucker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267; *Alabama, etc. R. Co. v. Chapin*, 80 Ala. 615; *Isham v. Dow's Est.*, 70 Vt. 588, 5 Am. Neg. Rep. 106, 45 L.R.A. 87.

²³ *Powell v. Salisbury*, 2 Y. & J. 391; *White v. McNett*, 33 N. Y. 371; *Welch v. Piercy*, 7 Ired. 365; *Halestrap v. Gregory*, [1895] 1 Q. B. 561.

The act of opening a fence which incloses a pasture in which horses are kept is the proximate cause of injury to them if they escape and come in contact with a barbed-wire fence, such material being largely used for fencing in the adjacent country. *West v. Ward*, 77 Iowa, 323, 14 Am. St. 284.

²⁴ *Bennett v. Lockwood*, 20 Wend. 223, 32 Am. Dec. 532.

and it is possible that other cattle will not trespass upon such field to destroy a crop there,²⁵ or to do injury to an animal there,²⁶ or to receive injury;²⁷ but the wrong done in opening such inclosure is so likely to lead to these injurious results that they are proximate if they occur. Opening the fence does not cause an animal to pass through it; it offers the opportunity, exposes to injury property within or property outside of it, or both. It is in this manner that the primary and efficient cause generally produces consequential damages. The party injured in his person or property is by the wrongful act of another or his culpable negligence exposed or left in exposure from some cause imminent and fairly obvious in existing circumstances or otherwise, and through such exposure the injury ultimately and proximately reaches him. The wrongful act is the cause of the injury in the natural and probable course of events by subjecting the party injured unlawfully to other and dependent causes from which the injury directly proceeds. In this way at least the relation of cause and effect must be established between the wrongful act and the injurious consequence.²⁸ The owner of a vessel employed in building a sea wall was given by the owner of the wall the exclusive right to its use as a place of safety for his vessel. The master

²⁵ *Scott v. Kenton*, 81 Ill. 96.

Injury done by trespassing animals owned by a third person is not the direct result of the destruction of the fence which inclosed the crops damaged. *Berry v. San Francisco*, etc. R. Co., 50 Cal. 435; *Durgin v. Neal*, 82 Cal. 595.

²⁶ *Lee v. Riley*, 18 C. B. (N. S.) 722.

²⁷ *Lawrence v. Jenkins*, L. R. 8 Q. B. 274.

²⁸ *United States Exp. Co. v. Taylor* (Tex. Civ. App.), 156 S. W. 617; *Chicago, etc. R. Co. v. Word* (Tex. Civ. App.), 158 S. W. 561, citing the text; *Marsh v. Usk H. Co.*, 73 Wash. 543; *Weiser v. Holzman*, 33 Wash. 87, 99 Am. St. 932; *Ford v. Hine*, 237 Ill. 463; *Cincinnati, etc.*

R. Co. v. Acrea, 42 Ind. App. 127; *Atchison, etc. R. Co. v. Parry*, 67 Kan. 515; *Hartzler v. Metropolitan St. R. Co.*, 140 Mo. App. 665; *International, etc. R. Co. v. Russell*, 48 Tex. Civ. App. 155; *Ray v. Pecos*, etc. R. Co., 40 Tex. Civ. App. 99; *Olmsted v. Brown*, 12 Barb. 657; *Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39, 12 L.R.A. 257; *Christianson v. Chicago, etc. R. Co.*, 67 Minn. 94; *Beopple v. Railroad*, 104 Tenn. 420; *Gilman v. Noyes*, 57 N. H. 627.

The negligence of the proprietor of a store in failing to guard an elevator shaft, and not the stumbling of a customer, is the proximate cause of the latter's death from falling into the shaft after stumbling

of another vessel, without permission, placed her behind the wall and refused to move her when requested, the former desiring to put his there as a place of safety against a storm. This vessel was sunk by the storm while thus excluded from that position. The sinking was the proximate consequence of being denied the shelter of the wall.²⁹ It is not required that the damages be foreseen, as consequential damages from a breach of contract must be contemplated by the parties when they enter into it.³⁰ Nor, on the other hand, will the wrong-doer be liable for every possible damage which may indirectly ensue from his misconduct.³¹

§ 29. The act complained of must be the efficient cause. The defendant's misconduct must be the efficient cause and the injury which follows must be such as ought to have been foreseen as a probable consequence in the light of surrounding circumstances.³² There is generally another and more immediate

over a platform upon which the goods he was inspecting were displayed, they being near the shaft. *Rosenbaum v. Shoffner*, 98 Tenn. 624.

One placed in a position of danger by the act or neglect of another becomes the primary cause of a resulting injury to the other by failing to use diligence to discover the danger and avoid it. *Louisville & N. R. Co. v. Wene*, 202 Fed. 887, 121 C. C. A. 245.

²⁹ *Derry v. Flitner*, 118 Mass. 131; *Tinsman v. Belvidere D. R. Co.*, 26 N. J. L. 148, 69 Am. Dec. 565.

³⁰ *Bowas v. Pioneer Tow Line*, 2 Sawyer, 21; *Haase v. Morton*, 138 Iowa, 205; *West v. Bristol T. Co.*, [1908] 2 K. B. 14.

³¹ *Beach v. Ranney*, 2 Hill, 314; *Central R. Co. v. Dorsey*, 116 Ga. 719; *Snyder v. Colorado Springs, etc. R. Co.*, 36 Colo. 288, 118 Am. St. 110, 8 L.R.A.(N.S.) 781.

³² *United States F. & G. Co. v. Des Moines Nat. Bank*, 74 C. C. A. Suth. Dam. Vol. I.—8.

553; *Kansas City S. R. Co. v. Prunty*, 66 C. C. A. 163; *Cole v. German S. & L. Soc.*, 59 C. C. A. 593, 63 L.R.A. 416; *Chesapeake & O. R. Co. v. Wills*, 111 Va. 32; *Same v. Paris*, 111 Va. 41, 28 L.R.A.(N.S.) 773; *Winfree v. Jones*, 104 Va. 39, 1 L.R.A.(N.S.) 201; *Brame v. Light, etc. Co.*, 95 Miss. 26, 21 L.R.A.(N.S.) 468; *Haas v. Tough*, 67 Kan. 253; *Haley v. St. Louis T. Co.*, 179 Mo. 30, 64 L.R.A. 295; *Bowers v. East Tennessee, etc. R. Co.*, 144 N. C. 684, 12 L.R.A.(N.S.) 446; *Clinton v. Lyons*, [1912] 3 K. B. 198. See *Parkinson v. Kortum*, 148 Iowa, 217; *Wigal v. City of Parkersburg*, 74 W. Va. 25, 52 L.R.A.(N.S.) 465.

The prior misconduct of the defendant in a personal injury action has nothing to do with the loss sustained by the plaintiff in consequence of a peculiar method of doing business pursued by him, which prevented sales of goods during his disability. *McDonnell v. Minneapolis, etc. R. Co.*, 17 N. D. 604.

cause of the injury; the primary cause, to be deemed responsible and efficient for the purpose of recovering damages, must have directly set in motion an intervening and more immediate agency or be directly in fault for the exposure of the injured party to its injurious influence.³³ The wrongful refusal of a corporation to register among its members one who has purchased shares of its stock on the ground that there was a debt due it from the original owner does not make it liable to such owner for a decline in their value occurring between the times when the transfer ought to have been registered and when in fact it was registered, such decline damaging the transferor because of the terms of the contract between him and the transferee, of which the company had no notice. There is no connection between the market price of the shares and the act of the corporation.³⁴ A bridge erected over a slough of a river and a part of the highway from the business part of a city to a levee on the river became impassable for want of repairs, by reason of which the owner of a lot of wood which had been collected at the levee for transportation over the bridge was unable to so transport it. While lying there under these circumstances it was washed away by a freshet. The damages were too remote to be the consequence of the neglect to repair the bridge.³⁵ The defendant's negligence did not consequentially cause the loss of the wood, if it could be moved to a place of safety in another direction; nor was the loss by freshet proximate unless, according to the general experience, it was

³³ *Teis v. Smuggler M. Co.*, 158 Fed. 260, 85 C. C. A. 478, 15 L.R.A. (N.S.) 893; *Louisville & N. R. Co. v. Keiffer*, 132 Ky. 419; *Schoultz v. Eckardt Mfg. Co.*, 112 La. 568, 104 Am. St. 452.

³⁴ *Skinner v. London Marine Ins. Co.*, 14 Q. B. Div. 882. See *Bourdette v. Sieward*, 107 La. 258, holding a similar rule where inspection of corporate books was denied a stockholder.

"If a new force or power has intervened, of itself sufficient to stand

as the cause of the injury, the first must be considered as too remote." *Chicago T. & T. Co. v. Chicago*, 110 Ill. App. 395.

³⁵ *Dubuque, etc. Ass'n v. Dubuque*, 30 Iowa, 176.

One who negligently injures a dock open to public use is not liable to a vessel owner whose vessel is detained outside the dock while repairs are being made. *Anglo-Am. S. Co. v. Houlder Line*, [1908] 1 K. B. 659.

a probable occurrence. The loss of an office as the result of an assault and battery is too remote, and too much the result of other and independent causes to be taken into consideration.³⁶ So where the defendant libeled a concert singer who, in consequence, refused to sing at the plaintiff's oratorio for fear of being badly received, this damage was not sufficiently connected with the act of the defendant. The refusal to sing might have proceeded from groundless apprehension or caprice, or some other cause altogether different than that alleged.³⁷ It

³⁶ *Brown v. Cummings*, 7 Allen, 507; *Boyce v. Bayliffe*, 1 Camp. 58; *Hoey v. Felton*, 11 C. B. (N. S.) 142; *Burton v. Pinkerton*, L. R. 2 Ex. 340; *Smitha v. Gentry*, 20 Ky. L. Rep. 171, 42 L.R.A. 302, citing the text.

³⁷ *Ashley v. Harrison*, 1 Esp. 48. In *Taylor v. Neri*, id. 386, it appeared that the defendant beat an actor and thereby disabled and prevented him from performing his engagement with the plaintiff; the injury to the manager was too remote.

These two cases came under criticism in *Lumley v. Gye*, 2 El. & B. 216, which was an action by the manager of a theatre against the manager of a rival theatre for procuring a singer to break her engagement. The circumstance that the plaintiff had an action against the singer herself upon her agreement was overruled, and the plaintiff recovered on the principle that the defendant incurred the same liability for interfering with such a servant as any other. *Wightman, J.*, said: "In the present case there is the malicious procurement of Miss W. to break her contract, and the consequent loss to the plaintiff. Why, then, may not the plaintiff maintain an action on the case? Because, as it is said, the loss or damage is not the natural or legal consequence of the acts of the defendant.

There is the *injuria* and the *damnum*; but it is contended that the *damnum* is neither the natural nor legal consequence of the *injuria*, and that, consequently, the action is not maintainable, as the breaking of her contract was the spontaneous act of Miss W. herself, who was under no obligation to yield to the persuasion or procurement of the defendant. Another case of *Vicars v. Wilcocks*, 8 East, 1, which, though it has been brought into question, has never been directly overruled, was relied upon as an authority upon this point for the defendant. That case, however, is clearly distinguishable from the present upon the ground suggested by Lord Chief Justice Tindal in *Ward v. Weeks*, 7 Bing. 211, 215, that the damage in that case, as well as in *Vicars v. Wilcocks*, was not the necessary consequence of the original slander uttered by the defendants, but the result of spontaneous and unauthorized communications made by those to whom the words were uttered by the defendants. The distinction is taken in *Green v. Button*, 2 Cr., M. & R. 707, in which it was held the action was maintainable against the defendant for maliciously and wrongfully causing certain persons to refuse to deliver goods to the plaintiff by asserting that he had a lien upon them

is not the natural result of enticing a minor daughter from her home, against her father's objections, and employing her to work in defendant's home that she should be seduced by the latter's son.³⁸ The killing of the plaintiff's son, without wilful intent to injure the plaintiff, does not give the latter a cause of action for the breach of a contract on the son's part to support his father.³⁹ There is no connection between defamatory statements made respecting one who desires employment and is required to give a bond to his employer and the refusal of a company to give such bond because of such statements; between the defendant's wrong and the plaintiff's damage the voluntary act of a third party intervened and was the proximate cause of the loss of employment.⁴⁰ A claim of damages for goods frozen because the defendant had taken a false and spurious deed of land, thereby preventing the digging of a cellar in which to put the goods, cannot be allowed.⁴¹ Defendant negligently stored oil on a wooden platform of its freight

and ordering these persons to retain the goods until further orders from him. It was urged for the defendant in that case that as the persons in whose custody the goods were, were under no legal obligation to obey the orders of the defendant it was a mere spontaneous act of these persons which occasioned the damage to the plaintiff; but the court held the action maintainable though the defendant did make the claim as of right, he having done so maliciously, and without any reasonable cause, and the damage accruing thereby."

The doctrine of *Vicars v. Wilcocks* and cases of that class does not exclude responsibility when the damage results to the party injured through the intervention of the legal and innocent acts of third parties, for in such instances damage is regarded as occasioned by the wrongful cause and not by those which are not wrongful; as where one who de-

sires to make the customer of another believe that the work done for him is badly done, and to accomplish that end loosens a shoe put on the customer's horse. In such case the person who defames the horseshoer is responsible to him for the loss of the patronage which may result from his act. *Hughes v. McDonough*, 43 N. J. L. 459, 39 Am. Rep. 603.

³⁸ *Stewart v. Strong*, 20 Ind. App. 44.

³⁹ *Brink v. Wabash R. Co.*, 160 Mo. 87, 53 L.R.A. 811, 83 Am. St. 459; *Gregory v. Brooks*, 35 Conn. 437, 95 Am. Dec. 278; *Connecticut Mut. L. Ins. Co. v. New York, etc. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571.

⁴⁰ *McDonald v. Edwards*, 20 N. Y. Misc. 523; *Pickett v. Wilmington & W. R. Co.*, 117 N. C. 616, 53 Am. St. 611, 30 L.R.A. 257.

⁴¹ *Cormier v. Bourque*, 32 New Bruns. 283.

house in a town and had done so for such a length of time that the platform and the ground beneath it had become saturated with oil. A fire was caused by throwing a match upon the ground under the platform by a person not connected with the defendant, but who was rightfully on the premises. The defendant was not liable for the loss of buildings near the freight house as the result of the fire.⁴² But the rule is otherwise if the substance negligently exposed is liable to ignite spontaneously and produce damage.⁴³ One who removes burning material to a place of safety in order to save his own property and it there ignites and destroys the property of another, which would otherwise not have been burned, must answer for its loss regardless of the comparative value of the property saved thereby and the value of that burned.⁴⁴ A person who calls a convalescent over the telephone and gives information as to a fact, though violent language is used, is not liable for the bodily pain and mental anguish produced thereby.⁴⁵ The failure of a burglar alarm system to work on a single occasion does not impose liability upon the contractor for the loss of goods taken by burglars.⁴⁶ The neglect of the purchaser of property to put it in repair intervenes between the negligence of the builder in failing to do so and an injury occurring after its sale.⁴⁷

§ 30. **Same subject.** A lease of a canal was made by commissioners of navigation under a statute providing that if the lessee should permit the work to be out of repair the commissioners should give him notice to repair, and on his neglecting to make the repairs they might make them and pay the expenses out of the tolls. A lock forming part of the canal fell and detained a barge. In an action for that detention against the commissioners for neglecting to give notice to the

⁴² *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 4 Am. Neg. Rep. 490, 41 L.R.A. 794; *Home O. & G. Co. v. Dabney*, 79 Kan: 820.

⁴³ *Vaughan v. Menlove*, 3 Bing. (N. C.) 468.

⁴⁴ *Latta v. New Orleans, etc. R. Co.*, 131 La. 272.

⁴⁵ *Kramer v. Ricksmeier*, 159 Iowa, 48, 45 L.R.A. (N.S.) 928.

⁴⁶ *Silverblatt v. Brooklyn Tel. & M. Co.*, 150 App. Div. 268; *Nirdlinger v. American Dist. Tel. Co.*, 245 Pa. 453.

⁴⁷ *Omaha v. Armour*, 196 Fed. 885, 116 C. C. A. 447.

lessee to repair it was held that the action would not lie because the detention was not a damage naturally flowing from the alleged neglect, it not being shown that if such notice had been given the lessee would have repaired or that the commissioners would have done so. Pollock, C. B.: "To say that the damages could be the consequence of the wrongful act or omission is, in our judgment, to assert a false proposition of law. The surmise is,—if the notice had been given the repairs would have been done and the lock would not have fallen in, and so not giving notice caused the lock to fall in. As we have said, this is not proved; but it is not the proximate, necessary or natural result of not giving notice. The not giving notice is not sufficient to bring about the result; the giving of it would not be sufficient to hinder it."⁴⁸ Here the immediate cause of the detention was the obstruction and want of repair of the canal; the alleged wrong of the defendant did not put the canal out of repair, and as the commissioners were not absolutely required to do anything but give notice, as a step towards repair, it could not be assumed as a matter of law that doing so would have caused the repair to be made. The relation of cause and effect between the wrongful act and the alleged injurious consequence was not established. It is indispensable that the plaintiff should show not only that he has sustained *damage*, and that the defendant has committed a *tort*, but that the damage is the clear and necessary consequence of the tort and that it can be clearly defined and ascertained.⁴⁹

⁴⁸ Walker v. Goe, 3 H. & N. 395.

⁴⁹ Hadwell v. Righton, [1907] 2 K. B. 245; Lamb v. Stone, 11 Pick. 527; Vernon v. Keys, 12 East, 632; Morgan v. Bliss, 2 Mass. 111; Harrison v. Redden, 53 Kan. 265, citing the text; Smitha v. Gentry, 20 Ky. L. Rep. 171, 42 L.R.A. 302, citing the text; Johnson v. Western U. Tel. Co., 79 Miss. 58, 12 Am. Neg. Rep. 487. See Mitchell v. Western U. Tel. Co., 12 Tex. Civ. App. 262.

The causation between a fire negligently started and which is supposed to have been extinguished, but

which starts up again, is not severed by the nonaction of a third person after the second fire starts. Although such failure to act is culpable, it neither adds to the original force nor gives it new direction, and hence in tracing back the line of causation it will not be noticed as a potent agency. Wiley v. West Jersey R. Co., 44 N. J. L. 247.

An attorney who neglects to pay the interest on a mortgage for his client until after foreclosure proceedings are begun and an additional sum is demanded by the mort-

Loss of credit and of standing are not the necessary effects of being ejected from a hotel in the presence of other persons.⁵⁰

An action on the case was brought by a creditor against his debtor and another for confederating together to prevent the plaintiff from obtaining security for the payment of his debt; they were charged with having accomplished that wrong by removing the debtor's property from his possession to that of his confederate, who secured it or its proceeds and thus prevented its attachment. The plaintiff had obtained judgment, and the debtor had relieved himself from the execution against his body by taking the poor debtor's oath, and the debt remained wholly unpaid. The case was proved except the conspiracy. It was held that the action could not be maintained. Among other reasons for this conclusion was the uncertainty of the plaintiff's damage. Metcalf, J., said: "How could this plaintiff prove that he suffered any damage from the acts of the defendant which are averred in the declaration? How could he prove that he would have secured his debt by attaching the property of his debtor if the defendant had not intermeddled with it? Other creditors might have attached it before him, or it might have been stolen or destroyed while in the debtor's possession. The fact that the plaintiff has suffered actual damage from the defendant's conduct is not capable of legal proof, because it is not within the compass of human knowledge, and therefore cannot be shown by human testimony. It depends on numberless unknown contingencies and can be nothing more than a matter of conjecture."⁵¹

gagee is not liable for the difference between the value of the property and the price it brought at the foreclosure sale, it not being shown that the mortgagor would have been able to make the later payments required. *Dean v. Radford*, 141 Mich. 336.

⁵⁰ *McCutecheon v. Malin*, 37 Tex. Civ. App. 240.

⁵¹ *Wellington v. Small*, 3 Cush. 145; *Cain v. Vollmer*, 19 Idaho, 163, 32 L.R.A.(N.S.) 38, quoting the

text. See *Stone v. Crewdson*, 44 Wash. 691.

In *Randall v. Hazelton*, 12 Allen, 412, a mortgagee voluntarily promised the mortgagor not to act under a power of sale contained in a mortgage without a notice to him; he was afterwards induced by the falsehood of the defendants to assign the mortgage to one M. for their benefit, and then caused such foreclosure to take place in a manner to avoid notice reaching the plaintiff, who

§ 31. **Same subject.** A demurrer was sustained to a declaration which stated that the defendant and a confederate conspired to and did obtain possession of a portion of the plaintiff's premises by falsely pretending that it was wanted for a lawful trade, and then set up an illicit still there; that by falsely pre-

was compelled to pay \$500 to get a deed of the property. The case was determined on demurrer against the plaintiff. The promise of the mortgagee was gratuitous, and therefore neither he nor an assignee would do any legal wrong by foreclosing according to the power in the mortgage. The damage was held to result from the foreclosure and not from the alleged wrong. "Damages," say the court, "can never be recovered where they result from the lawful act of the defendant." The benefit of that gratuitous promise was not a matter of legal right, and though it would have been kept but for the defendant's fraudulent contract and the plaintiff saved from the loss which resulted from the sale, yet that fraud was not actionable because it did not affect any legal right; it could not be said to be an invasion of such a right "to deprive the plaintiff even by falsehood of the benefit of this gratuitous undertaking." The court say: "In the *Tunbridge-Wells Dippers*' case, 2 Wils. 414, while the court remark that there was a real damage in depriving the plaintiff of some gratuity, they also say in the same sentence that the injury was by disturbing the dippers in the exercise of their right or employment, which it seems by some statutes they were entitled to." *Hutchins v. Hutchins*, 7 Hill, 104; *Burton v. Henry*, 90 Ala. 281.

In *Bradley v. Fuller*, 118 Mass. 239, the court stated the material allegations of the declaration, which

was held, on demurrer, not to state a cause of action, to be that the defendant orally represented to the plaintiff that a corporation of which he was treasurer and whose overdue note the plaintiff then held, owed no other debts and had no attachments upon its property; that the representation was fraudulently and falsely made for the purpose of inducing the plaintiff not to commence suit upon his note until the corporate property could be placed beyond the reach of attachment by the plaintiff; that all the property of the company was afterwards attached and sold on execution upon another debt; and that the plaintiff, induced by the representations not to enforce his claim by suit, lost his debt against the company. In one count the plaintiff stated that he "was induced to forbear securing payment of his note by an attachment of said property, as he might and would have done but for said false representation." The court say: "Under the law as laid down by this court the facts stated in these counts do not show a legal cause of action, or that the plaintiff has suffered any legal damage. There is no attachment or attempt to attach, on the part of the plaintiff, alleged; it does not appear that by reason of the alleged representation he lost anything which he ever had. Taking these counts in the most favorable sense for the plaintiff they simply charge that the plaintiff, induced by the falsehood alleged, refrained from carrying in-

tending, and by divers false and fraudulent means and devices, they made it appear and he believed that it was the plaintiff who set up such still and was the proprietor thereof; that thereby he was convicted of keeping illicit stills. The damage was not the natural and proximate consequence of the defendant's act.⁵² Where a trespassing horse kicked a child it was held that the injury was not the natural consequence of the trespass in the absence of evidence that the defendant knew the horse was vicious. The court said to entitle the plaintiff to maintain an action it is necessary to show a breach of some legal duty due from the defendant to the plaintiff. And if there was negligence on the part of the owner of the horse in permitting him to be at large it did not appear to be connected with the damage of which the plaintiff complains. "The owner of a horse must be taken to know that the animal will stray if not properly secured, and may find its way into his neighbor's corn or pasture. For a trespass of that kind the owner is, of course, responsible. But if the horse does something which is quite contrary to his ordinary nature, something which his owner had no reason to expect him to do, he has

to effect an intention to attach; and that another creditor did attach and apply the company's property to the payment of his debt. It must necessarily be uncertain whether the plaintiff would have attached the property and applied it to the payment of his debt if the alleged representation had not been made."

It seemed to the author of this work that this case was erroneously decided. The law recognizes the value of the preference which one creditor by diligence may obtain by a first attachment of the property of an insolvent debtor. Its practical value was illustrated by that case. The debtor was liable to attachment, and had property. The plaintiff alleged that he might and would have attached it but for the fraudulent representations. The court, on de-

murrer, held it "necessarily uncertain" that this purpose would be executed; and so much so, that the law will not accept the allegation as stating a provable fact, and it is therefore not admitted by a demurrer. It certainly cannot be maintained, as a matter of law, that no damages can be recovered on the basis of frustrating an intention, the carrying out of which, in the future, is lawful and would secure an advantage or prevent a loss. That it may be proved that an intention will be carried out where the party has the ability and his interest requires it to be executed, is legally assumed in a multitude of cases.

⁵² *Barber v. Lesiter*, 7 C. B. (N. S.) 175.

the same sort of protection that the owner of a dog has, and everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway. It was assumed that the injury to the plaintiff was caused by the horse having viciously kicked him, as a horse of ordinary temper would not have done; therefore the plaintiff was bound to show, and did not, that the defendant knew that the horse was subject to that infirmity of temper.”⁵³ In a subsequent case a mare strayed into the plaintiff's pasture and there, from some unexplained cause, kicked the plaintiff's horse and broke his leg, and he

Expenses incurred by one whose property has been wrongfully levied on in trying to find buyers for it are too remote. *Fatheree v. Williams*, 13 Tex. Civ. App. 430.

⁵³ *Cox v. Burbridge*, 13 C. B. (N. S.) 430; *Jackson v. Smithson*, 15 M. & W. 563; *Hudson v. Roberts*, 6 Ex. 697; *Cooper v. Cashman* 190 Mass. 75, 3 L.R.A.(N.S.) 209; *Emmons v. Stevane*, 77 N. J. L. 570, 24 L.R.A.(N.S.) 458; *Corcoran v. Kelly*, 61 N. Y. Misc. 323; *State v. Smith*, 156 N. C. 628, 36 L.R.A. (N.S.) 910.

The test of liability is the rightfulness of the animal in being where he was when the injury was done. *McClain v. Lewiston Interstate F. & R. Ass'n*, 17 Idaho, 63, 25 L.R.A. (N.S.) 691, following *Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99. It is otherwise where a wild animal does an injury. *Hayes v. Miller*, 150 Ala. 621, 11 L.R.A. (N.S.) 748, 124 Am. St. 93.

In *Dickson v. McCoy*, 39 N. Y. 400, 1 Am. Neg. Cas. 321, a child of ten years was passing defendant's stable upon the sidewalk of a populous street, when the defendant's horse came out of the stable, being loose and unattended, and, in passing, kicked the boy. The complaint alleged that the horse was of a ma-

licious and mischievous disposition and accustomed to attack and injure mankind, but of this no proof was made. It was held that this was not material, that “it is not necessary that a horse should be vicious to make the owner responsible for injury done by him through the owner's negligence. The vice of the animal is an essential fact only when, but for it, the conduct of the owner would be free from fault,” as, for instance, in the case of a horse, properly fastened in the highway, which should kick or bite a passerby. In such a case the owner would be liable only if he had knowledge of the vicious disposition of the animal, but where a horse is allowed to run in the streets of a populous city it is obviously dangerous to the public, and the danger is none the less because the running and kicking of the horse are done in a playful mood than if prompted by a vicious disposition. *Mills v. Bunke*, 59 App. Div. 39.

In the absence of the owner of land his wife directed her child to drive off a horse trespassing thereon; while doing so the horse kicked the child. The court distinguished *Cox v. Burbridge*, *supra*, and sustained a recovery. *Waugh v. Montgomery*, 8 Viet. L. R. (law) 290.

was necessarily killed. Erle, C.J.: "The contest at the trial seems to have been whether or not the mare was of a ferocious or vicious disposition, and whether the defendant knew it. But I think it was not necessary to go into that question, because the act, which upon the evidence must be presumed to have caused the injury, was not one which was characteristic of vice or ferocity in the mare in the ordinary sense. The animal had strayed from its own pasture, and it was impossible that her owner could know how she would act when coming suddenly in the night-time into a field among strange horses. That constitutes the difference between this case and those relied on by the defendant, and supports the summing up of the judge when he said it was not a question of vice or *scienter* in the ordinary sense." The defendant was responsible for the trespass, the damage not being remote.⁵⁴ The owner of a domestic animal which trespasses on a highway is not liable to a person injured in consequence of his horse being frightened thereby.⁵⁵

Upon the trial of an action for the enticement of servants from the employment of another it was erroneous to permit evidence of consequential damages to the effect that the servants plaintiff first employed had provisions and those he subsequently employed to take their places had not, by which he was compelled to furnish provisions, and, making a poor crop, such persons were unable to pay him for the provisions furnished out of their share of the crop, by which he was damaged.⁵⁶

⁵⁴ Lee v. Riley, 18 C. B. (N.S.) 722; Barnes v. Chapin, 4 Allen, 444, 1 Am. Neg. Cas. 310, 81 Am. Dec. 710; Dunckle v. Kocker, 11 Barb. 387; Lyons v. Merrick, 105 Mass. 71; Harvey v. Buchanan, 121 Ga. 384.

Though the language of a statute imposing liability on the owner of a dog which injures a person is unqualified, one who wilfully, persistently and knowingly mistreats a dog may not recover for injuries resulting from its misconduct. Kelley v. Killourey, 81 Conn. 320, 129 Am. St. 220.

⁵⁵ Anderson v. Nesbitt, 43 Ind. App. 703.

⁵⁶ Salter v. Howard, 43 Ga. 601.

Under a statute which makes the person who contracts with, decoys or entices away any person in the employ of another who was entitled to the services of the person enticed liable for all such damages as the original employer may reasonably sustain by the loss of the labor of such employee, it is competent to consider the reasonable cost of procuring other labor, the damages resulting to crops from delay in planting, or, if planted, from failure to

§ 32. **Breach of statutory duties.** Whenever an action is brought for breach of duty imposed by statute the party bringing it must show that he had an interest in the performance of the duty and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another and the advantage to be derived to the party complaining of its breach from its performance is merely incidental and no part of the design of the statute, no such right is created as forms the subject of an action.⁵⁷ A private person might make a profit by the performance of the duty, but the breach of that duty, while it would naturally deprive him of that benefit, is not a wrong to him. The loss of such a benefit is not in a legal sense an injury. Though the actual, it is not the legal, consequence of the delinquency.⁵⁸ Thus, a postmaster bound by statute to advertise uncalled-for letters in a newspaper of a particular description commits no legal wrong to the proprietor of such paper when he omits such publication or gives the business to a paper of a different description.⁵⁹ The conductor of a place of public amusement who, in violation of a statute, ex-

work them, and such kindred damages as plaintiff could not have prevented by reasonable diligence and which are attributable to the defendant's act. *McCutchin v. Taylor*, 11 Lea, 259.

The damages which may be recovered for enticing away the servant of another include the profits of the servant's labor and the loss sustained by the plaintiff's inability to improve his property in consequence. *Smith v. Goodman*, 75 Ga. 198.

In *Gunter v. Astor*, 4 Moore, 12, 16 E. C. L. 357, 21 Rev. Rep. 733 (1819), one of the judges said: This is an action for seducing and enticing away the plaintiff's servants. The measure of damages he is entitled to recover from the defendants is not necessarily to be confined to those servants he might have in his employ at the time they

were so enticed, or for that part of the day on which they absented themselves from his service, but he is entitled to recover damages for the loss he sustained at that critical period. It appears, too, that the defendants combined to allure them from his service, and I do not think the court ought now to infer that two years' profit is too much for the plaintiff to recover.

⁵⁷ *Atkinson v. Newcastle*, L. R. 2 Ex. Div. 441; *Everett v. Great Northern R. Co.*, 100 Minn. 309, 9 L.R.A.(N.S.) 703; *Wickenburg v. Minneapolis, etc. R. Co.*, 94 Minn. 276.

⁵⁸ See *Mairs v. Baltimore & O. R. Co.*, 175 N. Y. 409.

⁵⁹ *Strong v. Campbell*, 11 Barb. 135. See *Rosan v. Big Muddy C. & I. Co.*, 128 Ill. App. 128; *Marsh v. Koons*, 78 Ohio 68, 125 Am. St. 688.

cludes a person therefrom is not answerable for a resulting injury to his business; the plaintiff's right was in one common with the public and did not cover the right to conduct his business in such place.⁶⁰ If the non-performance of a duty results in injury to a third person the delinquent party is responsible to him.⁶¹ Thus, where the owner of a water channel or cut, made pursuant to authority and open for the use of all vessels whose owners complied with the prescribed conditions, refused to allow a tug, necessarily employed to tow a vessel through it, access to the vessel, he was responsible to her owner for damages resulting from the discharge of her cargo by lighters.⁶² It is the natural result of locating a pest-house within a forbidden distance of a residence that the disease affecting patients in the pest-house will be communicated to persons living or visiting in the neighborhood.⁶³ "Whenever an act is enjoined or prohibited by law and the violation of the statute is made a misdemeanor any injury to the person of another caused by such violation is the subject of an action; and it is sufficient to allege the violation of the law as the basis of the right to recover and as constituting the negligence complained of."⁶⁴ One who violates a statute by carrying a revolver is liable to any

⁶⁰ *Greenberg v. Western T. Ass'n*, 140 Cal. 357.

⁶¹ *Tucker & D. Mfg. Co. v. Staley*, 40 Ind. App. 63.

⁶² *Buffalo Bayou Ship C. Co. v. Milby*, 63 Tex. 492. 51 Am. Rep. 668.

⁶³ *Henderson v. O'Halaran*, 114 Ky. 186; *Clayton v. Henderson*, 44 L.R.A. 474; *Henderson v. Clayton*, 53 L.R.A. 145 (Ky.). See *McKay v. Henderson*, 71 S. W. 625 (Ky.).

⁶⁴ *Messenger v. Pate*, 42 Iowa, 443. 14 Am. Neg. Cas. 591; *Stein v. United R.*, 159 Cal. 368; *Farrow v. Hoffecker*, 7 Penne. (Del.) 223; *St. Louis, etc. R. Co. v. McWhirter*, 145 Ky. 427; *Sterling v. Union C. Co.*, 142 Mich. 284; *Thomas v. Chicago G. W. R. Co.*, 112 Minn. 360; *Evans v. Chicago & N. R. Co.*, 109 Minn.

64, 26 L.R.A. (N.S.) 278; *Meshbresher v. Channellene O. & Mfg. Co.*, 107 Minn. 104, 131 Am. St. 441; *Fitzgerald v. International F. T. Co.*, 104 Minn. 138; *Anderson v. Settergren*, 100 Minn. 294; *Perry v. Tozer*, 90 Minn. 431, 101 Am. St. 416; *Illinois Cent. R. Co. v. Armstrong*, 93 Miss. 583; *Yazoo, etc. R. Co. v. Roberts*, 88 Miss. 80; *Leathers v. Blackwell D. T. Co.*, 144 N. C. 330, 9 L.R.A. (N.S.) 349; *Lenahan v. Pittston C. M. Co.*, 218 Pa. 311, 12 L.R.A. (N.S.) 461, 120 Am. St. 885; *Adams v. Cumberland Co.*, 117 Tenn. 470; *Louisville & N. R. Co. v. Martin*, 113 Tenn. 266; *Willette v. Rhinelander P. Co.*, 145 Wis. 537; *Sharon v. Winnebago F. Mfg. Co.*, 141 Wis. 185; *Cleveland, etc. R. Co. v. Tauer*, 176 Ind. 621, 39 L.R.A.

person injured by him therewith, though such person consented to the other's carrying and use of the revolver.⁶⁵ The defendant while violently beating a horse slipped and unintentionally injured the plaintiff. Because the beating was contrary to a statute forbidding cruelty to animals there was liability to the plaintiff.⁶⁶ There may be a recovery for illness caused by exposure to the weather in consequence of the failure of a carrier to comply with a statute requiring it to furnish adequate and suitable shelter for the accommodation of passengers.⁶⁷

§ 33. Injury through third person. Where the plaintiff is injured by the defendant's conduct to a third person it is too remote if he sustains no other than a contract relation to such third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such third person to perform his part, or in increasing the plaintiff's expense or labor of fulfilling such contract, unless the wrongful act is wilful for that purpose.⁶⁸ A., who had agreed with a town to support for a specific time and for a fixed sum all the town paupers, in sickness and in health, had no cause of action against S. for assaulting and beating one of the paupers, whereby A. was put to increased expense. The damage was too remote and indirect.⁶⁹ A stockholder in a bank cannot maintain an action against its directors for their negli-

(N.S.) 20, 96 N. E. 758; *St. Louis, etc. R. Co. v. Piburn*, 30 Okla. 262; *Gately v. Taylor*, 211 Mass. 60, 39 L.R.A.(N.S.) 472; *Morgan v. Brossé*, 64 Ore. 63; *Ward v. Ely-W. D. G. Co.*, 248 Mo. 348, 45 L.R.A.(N.S.) 550; *Fox v. Barekman*, 178 Ind. 572. See § 4.

It has been said that the non-observance of the statute raises a presumption that the injury was the result thereof. *Brown v. Kansas City, etc. R. Co.*, 166 Mo. App. 255.

Expense and inconvenience are elements of damage for the neglect to put in farm crossings. *Price v. St. Louis, etc. R. Co.*, 133 Mo. App. 653.

⁶⁵ *Evans v. Waite*, 83 Wis. 286.

⁶⁶ *Osborne v. Van Dyke*, 113 Iowa, 557, 54 L.R.A. 367.

⁶⁷ *Morrison v. Pere Marquette R. Co.*, 28 Ont. L. R. 319, 27 id. 551, affirming s. c., id. 271.

⁶⁸ *Brink v. Wabash R. Co.*, 160 Mo. 87, 53 L.R.A. 811, 83 Am. St. 459; *Gregory v. Brooks*, 35 Conn. 437, 95 Am. Dec. 278; *Lumley v. Gye*, 2 El. & Bl. 216; *McKay v. Henderson*, 71 S. W. 625 (Ky.); *Minreman v. Fox*, 43 Wash. 43; *Thompson v. Seaboard Air Line R. Co.*, 165 N. C. 377, 52 L.R.A.(N.S.) 97, quoting the text.

⁶⁹ *Anthony v. Slaid*, 11 Metc. (Mass.) 290.

gence in so conducting its affairs that its whole capital stock is lost and the shares rendered worthless, nor for the malfeasance of the directors in delegating the whole control of the affairs of the bank to the president and cashier, who wasted and lost the whole capital.⁷⁰ The direct injury is to the corporation, and only remotely to the stockholders. The latter have a remedy, in theory, though often inadequate, in the power of the corporation as such to obtain redress for injuries done to the common property by the recovery of damages.⁷¹ A party who by contract was, he furnishing the raw material, to have all the articles to be manufactured by a corporation, was not entitled to maintain an action against a wrong-doer who by trespass stopped the machinery so that it was prevented from furnishing manufactured goods to so great an extent as it otherwise would have done.⁷² A creditor can maintain no action against one who has forged a note by which the dividends from an estate were diminished.⁷³ An insurance company cannot recover from a wrong-doer who causes the loss insured against the money paid to satisfy such loss.⁷⁴ A man drafted into the military service deserted and another who had been drawn as an alternate to serve in such a contingency, and was consequently obliged to and did serve, had no legal claim against the deserter for the loss and injury of doing so.⁷⁵ A vendor of intoxicating liquors does not cause or contribute to the injury of a person who uses liquors sold by the former to a third person without the original seller's knowledge or consent.⁷⁶ Sanitary officers who acted under a statute were not responsible for injury to the business of one proceeded against, caused by the publication of the fact that he had been prosecuted.⁷⁷ But where a tradesman or me-

⁷⁰ *Smith v. Hurd*, 12 Mete. (Mass.) 371, 46 Am. Dec. 690. See *Bloom v. National United B. S. & L. Co.*, 152 N. Y. 114.

⁷¹ *Id.* See *Niles v. New York Cent., etc. R. Co.*, 176 N. Y. 119.

⁷² *Dale v. Grant*, 34 N. J. L. 142.

⁷³ *Cunningham v. Brown*, 18 Vt. 123, 46 Am. Dec. 140. See *Mairs v. Baltimore & O. R. Co.*, 175 N. Y. 409.

⁷⁴ *Rockingham Ins. Co. v. Boshier*, 39 Me. 253, 63 Am. Dec. 618; *Connecticut, etc. Ins. Co. v. New York, etc. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571. See *Pacific P. L. Co. v. Western U. Tel. Co.*, 123 Cal. 428.

⁷⁵ *Jemison v. Gray*, 29 Iowa. 537.

⁷⁶ *West v. Leiphart*, 169 Mich. 354.

⁷⁷ *In re Smith & Belfast Co.*,

chanic is defamed in his business or avocation by a false and fraudulent device practiced upon one of his customers the person who is guilty of such fraud is responsible for a loss of patronage flowing therefrom, although the customer was also wronged.⁷⁸ The exception indicated in the opening sentence of the section is illustrated by a case in which the defendant falsely claimed and represented himself to be a superintendent of wharves and harbor-master, and as such to have issued an order directing the captain of a vessel moored at the plaintiff's wharf to remove therefrom. At the time the order was given the captain was discharging, and the plaintiff was receiving, a cargo from the vessel. The plaintiff owned and kept such wharf for the purpose of letting it for hire. By means of such acts the captain was induced to remove from the plaintiff's wharf and discharge his cargo at another wharf. The right to recover was adjudged if the defendant acted with a malicious and fraudulent design to injure the plaintiff.⁷⁹

§ 34. **Liability as affected by extraordinary circumstances.** There must not only be a legal connection between the injury and the act complained of, but such nearness in the order of events and closeness in the relation of cause and effect that the influence of the injurious act may predominate over that of other causes and concur to produce the consequence or be traced to those causes.⁸⁰ To a sound judgment must be left each particular case. The connection is usually, but not always, enfeebled and the influence of the injurious act controlled where the wrongful act of a third person intervenes, or where any new agent, introduced by accident or design, becomes more powerful in producing the consequence than the first injurious act. The requirement that the consequences to be answered for should be natural and proximate is not that they should be such as upon a calculation of chances would be found likely to occur, nor such as extreme prudence would anticipate, but

[1910] 2 Irish, 285; *Fitzgerald v. Leonard*, 32 Irish L. 675.

⁷⁸ *Hughes v. McDonough*, 43 N. J. L. 459, 39 Am. Rep. 603.

⁷⁹ *Gregory v. Brooks*, 35 Conn. 437, 95 Am. Dec. 278. See *Weaver*

v. Neal, 61 W. Va. 57, 123 Am. St. 972.

⁸⁰ *Coyle v. Baum*, 3 Okla. 695, 716, quoting the text; *Pittsburg Reduction Co. v. Horton*, 87 Ark. 576, 18 L.R.A.(N.S.) 905.

only that they be such as have actually ensued one from another without the occurrence of any such extraordinary conjuncture of circumstances or the intervention of such an extraordinary result as that the usual course of nature should seem to have been departed from.⁸¹ The general rule is that a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct.⁸² We are not to link together as cause and effect events having no probable connection in the mind and which could not, by prudent circumspection and ordinary thoughtfulness, be foreseen as likely to happen in consequence of the act in which we are engaged. It may be true that the injury would not have occurred without the concurrence of our act with the event which immediately caused the injury, but we are not justly called to suffer for it unless the other event was the effect of our act or was within the probable range of ordinary circumspection. If one's fault happens to concur with something extraordinary and therefore not likely to be foreseen he will not be answerable for such unexpected result.⁸³ On the other hand, if damage ensues directly

⁸¹ *Harrison v. Berkley*, 1 Strobbh. 525, 549, 47 Am. Dec. 578. This case is criticised in a note on p. 830, 36 Am. St., which criticism is approved in *Meyer v. King*, 72 Miss. 1, 12, 35 L.R.A. 474. See *Lum Ah Lee v. Ah Soong*, 16 Hawaii, 163.

⁸² *Dalton v. Moore*, 141 Fed. 311, 72 C. C. A. 459; *Neely v. Ft. Worth, etc. R. Co.*, 96 Tex. 274, 14 Am. Neg. Rep. 659; *Bennett v. Lockwood*, 20 Wend. 223, 32 Am. Dec. 532; *Crain v. Petrie*, 6 Hill, 523, 41 Am. Dec. 765; *McGrew v. Stone*, 53 Pa. 436; *Big Goose & B. D. Co. v. Morrow*, 8 Wyo. 537, 547, 80³ Am. St. 955, citing the text.

⁸³ *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 4 Am. Neg. Rep. 490, 41 L.R.A. 794; *Meyer v. King*, 72 Miss. 1, 8, 35 L.R.A. 474, citing the text; *Roach v. Kelly*, 194 Pa. 24, 75 Am. St. 685; *McGrew v. Stone*, 53 Pa. 436; *Fairbanks v. Kerr*, 70

Pa. 86, 10 Am. Rep. 664; *People v. Mayor*, 5 Lans. 524; *Lee v. Burlington*, 113 Iowa, 356, 86 Am. St. 379; *Nelson v. Crawford*, 122 Mich. 466, 80 Am. St. 577; *Deisenrieter v. Kraus-M. M. Co.*, 97 Wis. 279, 286; *Milwaukee, etc. R. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. ed. 256, 259; *Consolidated E. L. & P. Co. v. Koepp*, 64 Kan. 735, 11 Am. Neg. Rep. 404; *Mobile & O. R. Co. v. Moerlein B. Co.*, 146 Ala. 404; *Seymour v. Union S. Y. & T. Co.*, 224 Ill. 579; *Glassey v. Worcester Con. St. R. Co.*, 185 Mass. 315; 16 Am. Neg. Rep. 86; *Wadasco v. Peoples*, 13 Pa. Dist. 333; *Southern Kansas R. Co. v. Emmett*, (Tex. Civ. App.) 139 S. W. 44; *McDoawall v. Great Western R. Co.*, [1903] 2 K. B. 331.

A defendant is not chargeable with the consequences of the malicious or wanton act of a third person if it was so unexpected or ex-

from the wrong done, and not wholly from an independent cause, there may be liability for the original neglect or act.⁸⁴

§ 35. *Illustrations of the doctrine of the preceding section.* An injury by negligence was done to wool by wetting it, rendering it necessary to take it out of the original packages in which it had been imported. A few weeks afterwards an act of congress was passed under which, if the wool had remained in such packages, the plaintiff would have been entitled to a return of duties. The loss of the right to claim a return thereof was not recoverable as a proximate consequence of the negligence. It was remarked that if the market value of the wool in the original packages had been higher by reason of its being entitled to debenture under the laws existing at the time when the injury was done the plaintiff would have had a right to an increase of damages in consequence of being obliged to break the packages; so if the market value had been enhanced at that time by reason of a general expectation that a statute would be passed allowing a return of duties.⁸⁵ In trespass for taking two horses, a wagon and double harness the declaration stated as special damage that when it occurred the plaintiff was moving with his family and household goods to another state, and was employing his horses, wagon and harness for that purpose; that he was thereby prevented from pursuing his journey and put to great expense for the support of himself and family; that when the property was taken the roads were frozen and the traveling good; but while it was detained the frost left the ground and the roads became so muddy that it was quite impossible for the plaintiff to prosecute his journey, by reason whereof he was detained with his family and prevented from putting in his crops in the state to which he was moving. It was erroneous to admit evidence of these various circumstances. The court recognized the rule that to be recovered the damages must be the natural and

traordinary that he could not or ought not to have anticipated it. *Watson v. Kentucky & I. & R. Co.*, 137 Ky. 619.

Some of the cases which deny the right to recover for mental suffering

or nervous shock do so on the ground that the injury is too remote. See §§ 21 *et seq.*

⁸⁴ *The Normannia*, 62 Fed. 469.

⁸⁵ *Stone v. Codman*, 15 Pick. 297.

proximate consequence of the act complained of; but it was said "no case can be found where a mere accident or event not resulting naturally from the act done by the defendant has been held sufficient to constitute a valid claim for damages."⁸⁶ The law is correctly stated, but in other cases there has been recovery for some of the damages here denied. In the plaintiff's predicament increased expenses and loss of time were necessary results of the taking of the property. In an English case⁸⁷ the plaintiff took passage to Australia in the defendant's vessel, but was not allowed to sail on account of a mistaken belief that he had not paid his entire fare. The error was found out immediately and he was offered a passage in a ship which sailed a week after the first. Instead of going by it, however, he remained in England to a later time to sue the defendant. It was held that the expense of his keep till trial could not be allowed as damages, since he might have gone earlier if he had wished. The suicide of one who was injured on a railway train eight months after the injuries were sustained, though they disordered his mind and body, is not a result which might naturally and reasonably be expected to follow. The court say: "The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'great first cause least understood' in which the train of all causation ends."⁸⁸ The fact that a passenger train three-fourths of an hour behind its schedule time was blown over by a wind-

⁸⁶ *Vedder v. Hildreth*, 2 Wis. 427.

If the owner of horses illegally seized is unable to procure other means to cultivate his crop and in consequence it is damaged in excess of the value of the horses, he may recover for the injury to the crop. *Steel v. Metcalf*, 4 Tex. Civ. App. 313.

⁸⁷ *Ansett v. Marshall*, 22 L. J. (Q. B.) 118.

⁸⁸ *Scheffer v. Railroad Co.*, 105 U.

S. 249, 26 L. ed. 1070; *Daniels v. New York, etc. R. Co.*, 183 Mass. 393, 62 L.R.A. 751; *Allison v. Fredericksburg*, 112 Va. 243. See § 36.

If the injury which a deceased person received precipitated a malady and he would not have had it but for the wrong done him the jury may determine whether the injury was the proximate cause of death. *Turner v. Nassau El. R. Co.*, 41 App. Div. (N. Y.) 213.

storm which struck a portion of the track on which the train would not have been but for the delay does not make the company liable for an injury thereby sustained by a passenger.⁸⁹

A convict, aged thirty-seven years, had been in the penitentiary twelve years, and had escaped therefrom five times. He was in vigorous health, immoral, of vicious habits, violent passions and prone to desire for sexual intercourse, all of which facts his custodians knew. While at large, through their fault, the convict committed rape. Such act, it was ruled, was not one which the custodians ought to have foreseen as reasonably probable, and they were not liable for it.⁹⁰ Because of the icy condition of a chute used for loading stock an animal thereon slipped and fell, knocking down a second, which fell upon and injured the plaintiff. It was no defense that this connected series of causes produced the injury.⁹¹ Though a snow storm causes animals to travel toward and into a dangerous excavation, the existence of the latter and the neglect of the person responsible therefor are the proximate cause of the loss of the animals.⁹² Making an assault on a woman waiting in a railroad station at night in consequence of which her child of seven years becomes frightened, runs out on the tracks and is killed by a train is the proximate cause of the death.⁹³ While standing on a platform waiting for a train the plaintiff was injured by being struck by the dead body of a person who was killed while attempting to cross the tracks of the railroad near where the plaintiff was. Assuming that negligence on the part of the railroad company was shown, there was no liability.⁹⁴ The Georgia court reached

⁸⁹ McClary v. Sioux City & P. R. Co., 3 Neb. 44, 19 Am. Rep. 631.

⁹⁰ Henderson v. Dade C. Co., 100 Ga. 568, 3 Am. Neg. Rep. 133, 40 L.R.A. 95; Hullinger v. Worrell, 83 Ill. 220.

⁹¹ Kincaid v. Kansas City, etc. R. Co., 62 Mo. App. 365.

⁹² Big Goose & B. D. Co. v. Morrow, 8 Wyo. 537, 80 Am. St. 955.

⁹³ McGehee v. McCarley, 33 C. C. A. 29, 91 Fed. 462. See § 36.

A woman who suffers a miscar-

riage because of the effort made to reach a place of safety may recover for the physical pain and medical expenses resulting though the person who threatened the assault was not within striking distance. Dumme v. Regal, 17 Pa. Dist. 1012.

⁹⁴ Wood v. Pennsylvania R. Co., 177 Pa. 306, 10 Am. Neg. Cas. 103, 35 L.R.A. 199, 55 Am. St. 728, followed in Evansville, etc. R. Co. v. Welch, 25 Ind. App. 308, 8 Am. Neg. Rep. 383.

a different conclusion where the company's engineer acted recklessly and wantonly.⁹⁵

§ 36. **Liability of carriers for consequential damages; extraordinary circumstances.** One of the leading American cases on the liability of carriers of passengers for consequential damages was decided in 1882.⁹⁶ Although the decision was not unanimous it has had a noticeable influence in courts which have since been called upon to consider similar questions. The principal facts involved are not essentially different from those in an English case decided in 1875,⁹⁷ but the rules of law applied are in strong contrast. This is in part accounted for by the fact that in the former case the action was held to be in tort, while the English case was considered as one for breach of the contract. In the former the plaintiffs were husband and wife. They had been the defendant's passengers, and were directed to leave its train at a point three miles from M., their destination, being told that that place was reached. When they disembarked it was dark; a freight train stood on a side-track; there were no lights visible and no platform on which to alight. There was a station-house near, but it was hid from view by the freight train. The plaintiffs did not know their location, but supposed that they were one mile nearer M. than they were; they started thither expecting to find a house in which they might remain, but did not find one until they were within one mile of M., when they concluded to go on rather than to seek shelter at the house, it being a considerable distance from the track. It was late at night when they reached M. and Mrs. B. was quite exhausted. She was pregnant at the time, and during that night suffered severe pains which continued for more than two months, when a miscarriage resulted and inflammation set in. The jury found that her sickness was caused by the walk, that the plaintiffs were not negligent in taking that walk, but were compelled to take it as the result of the defendant's wrongful act. The first question determined was that the action was

⁹⁵ *Western & R. Co. v. Bailey*, 105 54 Wis. 342, 7 Am. Neg. Cas. 203.
Ga. 100. ⁹⁷ *Hobbs v. London, etc. R. Co.*, L.

⁹⁶ *Brown v. Chicago, etc. R. Co.*, R. 10 Q. B. 111.

in tort for the negligence and not upon the contract to carry, notwithstanding the complaint recited that the relation between the parties was a contract relation, and that the defendant "wholly disregarded its duty in the premises, and its contract and obligations to and with the plaintiffs."⁹⁸ The court, Taylor, J., writing the opinion, said that the doctrine is clearly established that one who commits a trespass or other wrong is liable for all the damage which legitimately flows directly therefrom, whether such damages might have been foreseen by the wrong-doer or not. Had the defendant wrongfully placed the plaintiffs off the train in the open country, where there was no shelter, in a cold and stormy night, and on account of the state of their health, in their attempts to find shelter, they had become exhausted and perished it would seem quite clear that the defendant ought to be liable. Its wrongful act would be the natural and direct cause of their deaths, and it would be a lame excuse for the defendant that if the plaintiffs had been of more robust health they would not have perished or have suffered any material injury. It was no excuse that the female plaintiff's condition was not known to the railroad employees.⁹⁹

⁹⁸ This view of the nature of the action is different from that entertained in *Hobbs v. London, etc. R. Co.*, L. R. 10 Q. B. 111 (compare *McMahon v. Field*, 7 Q. B. Div. 591), where it was held that an action resting on facts quite like those in the principal case was upon contract, and that damages resulting from the walk taken by the plaintiff to reach his home and sickness consequent thereupon could not be recovered. The case referred to is disapproved in *Evans v. St. Louis, etc. R. Co.*, 11 Mo. App. 463, 472; *Cincinnati, etc. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Trout v. Watkins L. & U. Co.*, 148 Mo. App 621; *Texas M. R. Co. v. Geraldson*, 54 Tex. Civ. App. 71.

The rule of the Wisconsin case as to the form of the action is in

harmony with *Sloane v. Southern California R. Co.*, 111 Cal. 668, 8 Am. Neg. Cas. 76, 32 L.R.A. 193; *Head v. Georgia, etc. R. Co.*, 79 Ga. 538, 4 Am. Neg. Rep. 39, 11 Am. St. 454; *Seals v. Augusta Southern R. Co.*, 102 Ga. 817, 3 Am. Neg. Rep. 784; *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454, 8 Am. Neg. Cas. 444, 20 Am. St. 589, 9 L.R.A. 688; *Coy v. Indianapolis G. Co.*, 146 Ind. 655, 1 Am. Neg. Rep. 222, 36 L.R.A. 535; *Chicago, etc. R. Co. v. Spirk*, 51 Neb. 167, 2 Am. Neg. Rep. 400; *L. & N. R. Co. v. Storms*, 15 Ky. L. Rep. 333 (Ky. Super. Ct.); *Alabama & V. R. Co. v. Hanes*, 69 Miss. 160; *Toronto R. Co. v. Grinstead*, 24 Can. Sup. Ct. 570.

⁹⁹ *Sloane v. Southern California R. Co.*, *supra*; *Mann v. Boudoir C. Co.*, 4 C. C. A. 540, 54 Fed. 646, 21

By wrongfully placing the parties in the position in which they were the defendant was also liable for the resulting injury, whether it was the immediate result of its act or of theirs in endeavoring to escape therefrom. The case was within the rule that where an efficient adequate cause is found it must be considered the true cause unless some other cause independent of it is shown to have intervened between it and the result.¹ In strong contrast with the case stated is one decided in 1873,² in which it is held that a female passenger who suffers injuries

L.R.A. 289; *East Tennessee, etc. R. Co. v. Lockhart*, 79 Ala. 315; *Roswell v. Davenport*, 14 N. M. 91, citing the text.

¹ *Brown v. Chicago, etc. R. Co.*, 54 Wis. 342, 7 Am. Neg. Cas. 203, has been approved as to the substantial point in it in *Sloane v. Southern California R. Co.*, 111 Cal. 668, 8 Am. Neg. Cas. 76, 32 L.R.A. 193; *Coy v. Indianapolis G. Co.*, 146 Ind. 655, 1 Am. Neg. Rep. 222, 36 L.R.A. 535; *Chicago, etc. R. Co. v. Spirk*, 51 Neb. 167, 2 Am. Neg. Rep. 400; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168, 3 Am. Neg. Cas. 148; *Cincinnati, etc. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Same v. Acrea*, 42 Ind. App. 127. To the same effect are *Winkler v. St. Louis, etc. R. Co.*, 21 Mo. App. 99, 9 Am. Neg. Cas. 497; *Augusta & S. R. Co. v. Randall*, 79 Ga. 304; *Evans v. St. Louis, etc. R. Co.*, 11 Mo. App. 463; *Fitzpatrick v. Great Western R. Co.*, 12 Up. Can. Q. B. 645; *Baltimore City P. R. v. Kemp*, 61 Md. 74, 3 Am. Neg. Cas. 655; *Davis v. Standard Nat. Bank*, 50 App. Div. 210; *Ehrgott v. Mayor*, 96 N. Y. 264, 48 Am. Rep. 622; *Toronto R. Co. v. Grinstead*, 24 Can. Sup. Ct. 570; *Yazoo, etc. R. Co. v. Aden*, 77 Miss. 382; *Truel v. Missouri, etc. R. Co.*, 143 Mo. App. 380; *Dye v. Chicago*

& A. R. Co., 135 id. 254; *Western U. Tel. Co. v. Powell*, 54 Tex. Civ. App. 466, 21 Am. Neg. Rep. 21; *Texas M. R. Co. v. Geraldton*, id. 71; *St. Louis S. R. Co. v. Foster*, 46 id. 517; *St. Louis, etc. R. Co. v. Davis*, 37 Okla. 340; *Denver v. Hyatt*, 28 Colo. 129; *Georgia R. & E. Co. v. McAllister*, 126 Ga. 447, 7 L.R.A. (N.S.) 1177; *Reimard v. Bloomsburg & S. R. Co.*, 228 Pa. 384; *St. Louis S. R. Co. v. Franks*, 52 Tex. Civ. App. 614; *Louisiana & R. Co. v. Rider*, 103 Ark. 558. See *Smith v. British, etc. Co.*, 86 N. Y. 408, 9 Am. Neg. Cas. 585; *Putnam v. New York, etc. R. Co.*, 47 Hun. 439; §§ 48, 49. In opposition are *Raymond v. Haverhill*, 168 Mass. 382; *Snow v. New York, etc. R. Co.*, 185 Mass. 321, 17 Am. Neg. Rep. 261.

An agent who wrongly informs a passenger that a train she is about to take will make close connections with the train of another road at a designated place is not bound to foresee that she would procure a conveyance and, in the face of a storm, in a delicate state of health, drive over a rough road to her father's house, and that a miscarriage would result. *Fowlkes v. Southern R. Co.*, 96 Va. 742.

² *Pullman P. C. Co. v. Barker*, 4 Colo. 344, 9 Am. Neg. Cas. 131, 34 Am. Rep. 89.

through a carrier's negligence cannot recover for such as are the result of the physical condition she is in, as where illness follows arrested menstruation, although the negligence produces that condition. It has been well observed concerning this case that it is unsustained by authority and is supported by neither the principles of law nor humanity.³ It is most satisfactory to know that is not now recognized as authority in the court which decided it.⁴ If a passenger wrongfully put off a train at a flag-station, when it is dark and a storm is raging, and at a great distance from his starting point and destination, is injured by falling through a cattle-guard while on his way to the nearest station the jury may decide whether the result is attributable to such wrong.⁵ If the temperature of a waiting room produces pneumonia the carrier is liable for the consequences.⁶ If a shock or injury to the nervous system is occasioned by the wrongful ejection of a passenger from a car or a person who expects to become a passenger from the carrier's waiting room it will be regarded as a physical injury, and the act which caused the shock will be taken to be the proximate cause of the injury if bodily suffering is the result of the shock.⁷ If a passenger who informs a conductor when she boards his train that friends will meet her at her destination is carried beyond it and obliged to sit up all night in a car into which cold is admitted, and to change cars during the night and leave the train at an early hour in the morning the jury may well find that the carrier is responsible for her subsequent sickness.⁸ One who has bought

³ *Brown v. Chicago, etc. R. Co., Terre Haute & I. R. Co. v. Buck*, 3 Am. Neg. Cas. 148, *Ehrgott v. Mayor, supra*; *Brckett v. Southern R. Co.*, 88 S. C. 447.

⁴ *Denver v. Hyatt, supra*; *Colorado Springs & I. R. Co. v. Nichols*, 41 Colo. 272, 20 L.R.A.(N.S.) 215.

⁵ *Evans v. St. Louis, etc. R. Co.*, 11 Mo. App. 463, 8 Am. Neg. Cas. 486; *Winkler v. Same*, 21 id. 99, 9 Am. Neg. Cas. 497. See *Patten v. Chicago & N. R. Co.*, 32 Wis. 524, 7 Am. Neg. Cas. 191; and compare

Lewis v. Flint, etc. R. Co., 54 Mich. 55, 9 Am. Neg. Cas. 465; *McLane v. Botsford E. Co.*, 136 Mich. 664, 16 Am. Neg. Rep. 390.

⁶ *St. Louis, etc. R. Co. v. Hook*, 83 Ark. 584.

⁷ *Sloane v. California Southern R. Co.*, 111 Cal. 668, 32 L.R.A. 193; *Texas M. R. Co. v. Geraldton*, 54 Tex. Civ. App. 71.

⁸ *Missouri, etc. R. Co. v. Henesey*, 20 Tex. Civ. App. 316; *Grimsted v. Toronto R. Co.*, 21 Ont. App. 578.

a ticket and is waiting in a station to take a train is a passenger,⁹ and if the carrier's gateman, knowing such person is ill, is so waiting, and has bought his ticket, fails to comply with his request to notify him of the arrival of his train and after the train has gone directs a policeman to eject such person from the station, saying that "he was not in a condition of mind to go on any train," and such person, after being ejected, and while wandering about the tracks near the station, is run over by a train and killed the carrier is responsible.¹⁰ If the agent of an express company receives a package for transportation with notice that it contains medicine for a sick person and that it is important it be sent at once, the carrier is liable for the physical and mental injury which its delay in forwarding the medicine may occasion to the sick person; but not for the mental suffering of the husband on account of his wife's condition.¹¹ Where a carrier left a locked car marked "powder" near its warehouse, in which a fire broke out, and the city fire department refrained from making efforts to put out the fire through reasonable fear of the explosion of the powder supposed to be in the car, notwithstanding it was empty, the negligence in so leaving the car is the proximate cause of the loss of property in the warehouse, it being reasonably certain the fire would have been controlled but for the apprehension of the firemen.¹² On the other hand, a carrier is not presumed to contemplate that an accident may produce insanity in one of its passengers, no bodily harm being sustained.¹³ The loss of the services and companionship of a wife, resulting from her husband's being carried beyond his destination, and expenses incurred in effecting her cure are not recoverable.¹⁴ To recover consequential damages resulting from

⁹ *Grimes v. Pennsylvania Co.*, 36 Fed. 72, 7 Am. Neg. Cas. 631; *Warren v. Fitchburg R. Co.*, 8 Allen, 227; *Wells v. New York Cent. etc. R. Co.*, 25 App. Div. 365.

¹⁰ *Wells v. R. Co.*, *supra*; *Macon, etc. R. Co. v. Moore*, 125 Ga. 810.

¹¹ *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363.

¹² *Hardman v. Montana Union R.*

Co., 39 L.R.A. 300, 27 C. C. A. 407, 83 Fed. 88.

¹³ *Haile v. Texas & P. R. Co.*, 9 C. C. A. 134, 60 Fed. 557, 23 L.R.A. 774; *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. ed. 1070; *St. Louis, etc. R. Co. v. Bragg*, 69 Ark. 402, 86 Am. St. 206.

¹⁴ *Sappington v. Atlanta, etc. R. Co.*, 127 Ga. 178.

being ejected from a train the plaintiff must show that his subsequent conduct in attempting to reach his destination was reasonable.¹⁵ The failure to stop a train at a proper place does not justify a passenger in leaping off unless he is invited to do so by the carrier's agent and the attempt was not obviously dangerous.¹⁶ In the absence of notice that a passenger whom a conductor has promised to awaken was to be met at a station on another road by her father and carried thence to her sister's, where her sick child would receive medical treatment, there is no liability for her mental suffering caused by failure to meet her father and anxiety respecting the child though the conductor failed to keep his promise.¹⁷

If the negligence of a carrier results in an injury to a passenger by which his system is rendered susceptible to disease and less able to resist it when he is attacked by it and death results, the injury is the proximate cause thereof, although the disease is to be regarded as an intervening agency and the malady which attacked him was prevalent in the community.¹⁸ The court observe that if it "were to undertake to declare any other rule we should be involved in inextricable confusion, for it is clear that the passenger who suffers injuries of a serious character is entitled to some damages, and it is impossible for any one to pronounce, as a matter of law, at what point the injury flowing from the wrong terminated. The only possible practicable rule is that the wrong-doer whose act is the mediate cause of the injury shall be held liable for all the resulting damages, and that the question of whether his wrong was the mediate cause is one for the jury."¹⁹

¹⁵ *Chicago, etc. R. Co. v. Spirk*, 51 Neb. 167, 2 Am. Neg. Rep. 400.

¹⁶ *Burgin v. Richmond & D. R. Co.*, 115 N. C. 673, 6 Am. Neg. Cas. 125.

¹⁷ *Chicago, etc. R. Co. v. Boyles*, 11 Tex. Civ. App. 522, 10 Am. Neg. Cas. 296. This case is of doubtful authority. Compare it with *Mis-souri, etc. R. Co. v. Hennesey*, 20 Tex. Civ. App. 316.

¹⁸ *McCoy v. Indianapolis G. Co.*,

146 Ind. 655, 667, 36 L.R.A. 535, quoting the text.

¹⁹ *Bradshaw v. Lancashire, etc. R. Co.*, L. R. 10 C. P. 109; *Baltimore P. R. Co. v. Kemp*, 61 Md. 619, 48 Am. Rep. 134; *Oliver v. La Valle*, 36 Wis. 592; *Sloan v. Edwards*, 61 Md. 89; *Delie v. Chicago, etc. R. Co.*, 51 Wis. 400; *Beauchamp v. Saginaw M. Co.*, 50 Mich. 163, 45 Am. Rep. 30; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Lyons*

§ 37. **Intervening cause.** Goods carried in a canal boat were injured by the wrecking of the boat, caused by an extraordinary flood which would not have been encountered but for a retarded passage in consequence of the carrier employing a lame horse. This fact was so unlikely to conduce to such an event that the defendant was not liable.²⁰ A carrier was guilty of a negligent delay of six days in transporting wool which, while in his depot at the place of destination a few days after, was submerged by a sudden and violent flood. The flood was the proximate cause of the injury and the delay the remote cause.²¹ The same rule has been applied where there was negligent delay in dispatching or delivering goods and they were lost while in the carrier's hands by flood, sudden storm or other immediate cause, and where the carrier justifiably deviated from the usual route in transporting goods; the damage occurring without his fault, he was not responsible.²² In similar cases in New York and other states a different conclusion has been reached. In one it was

v. Second Ave. R. Co., 89 Hun, 374, 12 Am. Neg. Cas. 391, affirmed without opinion, 115 N. Y. 654; Purcell v. Lauer, 14 App. Div. (N. Y.) 33, 12 Am. Neg. Rep. 57; Keegan v. Minneapolis, etc. R. Co., 76 Minn. 90; Terre Haute & I. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168. The opinion in the last case reviews a large number of cases, including *Ginna v. Second Ave. R. Co.*, 8 Hun, 494, 9 Am. Neg. Cas. 623, affirmed 67 N. Y. 596; *Brown v. Chicago, etc. R. Co.*, 54 Wis. 342, 7 Am. Neg. Cas. 203; *Sauter v. New York, etc. R. Co.*, 66 N. Y. 50, 6 Am. Neg. Cas. 208, 23 Am. Rep. 18. Compare *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. ed. 1070, and other cases cited in n. 8, *supra*.

²⁰ *Morrison v. Davis*, 20 Pa. 171; *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44, 19 Am. Rep. 631.

²¹ *Denny v. New York Cent. R. Co.*, 13 Gray, 481, 74 Am. Dec. 645; *French v. Merchants' & M's. T. Co.*,

199 Mass. 433, 19 L.R.A.(N.S.) 1006.

²² *Railroad Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909; *Daniels v. Ballentine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Hoadley v. Northern T. Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Empire State C. Co. v. Atchison, etc. R. Co.*, 210 U. S. 1, 52 L. ed. 931, 135 Fed. 135, citing federal cases; *Atchison, etc. R. Co. v. Henry*, 78 Kan. 490, 18 L.R.A.(N.S.) 177; *Rogers v. Missouri Pac. R. Co.*, 75 Kan. 222, 121 Am. St. 416, 10 L.R.A.(N.S.) 658; *McLane v. Botsford E. Co.*, 136 Mich. 664, 16 Am. Neg. Rep. 390; *Wertheimer S. Co. v. Missouri Pac. R. Co.*, 147 Mo. App. 489; *Lightfoot v. St. Louis, etc. R. Co.*, 126 id. 532; *Moffatt C. Co. v. Union Pac. R. Co.*, 113 id. 544; *Fentiman v. Atchison, etc. R. Co.*, 44 Tex. Civ. App. 455, citing local cases; *Herring v. Chesapeake & W. R. Co.*, 101 Va. 778, 15 Am. Neg. Rep. 365.

held that when a carrier is intrusted with goods for transportation and they are injured or lost in transit the law holds him responsible. He is only exempted by showing that the injury was caused by an act of God or the public enemy; and to avail himself of such exemption he must show he was free from fault. If he departs from the line of his duty and violates his contract, and while thus in fault, and in consequence of that fault, the goods are injured by the act of God, which would not otherwise have caused the injury, he is not protected.²³ There was unreasonable delay on the part of the carrier in forwarding goods, and while they were in a railroad depot at an intermediate point they were injured by an extraordinary flood; the carrier was liable because the goods were exposed to the flood by his fault.²⁴ These cases relating to carriers or others held to an absolute responsibility, except as relieved by showing that the injury was

²³ *Cumberland P. L. Co. v. Stam-
baugh*, 137 Ky. 528, 31 L.R.A.
(N.S.) 1131. See *Voudrie v. South-
ern R. Co.*, 155 Ill. App. 279; *Mc-
Alister v. Chicago, etc. R. Co.*, 74
Mo. 351.

²⁴ *Greene v. Louisville & N. R.
Co.*, 163 Ala. 138, 136 Am. St. 67;
Alabama G. S. R. Co. v. Quarles, 145
Ala. 436, 5 L.R.A.(N.S.) 867, 117
Am. St. 54. (The opinion collects
the cases favoring this view and
those following the rule of *Morrison
v. Davis*, 20 Pa. 171); *Choctaw, etc.
R. Co. v. Rolfe*, 76 Ark. 220, citing
the text; *Providence W. Ins. Co. v.
Western U. Tel. Co.*, 153 Ill. App.
118; *Green-W. S. Co. v. Chicago*,
etc. R. Co., 139 Iowa, 123, 5 L.R.A.
(N.S.) 882, (reviewing numerous
cases); *Sutton v. Western U. Tel.
Co.*, 129 Ky. 166; *Bibb Broom C.
Co. v. Atchison, etc. R. Co.*, 94
Minn. 269, 17 Am. Neg. Rep. 590,
69 L.R.A. 509, 110 Am. St. 361;
Alabama G. S. R. Co. v. Elliott, 150
Ala. 381, 9 L.R.A.(N.S.) 1264, 124
Am. St. 72, and local cases cited;
Read v. Spaulding, 30 N. Y. 630, 86

Am. Dec. 426; *Wald v. Pittsburg*,
etc. R. Co., 162 Ill. 545, 53 Am. St.
332, 35 L.R.A. 356, citing *McGraw
v. Baltimore & O. R. Co.*, 18 W. Va.
361, 41 Am. Rep. 696; *Dening v.
Grand Trunk R. Co.*, 48 N. H. 455,
2 Am. Rep. 267; *Read v. St. Louis*,
etc. R. Co., 60 Mo. 199; *Williams
v. Grant*, 1 Conn. 487, 7 Am. Dec.
235; *Davis v. Garrett*, 6 Bing. 617;
Crosby v. Fitch, 12 Conn. 410, 31
Am. Dec. 745; *Rodgers v. Central
Pac. R. Co.*, 67 Cal. 606, 13 Am.
Neg. Cas. 346; *Higgins v. Dewey*,
107 Mass. 494, 9 Am. Rep. 63;
*Philadelphia & R. R. Co. v. Ander-
son*, 94 Pa. 360.

The authorities are not at variance where the property damaged is perishable or inherently susceptible to damage from climatic influences, as sudden changes in the weather. These the carrier must anticipate, and for injuries resulting to such property from such causes is liable where negligent delay in forwarding them contributes to cause the injury. *Bibb Broom C. Co. v. R. Co.* *supra*.

caused by the act of God, are not wholly controlled by the consideration of the nearness of the injury to the fault. Davies, J., said: "It is to be observed that the foundation of this exemption is that the party claiming the benefit and application of it must be without fault on his part," referring to several cases.²⁵ "These cases," he continues, "clearly establish the rule that the carrier cannot avail himself of the exception to his liability which the law has created unless he has been free from negligence or fault himself. The policy of the law is to hold him to a strict liability; and this policy, for wise and just purposes, ought not to be departed from. But when the injury occurs from a cause which the carrier could not guard against nor protect himself from, from such an event the law excuses him, but it only does it when he himself is not in fault and is free from all negligence."²⁶ It has been held that if an administrator deposits

²⁵ Davis v. Garrett, 6 Bing. 716. In this case the plaintiff put on board the defendant's barge lime to be conveyed from M. to L. The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and the barge thereby taking fire the whole was lost; he was liable. Tindal, C. J., observed that no wrongdoer can be allowed to apportion or qualify his own wrong, and that as a loss had actually happened whilst his wrongful act was in operation and force, and which was attributable to such act, he could not set up as an answer to the action the bare possibility of a loss if the act had never been done. It might admit of a different construction if he could show not only that the same loss *might* have happened, but that it must have happened, if the act complained of had not been done. Charleston S. Co. v. Bason, 1 Harp. 262; Campbell v. Morse, id. 468; Bell v. Reed, 4 Bin. 127, 5 Am. Dec. 398; Hart v. Allen, 2 Watts, 114; Hand v. Baynes, 4

Whart. 204; Williams v. Grant, Crosby v. Fitch, *supra*.

²⁶ In Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426. In accord: Alabama G. S. R. Co. v. Quarles, 145 Ala. 436, 5 L.R.A. (N.S.) 867, 117 Am. St. 54; Same v. Elliott, 150 Ala. 381, 9 L.R.A. (N.S.) 1264, 124 Am. St. 72; Sandy v. Lake St. R. Co., 235 Ill. 194; Jones v. Minneapolis, etc. R. Co., 91 Minn. 229, 15 Am. Neg. Rep. 355.

See last section. In Parmalee v. Wilks, 22 Barb. 539, the plaintiff, the owner of a raft of saw logs lying at Port Maitland, Canada, made a contract with the defendants, the owners of a steamboat, by which it was agreed that they would come to Port Maitland on the next Tuesday morning with the steamboat, and proceed up the river about five miles to D., and there land her passengers, and immediately return to Port Maitland and take the plaintiff's raft in tow, and tow it to Black Rock, a distance of about forty miles, which the steamboat could traverse in about fourteen

money of an estate in a bank and allows it to remain after the time when it should, by punctual performance of his duty, have been distributed and in the hands of those entitled to it, and the bank fails and the money is lost he and his sureties are liable therefor, and the sum so lost is the measure of damages.²⁷

It is immaterial what is the intermediate cause between the act complained of and the injurious consequence, if such act is the efficient and proximate cause and the consequence was the probable result.²⁸ There may be intervening operations of nature,²⁹ acts produced by the volition of animals or of human beings, innocent acts of the injured party or of third persons,

hours with the raft in tow. The usual time for the arrival of the steamboat at Port Maitland, upon her trip up, was 3 o'clock in the morning, and it generally took about two hours to proceed to D., land her passengers and return to Port Maitland. On Tuesday morning the weather was fair and the lake and river were calm, and so continued through the day. But the boat failed to call for the raft according to the agreement. In the evening, about sunset, she returned and took the raft in tow for Black Rock. During the night a storm arose and the raft went to pieces and was scattered along the shore. Held, that had the defendants entered upon the performance of the contract at the time specified and used proper diligence in attempting to perform it the plaintiff would have taken all the risk of storms or other casualties. But as they delayed for some fourteen hours to enter upon its performance, and as such delay resulted in the raft being overtaken by the storm, they were responsible for the consequences; that when they took the raft in tow in the *evening* instead of the *morning*, as agreed, they took the risk of any storm that should arise after a suffi-

cient time had elapsed for towing the raft to Black Rock, if they had commenced the towing in the morning. The plaintiff had a right to fix the time in the contract, and make it an essential part of it, considering the dangers of navigation upon the lake, and the peculiar nature and condition of his property; he might determine when the voyage should commence and make a special agreement to that effect. And upon the nonperformance of the agreement, at the time specified, the party in default was liable for the damages resulting from causes which would not have arisen had the agreement been performed. *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514, 6 Am. Rep. 124; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500; *Rawson v. Holland*, 59 N. Y. 611, 17 Am. Rep. 394.

²⁷ *McNabb v. Wixon*, 7 Nev. 163.

²⁸ *Smith v. Northern Pac. Ry. Co.*, 79 Wash. 448.

²⁹ *Benedict P. Co. v. Atlantic C. L. R. Co.*, 55 Fla. 514, 20 L.R.A. (N.S.) 92; *Pacific Union Club v. Commercial Union Assur. Co.*, 10 Cal. App. 203, (destruction of water mains by an earthquake preventing

and even tortious acts of the latter, and the chain of cause and effect not be necessarily broken or the result rendered remote. The test is not to be found in any arbitrary number of intervening events or agents, but in their character and in the natural and probable connection between the wrong done and the injury.³⁰ In entering a slip a ferryboat, through negligence, struck the side of the rack with such violence as to cause the

the extinguishment of fire; fire was proximate cause of loss of property that burned, and insurer was liable though its policy excepted loss caused by earthquake).

30 Choctaw, etc. R. Co. v. Holloway, 191 U. S. 334, 48 L. ed. 207, 15 Am. Neg. Rep. 235; Merrill v. Los Angeles G. & E. Co., 158 Cal. 499, 31 L.R.A.(N.S.) 559; Albany & N. R. Co. v. Wheeler, 6 Ga. App. 270; Ballentine v. Illinois Cent. R. Co., 157 Ill. App. 295; Davis v. Mercer L. Co., 164 Ind. 413, 18 Am. Neg. Rep. 485; Cleveland, etc. R. Co. v. Patterson, 37 Ind. App. 617; Peru H. Co. v. Lenhart, 48 Ind. App. 319; Evansville & I. R. Co. v. Allen, 34 Ind. App. 636; Central U. Tel. Co. v. Sokola, id. 429; Beckler v. Merringer, 131 Iowa, 614; Kansas City v. Siese, 71 Kan. 283; St. Louis, etc. R. Co. v. League, id. 79, 18 Am. Neg. Rep. 86; Louisville & N. R. Co. v. Eckman, 137 Ky. 331; Claussen v. Cumberland Tel. & T. Co., 126 La. 1087; McDonald v. Snelling, 14 Allen, 296; Vandenburgh v. Truax, 4 Denio, 464; Kellogg v. Chicago, etc. R. Co., 26 Wis. 223, 7 Am. Rep. 69; Murdock v. Walker, 43 Ill. App. 590; Northern Pac. R. Co. v. Lewis, 2 C. C. A. 446, 51 Fed. 658; Marsh v. Great Northern P. Co., 101 Me. 489; Turner v. Page, 186 Mass. 600; Corley v. Board of Levee Com'rs, 95 Miss. 617; Jones v. Kansas City, etc. R. Co., 178 Mo. 528, 20 Am. Neg. Rep. 674, 101 Am. St. 434;

Troll v. St. Louis P. C. Co., 160 Mo. App. 501; South Side R. Co. v. St. Louis, etc. R. Co., 154 Mo. App. 364; Murrell v. Smith, 152 id. 95; Parker v. St. Louis T. Co., 108 id. 465, 17 Am. Neg. Rep. 263; Mize v. Rocky Mt. Bell Tel. Co., 38 Mont. 521, 129 Am. St. 659; Hilligas v. Kuns, 86 Neb. 68, 26 L.R.A.(N.S.) 284; Collins v. West Jersey Exp. Co., 72 N. J. L. 231, 5 L.R.A.(N.S.) 373, 19 Am. Neg. Rep. 393; Cohen v. Rittmann, (Tex. Civ. App.) 139 S. W. 59; Houston B. & T. R. Co. v. O'Leary, (Tex. Civ. App.) 136 S. W. 601; Atchison, etc. R. Co. v. Mills, 53 Tex. Civ. App. 359; Western U. Tel. Co. v. Auslet, id. 264; Same v. Gulick, 48 id. 78; St. Louis S. R. Co. v. Bryant, 46 id. 601; Gulf, etc. R. Co. v. Boyce, 39 id. 195, 20 Am. Neg. Rep. 689; Standard L. & P. Co. v. Muncey, 33 id. 416; Stone v. Union Pac. R. Co., 32 Utah, 185; Lincoln v. Central Vermont R. Co., 82 Vt. 187, 137 Am. St. 998; Richmond v. Gay, 103 Va. 320; Standard O. Co. v. Wakefield, 102 Va. 824, 17 Am. Neg. Rep. 259, 66 L.R.A. 792; Williams v. Ballard L. Co., 41 Wash. 338; Sheare v. Buckley, 31 Wash. 370; Southern R. Co. v. Daughdrill, 11 Ga. App. 603; Creaser v. Creaser, 41 Nova Scotia, 480; Helena G. Co. v. Rogers, 104 Ark. 59; Strayer v. Quincey, etc. R. Co., 170 Mo. App. 514; Brown v. Oregon-W. R. & N. Co., 63 Ore. 396; Beiser v. Cincinnati, etc. R. Co., 152 Ky. 522.

passengers to sway, in consequence of which one of their number fell and was injured. The producing cause was negligence, and there was no interruption thereof by what the injured person did after his fall.³¹ One who builds a back fire to save his property from a fire negligently caused by another does only what he ought to do, and if the fire he started ruins the property it was designed to save there is no break in the chain of cause and effect as to the wrong-doer, if it is clear the property would have been burned had the second fire not been set.³² Allowing a long ladder to rest outside a sidewalk in a street and against a building was the proximate cause of an injury sustained by a passer-by through its fall in consequence of an unusual wind.³³

§ 38. **Same subject.** The primary cause may be the proximate cause of a disaster though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied at the other end, that force being the proximate cause of the movement. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole; or was there some new and independent cause, disconnected from the primary fault and self-operating, which produced the injury? The inquiry must be answered in accordance with common understanding.³⁴ The act of furnishing

³¹ *Cash v. New York Cent. etc. R. Co.*, 56 App. Div. 473.

³² *McKenna v. Baessler*, 86 Iowa, 197, 17 L.R.A. 310; *Owen v. Cook*, 9 N. D. 134, 47 L.R.A. 646.

³³ *Moore v. Townsend*, 76 Minn. 64, 6 Am. Neg. Rep. 95. See *Parmenter v. Marion*, 113 Iowa, 297; *Trapp v. McClellan*, 68 App. Div. 362.

³⁴ *Milwaukee, etc. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Miller v. Kelly C. Co.*, 239 Ill. 626, 21 Am. Neg. Rep. 664, 130 Am. St. 245; *Georgetown Tel. Co. v. McCullough*, 118 Ky. 182, 111 Am. St. 294; *Hull v. Thomson T. Co.*, 135

Mo. App. 119; *Lawrence v. Heidebreder I. Co.*, 119 id. 316; *Mayrant v. Columbia*, 77 S. C. 281, 10 L.R.A. (N.S.) 1094; *Reynolds v. Galveston, etc. R. Co.*, 101 Tex. 2; *Cohen v. Rittimann* (Tex. Civ. App.), 139 S. W. 59; *Driscoll v. Allis-C. Co.*, 144 Wis. 451. See *Gulf & C. R. Co. v. Sneed*, 84 Miss. 252.

The owner of an elevator is not liable for the act of a stranger who operates it during the temporary absence of the person who had charge of it. *Board of Trade B. Co. v. Cralle*, 109 Va. 246, 22 L.R.A. (N.S.) 297, 123 Am. St. 917.

In *Lowery v. Manhattan R. Co.*,

liquor to a man in a stupidly drunken condition, with knowledge thereof, no duress, deception or persuasion being used,³⁵ although a statutory misdemeanor, is only the remote cause of his death; his act in drinking it is the proximate and intervening cause.³⁶ The voluntary intoxication of a person who has attained the age of discretion, but for which the injury resulting from the sale of chloroform to him in violation of law would not have happened, breaks the chain of cause and effect.³⁷ The

99 N. Y. 158, 52 Am. Rep. 12, 12 Daly 431, fire fell from a locomotive on an elevated road upon a horse and its driver. The horse ran and, resisting an attempt to get him against a curbstone, ran over it and injured the plaintiff, who was on the sidewalk. The driver's effort to stop the horse by turning him from the course he was taking was, whether prudent or not, a continuation of the result of the defendant's negligence and its natural and probable consequence, as was the injury inflicted upon the plaintiff.

A fire started by defendant's negligence, after spreading one mile and a quarter to the northeast, near the plaintiff's property, met a fire having no responsible origin, coming from the northwest. After the union, fire swept on from the northwest to and into plaintiff's property causing its destruction. Either fire, if the other had not existed, would have reached the property and caused its destruction at the same time. Held, that the rule of liability in case of joint wrongdoers does not apply; that the independent fire from the northwest became a superseding cause, so that the destruction of the property could not, with reasonable certainty, be attributed in whole or in part to the fire having a responsible origin; that the chain of responsible causation was so broken

Suth. Dam. Vol. I.—10.

by the fire from the northwest that the negligent fire, if it reached the property at all, was a remote and not the proximate cause of the loss. After the fire swept everything of a combustible character clean on both sides of defendant's right of way, plaintiff's horses, that were running at large, went upon the railway track and were killed by a passing train without negligence on the part of the train men. The right of way had never been fenced as required by law. Held, that the rule of absolute liability, under the statute requiring railway companies to fence their tracks, applies only where the loss is produced, in whole or in part, by reason of the failure to fence; that in the circumstances stated the chain of causation reaching from the failure to fence was broken by the fire that would unquestionably have destroyed the fence if it had existed, so that the failure to fence cannot be said to have contributed to the entry of the horses upon the railway track. *Cook v. Minneapolis, etc. R. Co.*, 98 Wis. 624, 40 L.R.A. 457 (as stated in the syllabus by Marshall, J.).

³⁵ See *McCue v. Klein*, 60 Tex. 168, 48 Am. Rep. 260.

³⁶ *King v. Henkie*, 80 Ala. 505, 60 Am. Rep. 119. See *Triggs v. McIntyre*, 215 Ill. 369.

³⁷ *Meyer v. King*, 72 Miss. 1, 35 L.R.A. 474.

sale of poison without the label required by statute does not make the vendor liable for the death of a man who took it while intoxicated. His acts in buying and taking it were the proximate cause of his death; they were independent acts, which intervened and broke all connection between the omission to label and the death.³⁸ The owner of a ferryboat must foresee that horses thereon may take fright at the sound of whistles from other boats and guard against such horses backing into the water, and if he fails to provide a sufficient rail to prevent that result his neglect is the efficient cause of the loss of the horses.³⁹ One whose private way over the land of another is obstructed by a fence built under a claim of right and who proceeds to have such way laid out as a public way cannot recover the expense of so doing in a suit for the obstruction of the way.⁴⁰ Any wrongful act which exposes one to injury from rain, heat, frost, fire, water, disease, the instinctive or known vicious disposition or habits of animals, or any other natural cause under circumstances which render it probable that such an injury will occur is a primary, efficient and proximate cause if harm ensues.⁴¹ Many such cases have been referred to in the preceding pages. Persons who dam water-courses are presumed to have knowledge of the fact that natural causes operate to fill up their beds

³⁸ *Ronker v. St. John*, 21 Ohio C. C. 39.

³⁹ *Sturgis v. Kountz*, 165 Pa. 358, 27 L.R.A. 390.

⁴⁰ *Holmes v. Fuller*, 68 Vt. 207.

⁴¹ *Western & A. R. Co. v. Bailey*, 105 Ga. 100; *Alabama, etc. R. Co. v. Chapman*, 83 Ala. 453; *Vogel v. McAuliffe*, 18 R. I. 79; *Pulaski G. L. Co. v. McClintock*, 97 Ark. 576, 32 L.R.A.(N.S.) 825; *St. Louis S. R. Co. v. Mackey*, 95 Ark. 297; *Louisiana & A. R. Co. v. Nix*, 94 Ark. 270; *National F. Co. v. Green*, 50 Colo. 307; *Nelson v. State*, 32 Ind. App. 88, 17 Am. Neg. Rep. 257; *Ward v. Aetna L. Ins. Co.*, 82 Neb. 499; *McCahill v. New York T. Co.*, 201 N. Y. 221; *Sweet v. Per-*

kins, 196 N. Y. 482; *Waters-P. O. Co. v. Deselms*, 18 Okla. 107; *Danenhower v. Western U. Tel. Co.*, 218 Pa. 216; *Cameron v. Citizen's T. Co.*, 216 Pa. 191; *Houston, etc. R. Co. v. Gerald* (Tex. Civ. App.), 128 S. W. 166; *Ft. Worth, etc. R. Co. v. Morris*, 45 Tex. Civ. App. 596; *Chicago, etc. R. Co. v. Groner*, 43 id. 264.

The sale of railway tickets by an agent afflicted with small pox to a husband for himself and wife is the proximate cause of the communication of the disease from the husband to her. *Missouri, etc. R. Co. v. Raney*, 44 Tex. Civ. App. 517; *Smith v. Baker*, 20 Fed. 709.

and cause water to overflow adjacent lands; they cannot avoid liability for the resultant consequences because of such fact.⁴² If a positive tort is committed by unnecessarily leaving an obstruction in the bed of a natural water-course the parties who commit the wrong must take notice of the violence of rainfalls in that locality.⁴³

§ 39. Acts of injured party; fraud and exposure to peril. The act of the injured party may be the more immediate cause of his injury; yet, if that be an act which was as to him reasonably induced by the prior misconduct of the defendant and without concurring fault of the sufferer, that misconduct will be treated as the responsible and efficient cause of the damage.⁴⁴ Cases of fraud where, by some artifice or false representation, the plaintiff has been induced to incur obligations, part with his property or place himself in any predicament by which he suffers loss are apt illustrations. The act by which he binds himself, pays money or alters his situation is his own, but superinduced by the superior vicious will of the defrauding

⁴² Mississippi & T. R. Co. v. Archibald, 67 Miss. 38; Elder v. Lykens Valley C. Co., 157 Pa. 490, 37 Am. St. 742.

⁴³ Brink v. Kansas City, etc. R. Co., 17 Mo. App. 177, 202.

⁴⁴ Southern Pac. R. Co. v. Svendsen, 13 Ariz. 111; Temple E. Co. v. Halliburton (Tex. Civ. App.), 136 S. W. 584; Collins v. Waterbury Co., 144 App. Div. (N. Y.) 670; Gulf, etc. R. Co. v. Tullis, 41 Tex. Civ. App. 219; Denison & S. R. Co. v. Freeman, 38 id. 152; Adamson v. Norfolk & P. T. Co., 111 Va. 556; Herdt v. Koenig, 137 Mo. App. 589; Hull v. Thomson T. Co., 135 id. 119; Lawrence v. Heidbreder I. Co., 119 id. 316; Western U. Tel. Co. v. Wells, 50 Fla. 474, 2 L.R.A.(N.S.) 1072, 111 Am. St. 129; Burger v. Omaha, etc. St. R. Co., 139 Iowa 645, 130 Am. St. 343; Navailles v. Dielman, 124 La. 422; Steverman v. Boston E. R. Co., 205 Mass. 508;

Cameron v. New England Tel. & T. Co., 182 Mass. 310, 13 Am. Neg. Rep. 86; Howell v. Lansing City E. R. Co., 136 Mich. 432; Smith v. Chicago City R. Co., 169 Ill. App. 570; Hackett v. Chicago, etc. R. Co., 170 id. 140, 4 N. C. C. A. 183; Oak Leaf M. Co. v. Littleton, 105 Ark. 392; Cincinnati, etc. R. Co. v. Spears, 152 Ky. 200; Evans v. Chicago & N. R. Co., 109 Minn. 64, 26 L.R.A.(N.S.) 278; West v. St. Louis S. R. Co., 187 Mo. 351; Cherbuliez v. Parsons, 59 N. Y. Misc. 613; Bremisholtz v. Pennsylvania R. Co., 229 Pa. 88; Cohn v. May, 210 Pa. 615, 69 L.R.A. 800, 105 Am. St. 840; James v. Fountain Inn Mfg. Co., 80 S. C. 232.

In § 671 are given several illustrations of the rule as between vendor and vendee where injuries have resulted from the proper use of property sold because of defects in it. See also, § 25.

party; and the latter is responsible for all the loss which ensues. A single instance will suffice. W. obtained goods from the plaintiff on credit upon the representation of R. that W. was responsible and worthy of credit and owed very little if anything. At the time of the sale and delivery of the goods W. was insolvent and R. knew it. R. himself had a judgment against W. for a considerable amount docketed only a month previous to the sale. On this judgment R. caused an execution to be issued and levied upon the goods so obtained from the plaintiff before they reached W. For these representations R. was liable to the plaintiff for the value of the goods sold to W.⁴⁵

If the plaintiff is placed in a situation of danger to person or property by the defendant's misconduct and is injured in a reasonable endeavor to extricate himself, such misconduct is the proximate cause of the injury though it proceed more immediately, and it may be exclusively, from the plaintiff's own act. Thus, if through the default of a coach proprietor in neglecting to provide proper means of conveyance a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible in damages, although the coach was not actually overturned.⁴⁶ The same principle applies where

⁴⁵ *Bean v. Wells*, 28 Barb. 466; *Connally v. Saunders* (Tex. Civ. App.), 142 S. W. 975, quoting the text.

⁴⁶ *Jones v. Boyce*, 1 Stark. 493; *Ingalls v. Bills*, 9 Mete. (Mass.) 1, 9 Am. Neg. Cas. 426; *McKinney v. Neil*, 1 McLean 540, 7 Am. Neg. Cas. 612; *Frink v. Potter*, 17 Ill. 406, 9 Am. Neg. Cas. 200; *Buel v. New York, etc. R. Co.*, 31 N. Y. 314, 5 Am. Neg. Cas. 87, 88 Am. Dec. 271; *McPeak v. Missouri Pac. R. Co.*, 128 Mo. 617, 4 Am. Neg. Cas. 806; *Epland v. Same*, 57 Mo. App. 147, 4 Am. Neg. Cas. 440; *Southwestern R. Co. v. Paulk*, 24 Ga. 356; *Wilson v. Northern Pac. R. Co.*, 26 Minn. 278, 4 Am. Neg. Cas. 209, 37 Am. Rep. 410; *Oliver v. La Valle*, 36

Wis. 592; *Twomley v. Central, etc. R. Co.*, 69 N. Y. 158, 6 Am. Neg. Cas. 217; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 5 Am. Neg. Cas. 151, 10 Am. Rep. 327; *Smith v. St. Paul, etc. R. Co.*, 30 Minn. 169, 4 Am. Neg. Cas. 218; *Dimmitt v. Hannibal, etc. R. Co.*, 40 Mo. App. 654, 9 Am. Neg. Cas. 505; *Knowlton v. Milwaukee City R. Co.*, 59 Wis. 278; *Knapp v. Sioux City & P. R. Co.*, 65 Iowa 91, 14 Am. Neg. Cas. 647, 54 Am. Rep. 1, 71 Iowa 41; *Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39, 12 L.R.A. 257; *Budd v. United C. Co.*, 25 Ore. 314, 6 Am. Neg. Cas. 216, 27 L.R.A. 279; *Nicholsburg v. Second Ave. R. Co.*, 11 N. Y. Misc. 432; *Baker v. North East Borough*, 151 Pa. 234; *Hookey*

one person is injured in an attempt to save the life of another which was imperilled by the fault of the defendant.⁴⁷ Nor is a person chargeable with contributory negligence—that is, with making his own act in part the efficient cause—for acting erroneously in a position of sudden danger in which he is placed by the negligence or fault of another. If, therefore, a stage-coach is upset by the negligence of the driver and a passenger

v. Oakdale, 5 Pa. Super. 404; Vallo v. United States Exp. Co., 147 Pa. 404, 14 L.R.A. 743, 30 Am. St. 741; Quinn v. Shamokin, etc. R. Co., 7 Pa. Super. 19; Washington, etc. R. Co. v. Hickey, 5 D. C. App. Cas. 436, 9 Am. Neg. Cas. 173; South Covington & C. R. Co. v. Ware, 84 Ky. 267, 9 Am. Neg. Cas. 381; Cody v. New York, etc. R. Co., 151 Mass. 462, 9 Am. Neg. Cas. 464, 7 L.R.A. 843; Connell v. Prescott, 20 Ont. App. 49; Ellick v. Wilson, 58 Neb. 584, 6 Am. Neg. Rep. 305; Galveston, etc. R. Co. v. Zantzinger, 92 Tex. 365, 44 L.R.A. 553; Postal Tel. C. Co. v. Hulsey, 132 Ala. 444, 453, 13 Am. Neg. Rep. 450; Texas & P. R. Co. v. Watkins (Tex. Civ. App.), 26 S. W. 760; Colusa Parrot M. & S. Co. v. Monahan, 162 Fed. 276, 89 C. C. A. 256; Omaha W. Co. v. Schamel, 147 Fed. 502, 78 C. C. A. 68; Southern R. Co. v. Reeder, 152 Ala. 227, 126 Am. St. 23; Jennings v. Philadelphia, etc. R. Co., 29 App. D. C. 219; Wilson v. Central R. Co., 132 Ga. 215; Western & A. R. Co. v. Bryant, 123 Ga. 77; Illinois Cent. R. Co. v. Haecker, 110 Ill. App. 102; McIntyre v. Orner, 166 Ind. 57, 4 L.R.A.(N.S.) 1130, 117 Am. St. 359; Chicago, etc. R. Co. v. Martin, 31 Ind. App. 308; Murphy v. Chicago G. W. R. Co., 140 Iowa 332; Kansas City L. R. Co. v. Langley, 70 Kan. 453; St. Louis, etc. R. Co. v. Brock, 69 Kan. 448; Palmer T. Co. v. Long, 140 Ky.

111; South Covington & C. St. R. Co. v. Crutcher, 135 Ky. 698; Cossett v. St. Louis & S. R. Co., 224 Mo. 97; Williamson v. St. Louis T. Co., 202 Mo. 345; Garrett v. Wabash R. Co., 159 Mo. App. 63; Blyston-Spencer v. United R. Co., 152 Mo. App. 118; Wood v. New York Cent. etc. R. Co., 83 App. Div. 604, 17 Am. Neg. Rep. 276; Rundler Slate Belt E. St. R. Co., 33 Pa. Super. 233; Gaviray Davila v. American R. Co., 1 Porto Rico Fed. 81; Thompson v. Seaboard A. L. R., 81 S. C. 333, 20 L.R.A.(N.S.) 426; Williams v. Galveston, etc. R. Co., 34 Tex. Civ. App. 145; Wilson v. Newport D. Co., L. R. 1 Ex. 177; Deegan v. Gutta Percha & R. Mfg. Co., 131 App. Div. 101; Burnett v. Atlantic C. L. R. Co., 132 N. C. 261; Serafina v. Galveston, etc. R. Co. (Tex. Civ. App.), 42 S. W. 142; Interstate C. Co. v. Love, 153 Ky. 323, 4 N. C. C. A. 456.

⁴⁷ Dixon v. New York, etc. R. Co., 207 Mass. 126; Mobile & O. R. Co. v. Ridley, 114 Tenn. 727, and cases cited; Citizens' R. Co. v. Griffin, 49 Tex. Civ. App. 569. Before a person can claim exemption from the effects of his conduct in taking a position of peril to rescue another it must appear that such other was in imminent danger because of the defendant's negligence. Wright v. Atlantic C. L. R. Co., 110 Va. 670, 25 L.R.A.(N.S.) 972.

therein, under the impulse of fear, acts in a manner which results in an injury to himself, where, had he remained calm and kept his place, he would have escaped harm, he will not thereby be precluded from recovering damages of the carrier.⁴⁸ A case arose in Massachusetts in which the immediate cause of the injury was the act of the plaintiff, and yet a defect in a highway was the proximate and efficient cause thereof, though other circumstances contributed. The alleged defect was a culvert extending across the highway and a hole at one end of the culvert. As the plaintiffs (husband and wife) were driving together in their wagon along the traveled part of the highway between the hours of eight and nine in the evening a band of musicians, a little way in advance, commenced to play, by which the horse was alarmed; this happened near the defect in the highway. In the course of the incident the wife was taken up from the ground at or near the culvert, seriously injured; but the precise manner in which she came to the ground, whether by being forcibly thrown from the wagon, by leaping from it, or by the two actions concurring, and whether the wagon did or did not come into contact with the hole were questions of fact. There was a variance between the proof and the declaration for which the judgment was reversed, but this instruction was approved: "When a party is traveling on a highway and there is a defect in it and the party, under apprehensions of an imminent peril, by the near approach of his carriage to the defect in the highway, but without or previous to actual contact with the defect, leaps from his carriage and is injured thereby, then the rule of law is this: it is an element of reasonable care on the part of the plaintiff. If the plaintiff be placed, by reason of the defect in the highway and his approach thereto, in such a situation as obliges him to adopt the alternative of a dangerous leap, or to remain at a certain peril, and he leaps and is injured, then, all the conditions of liability being fulfilled, he may recover damages of the party responsible for the repair of the

⁴⁸ Cases in two last preceding notes; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115, 7 Am. Neg. Cas.

297; *Feddeck v. St. Louis C. Co.*, 125 Mo. App. 24; *Palmer v. Warren St. R. Co.*, 206 Pa. 574, 63 L.R.A. 507.

highway.”⁴⁹ A lad aged ten years was forcibly put on a freight train and carried five miles. After being released he ran most of the distance to his home, was afterward taken sick and became permanently crippled. The jury found that this was the result of the trespass; a majority of the court refused to interfere with the verdict.⁵⁰ It is a rule of general application that the concurrence of an infant plaintiff's natural indiscretion with the defendant's negligence will not relieve the latter from responsibility for an act which results in injury to the former.⁵¹ If in consequence of an injury a wife becomes nervous and thereafter becomes pregnant, and as a result of her nervous state suffers a miscarriage the wrongful act of the defendant is the proximate cause thereof. “The perpetuation of the human race cannot be termed a voluntary act, but it rests upon instincts and desires which are fundamentally imperative.”⁵² Though the plaintiff's violation of an ordinance may prevent his recovery if the injury was sustained in consequence thereof,⁵³ that result may not follow if such violation had ceased when the injury was done though but for it he might not have been

⁴⁹ *Lund v. Tyngsboro*, 11 Cush. 563; *Flagg v. Hudson*, 142 Mass. 280, 56 Am. Rep. 674. See § 26.

⁵⁰ *Drake v. Kiely*, 93 Pa. 492. See *Emmons v. Quade*, 176 Mo. 22; *Chicago & E. I. R. Co. v. Mitchell*, 56 Ind. App. 354.

⁵¹ *Fishburn v. Burlington & N. R. Co.*, 127 Iowa, 483, 17 Am. Neg. Rep. 270, stated in note to § 19; *Brown v. C. & O. R. Co.*, 135 Ky. 798, 21 Am. Neg. Rep. 305, 25 L.R.A. (N.S.) 717; *Merschel v. Louisville & N. R. Co.*, 121 Ky. 620; *Mattson v. Minnesota, etc. R. Co.*, 95 Minn. 477, 18 Am. Neg. Rep. 511, 70 L.R.A. 503, 111 Am. St. 483; *Temple McComb City E. L. & P. Co.*, 89 Miss. 1, 11 L.R.A. (N.S.) 449, 119 Am. St. 698; *Buttron v. Bridell*, 228 Mo. 622; *Berry v. St. Louis, etc. R. Co.*, 214 Mo. 593; *Straub v. St. Louis*, 175 Mo. 413, 14 Am. Neg. Rep. 384; *Lynchburg Tel. Co. v. Booker*, 103

Va. 594, 19 Am. Neg. Rep. 514; *Olson v. Gill Home I. Co.*, 58 Wash. 151, 27 L.R.A. (N.S.) 884; *Akin v. Bradley E. & M. Co.*, 48 Wash. 97, 14 L.R.A. (N.S.) 586; *Pittsburg, etc. R. Co. v. Caldwell*, 74 Pa. 421, 10 Am. Neg. Cas. 122; *East Saginaw City R. Co. v. Bohn*, 27 Mich. 503, 9 Am. Neg. Cas. 474; *Holly v. Boston G. Co.*, 8 Gray 123, 69 Am. Dec. 233; *Stillson v. Hannibal, etc. R. Co.*, 67 Mo. 671; *Lane v. Atlantic Works*, 111 Mass. 136; *Sheridan v. Brooklyn & N. R. Co.*, 36 N. Y. 39, 9 Am. Neg. Cas. 619, 93 Am. Dec. 490. See *Singleton v. Eastern Counties R. Co.*, 7 C. B. (N. S.) 287; *Hughes v. Macfie*, 2 H. & C. 744; *Nangan v. Atterton*, L. R. 1 Ex. 239; *Lynch v. Nurdin*, 1 Q. B. 29. ⁵² *Sullivan v. Old Colony St. R. Co.*, 197 Mass. 512.

⁵³ *Newcomb v. Boston P. Department*, 146 Mass. 596, 4 Am. St. 354.

where he was when injured.⁵⁴ A person who is injured in endeavoring to protect his property from fire may recover from him who caused the fire.⁵⁵

§ 40. **Act of third person.** The innocent or culpable act of a third person may be the immediate cause of the injury and still an earlier wrongful act may have contributed so effectually to it as to be regarded in law as the efficient, or at least concurrent and responsible, cause.⁵⁶ The noted squib case is an

⁵⁴ *Jaehnig v. Ferguson*, 197 Mass. 364.

⁵⁵ *Illinois Cent. R. Co. v. Siler*, 229 Ill. 390, 15 L.R.A.(N.S.) 819; *Wilson v. Central R. Co.*, 132 Ga. 215. See § 37.

⁵⁶ *Wells Fargo & Co. v. Zimmer*, 186 Fed. 130, 108 C. C. A. 242; *Chicago v. Troy L. Mach. Co.*, 162 Fed. 678, 89 C. C. A. 470; *The J. G. Lindauer*, 158 Fed. 449; *Kleinpeter v. Castro*, 11 Cal. App. 83; *Moore v. Lanier*, 52 Fla. 353; *Central R. Co. v. Owen*, 121 Ga. 220; *Yeates v. Illinois Cent. R. Co.*, 241 Ill. 205; *Garibaldi v. O'Connor*, 210 Ill. 284, 66 L.R.A. 73; *New York, etc. R. Co. v. Hamlin*, 170 Ind. 20; *Cineinnati, etc. R. Co. v. Acrea*, 42 Ind. App. 127; *Baltimore, etc. R. Co. v. Kleespies*, 39 Ind. App. 151; *Huntington L. & F. Co. v. Beaver*, 37 id. 4; *Gardner v. Waterloo C. S. Co.*, 134 Iowa 6; *Huggard v. Glucose S. R. Co.*, 132 Iowa, 724; *Burk v. Creamery P. Mfg. Co.*, 126 Iowa, 730, 106 Am. St. 377; *Phinney v. Illinois Cent. R. Co.*, 122 Iowa, 488, 17 Am. Neg. Rep. 303; *Brower v. Western U. Tel. Co.*, 81 Kan. 109; *Watson v. Kentucky & I. B. & R. Co.*, 137 Ky. 619; *Louisville & N. R. Co. v. Lynch*, 137 Ky. 696; *Brown v. C. & O. R. Co.*, 135 Ky. 798, 25 L.R.A.(N.S.) 717 (act of third person in putting unlocked turntable in motion whereby injury to a child resulted); *Louisville Home Tel. Co.*

v. Gasper, 123 Ky. 128, 9 L.R.A.(N.S.) 548; *Sydnor v. Arnold*, 122 Ky. 557; *Lee v. Powell*, 126 La. 51; *O'Brien v. White*, 105 Me. 308; *Lockwood v. Boston E. R. Co.*, 200 Mass. 537, 22 L.R.A.(N.S.) 488; *Hollidge v. Duncan*, 199 Mass. 121, 17 L.R.A.(N.S.) 982; *Cunningham v. Atlas T. Co.*, 187 Mass. 51; *Fottler v. Moseley*, 185 Mass. 563; *Skin v. Reutter*, 135 Mich. 57, 15 Am. Neg. Rep. 86, 106 Am. St. 384, 63 L.R.A. 743; *Anderson v. Smith*, 104 Minn. 40; *Obermeyer v. Logeman C. Mfg. Co.*, 229 Mo. 97; *Smith v. Fordyce*, 190 Mo. 1; *O'Hara v. Laclede G. L. Co.*, 131 Mo. App. 428; *Estes v. Missouri Pac. R. Co.*, 116 id. 725; *Knaish v. Joline*, 138 App. Div. (N. Y.) 854; *Atchison, etc. R. Co. v. Seeger* (Tex. Civ. App.), 126 S. W. 1170; *French P. & O. Co. v. Phelps*, 47 Tex. Civ. App. 385; *Sipes v. Puget Sound E. R.*, 54 Wash. 47; *Wooding v. Jacobino*, id. 504; *Akin v. Bradley E. & M. Co.*, 48 Wash. 97, 14 L.R.A.(N.S.) 586; *United States N. G. Co. v. Hicks*, 134 Ky. 12, 23 L.R.A.(N.S.) 249, 135 Am. St. 407; *Freeman v. Missouri & K. Tel. Co.*, 160 Mo. App. 271; *Webber v. Barry*, 66 Mich. 127, 11 Am. St. 466; *Sumner v. Kinney* (Tex. Civ. App.), 136 S. W. 1192 (effects of medical treatment upon person injured); *Burrows v. March, etc. G. Co.*, L. R. 5 Ex. 67; *Lannen v. Albany G. Co.*, 44 N. Y. 459; *Guille*

example.⁵⁷ The defendant threw a squib into the market-house where it first fell; a person, to save himself, threw it off, and where it then fell it was again thrown for like reason and struck and injured the plaintiff. The defendant's act so directly caused the injury that trespass would lie. A defendant stopped his team and negligently left it in a business street without being hitched or otherwise secured. It started and ran violently along the street and collided with another team, which, though properly hitched, was frightened, broke from its fastenings and ran across the street against a horse and sleigh belonging to the plaintiff, injuring the horse. It appeared that while the de-

v. Swan, 19 Johns. 381, 10 Am. Dec. 234; Scholes v. North London R. Co., 21 L. T. (N. S.) 835; Pastene v. Adams, 49 Cal. 87; Vandenburg v. Truax, 4 Denio 464, 47 Am. Dec. 268; Lowery v. Manhattan R. Co., 99 N. Y. 158, 52 Am. Rep. 12, 12 Daly 431; Lewis v. Terry, 111 Cal. 39, 52 Am. St. 146, 31 L.R.A. 220; Grimes v. Bowerman, 92 Mich. 258, quoting the text; Chicago City R. Co. v. Cooney, 95 Ill. App. 471; Postal Tel. C. Co. v. Zoppi, 93 Tenn. 369, Choctaw, etc. R. Co. v. Hallowsay, 114 Fed. 458, 15 Am. Neg. Rep. 230, 52 C. C. A. 260, and cases cited; Coleman v. Bennett, 141 Tenn. 705; Lothian v. Rickards, 12 Aust. Com. L. R. 165; Reid v. Friendly Societies' H. Co., New Zéal. L. R. 3 C. A. 238; Southwestern Tel. & T. Co. v. Shirley (Tex. Civ. App.), 5 N. C. C. A. 784, 155 S. W. 663; Goldsmith v. Chicago, etc. R. Co., 176 Ill. App. 336; Atkeson v. Jackson Est., 72 (Wash.) 233, 5 N. C. C. A. 519, 130 Pac. 102; Campbell v. United R. Co., 243 Mo. 141; Thoreson v. St. Paul T. & L. Co., 73 Wash. 99; Louisville & N. R. Co. v. Woodford, 152 Ky. 398.

The connection between the sale of unlabeled poison and the death of a child who takes it is not broken

because its mother left the poison within the infant's reach, she not knowing it to be poison, nor by the infant's act in taking it. Wise v. Morgan, 101 Tenn. 273, 44 L.R.A. 548.

In *Sheridan v. Brooklyn & N. R. Co.*, 36 N. Y. 39, 9 Am. Neg. Cas. 619, 93 Am. Dec. 490, a child was on the platform of a car by direction of the conductor. By the rushing of another passenger for the purpose of getting off the car the child was pushed therefrom. Such conduct was not a justification to the defendant for its negligence in placing the child on the platform.

In *Macer v. Third Ave. R. Co.*, 47 N. Y. Super. 461, 5 Am. Neg. Cas. 731, the plaintiff's injuries were increased by an effort made by the defendant's servant to prevent them. The original negligence was the proximate cause.

A workman who is injured by a defective instrument used by a fellow-workman has a cause of action against the master. *Ryan v. Miller*, 12 Daly 177.

⁵⁷ *Scott v. Shepherd*, 2 W. Bl. 892, 7 Am. Neg. Rep. 582; *Owen v. Cook*, 9 N. D. 134, 47 L.R.A. 646; *Bradley v. Andrews*, 51 Vt. 530; *De Struve v. McGuire*, 25 Ont. L. R. 87, 491.

fendant's horses were running and before they had collided with the other horses a crowd of persons came into the street, halloosed and raised their hats for the purpose of stopping the horses, which caused them to swerve from the course they were taking, and in this manner they came in contact with the second team. The law was said to be well settled that when the plaintiff has been injured in his person or property by the wrongful act or omission of the defendant or through his culpable negligence the fact that a third party by his wrong or negligence contributed to the injury does not relieve him from liability. Referring to the facts, it was observed: "The running away, from the starting of the defendant's team till the collision, was a single transaction; and whatever influence the interposition of the crowd had in occasioning the collision, it was not the sole cause; the running away, which occurred through the defendant's negligence, was, in part at least, the occasion of it; both causes, therefore, in the most favorable view for the defendant, must have contributed to it; and as the defendant is responsible through his negligence for one of the agencies through which the collision occurred, under the rule we have stated, he is liable." Again: "All the consequences which actually resulted in this case from the running away of the defendant's team might, we think, reasonably have been expected to occur from the running away of any team under similar circumstances in the principal business street of a town; and the running away of the defendant's team was the efficient cause of the injury to the plaintiff's horse because it put in operation the force which was the immediate and direct cause of the injury."⁵⁸ In another case a team of horses, attached to a truck and unattended in a street, were stopped, after going a few yards, by a stranger, who, in trying to drive them to where they had been left, drove the truck against a push cart standing in the street, overturned the cart and injured the plaintiff. The negligence of the person who had charge of the horses was the proximate cause of the

⁵⁸ Griggs v. Fleckenstein, 14 Minn. 230; McDonald v. Snelling, 14 Al. 81, 1 Am. Neg. Cas. 311, 100 Am. len 292; McCahill v. Kipp, 2 E. D. Dec. 199; Billman v. Indianapolis. Smith 413; Pearl v. Macauley, 6 etc. R. Co., 76 Ind. 166, 40 Am. Rep. App. Div. (N. Y.) 70.

injury. They should not have been left in the middle of the carriage-way obstructing travel, besides subjecting other travelers to danger. The condition which authorized the by-stander to stop the horses also authorized him to drive them to a position where they would cease to be an obstruction and a menace to travel. A danger to be fairly anticipated from leaving horses unattended in a public street is that, if they start to run off, the persons who attempt to stop them may be careless or ignorant of the management of horses and thus jeopardize the safety of people on the highway. In such cases so leaving the horses is the proximate cause of the accident.⁵⁹

An assessor altered an assessment after it had been perfected and lodged with another officer and after his power over it had ceased; he altered it in such a manner that the property of the plaintiff was rated at a higher sum. The selectmen made out a rate-bill by which the plaintiff was charged with an increased amount and procured a tax warrant which they placed in the hands of the collector. The plaintiff refusing to pay the illegal portion of the tax, the selectmen, with knowledge of all the facts, directed the collector to levy and collect it. The levy was made, the plaintiff paid the tax and afterwards brought an action on the case against the assessor for the injury. The jury were rightly instructed that the action of the selectmen in directing the levy, although it might make them liable, would not affect the right of the plaintiff to recover against the defendant for the wrongful alteration and he was entitled to recover for the injury resulting from the levy.⁶⁰ An officer who makes a false return of *non est* to a summons is not relieved from liability because an order for service by publication intervened between his act and a judgment by default. Such order was the natural result of such return, and the further action of the court was the legitimate consequence of it.⁶¹ It is negligence to leave a railroad turntable in such condition that it may be revolved by children,⁶² and the negligence continues so as to

⁵⁹ Williams v. Koehler, 41 App. Div. (N. Y.) 426.

⁶⁰ Bristol Mfg. Co. v. Gridley, 28 Conn. 201, 27 id. 221, 71 Am. Dec. 56.

⁶¹ State v. Finn, 87 Mo. 310.

⁶² Koons v. St. Louis, etc. R. Co., 65 Mo. 592.

render the owner liable for an injury caused to a child by the revolving of the table by other children.⁶³ A person who has the management and control of a public place of amusement to which he invites the public, on payment of an admission fee, to attend and at which he sells to his customers intoxicating liquors, who sells to one in attendance there liquor in such quantity as to make him drunk and disorderly, well knowing that when in that condition he is likely to commit assaults upon others without provocation or cause, is bound to exercise reasonable care to protect his other patrons from the assaults and insults of such person, and for a failure to so do is liable to a person assaulted by him.⁶⁴ It is a probable consequence of an arrest that the fact may be published in a newspaper, and that the plaintiff may show in an action for false imprisonment.⁶⁵

§ 41. **Same subject.** The subject under consideration is well illustrated by those cases in which a party has suffered a special injury at the hands of third persons in consequence of the speaking of slanderous words. Where the injurious act of the third person is shown with the requisite certainty to have been the consequence of the defendant's speaking such words the action has been sustained.⁶⁶ In case for slanderous words by reason of which the plaintiff was turned out of her lodgings and employment it appeared that the defendant complained to E., the mistress of the house and his tenant, that her lodgers, of whom the plaintiff was one, behaved improperly at the windows; and he added that no moral person would like to have such people in his house. E. stated in her evidence that she dismissed the plaintiff in consequence of the words, not because she believed them, but because she was afraid it would offend her

⁶³ Nagel v. Missouri Pac. R. Co., 75 Mo. 653; Boggs v. Same, 18 Mo. App. 274; Morrison v. Kansas City, etc. R. Co., 27 id. 418; Gulf, etc. R. Co. v. McWhirter, 77 Tex. 356, 19 Am. St. 755, 12 Am. Neg. Cas. 623.

⁶⁴ Mastad v. Swedish Brethren, 83 Minn. 40, 53 L.R.A. 803; Rommel v. Schambacher, 120 Pa. 579; Moore v. Smith, 6 Ga. App. 649.

⁶⁵ Grimes v. Greenblatt, 47 Colo. 495.

⁶⁶ Sunley v. Metropolitan L. Ins. Co., 132 Iowa 123; Fuller v. Fenner, 16 Barb. 333; Hallock v. Miller, 2 Barb. 630; Moody v. Baker, 5 Cow. 351; Ward v. Weeks, 7 Bing. 211; Bateman v. Lyall, 7 C. B. (N. S.) 638; Williams v. Hill, 19 Wend. 305.

landlord if the plaintiff remained. The action was held maintainable, the special damages, which were its gist, being the consequence of the slanderous words used. The witness' statement that she did not dismiss the plaintiff because she believed the words spoken was not allowed to defeat the action. Lord Denman, C. J., said: "It would be speculating too finely on motives, and such a disposition in the court would too often put it in the power of the unwilling witness to determine a cause against the plaintiff. The proper question is whether the injury was sustained in consequence of the slanderous words having been used by the defendant."⁶⁷ But the injury must be the natural and proximate consequence. Damage caused by the repetition of the words by a third person who heard them uttered by the defendant is too remote,⁶⁸ unless the latter authorized or suggested their repetition, or there was some duty on the hearer to repeat them.⁶⁹ Such a spontaneous and unauthorized communication, it is said, cannot be considered as the necessary consequence of the original uttering of the words.⁷⁰

If the injury inflicted is not the reasonable and natural result of a wrongful act of the defendant, but was caused by such act of a third person, though it was remotely induced by defendant's conduct, he is not liable.⁷¹ Thus, in an action by one

⁶⁷ Knight v. Gibbs, 1 Ad. & E. 43.

⁶⁸ Ward v. Weeks, 7 Bing. 211; Schmidt v. Mitchell, 84 Ill. 195, 25 Am. Rep. 446.

⁶⁹ Adams v. Kelly, Ry. & Moo. 157; Parkes v. Prescott, L. R. 4 Ex. 169; Kendillon v. Maltby, Car. & M. 402; Derry v. Handley, 16 L. T. (N. S.) 263; Schoepflin v. Coffey, 162 N. Y. 12, and cases cited; Hastings v. Stetson, 126 Mass. 329, 30 Am. Rep. 683; Elmer v. Fessenden, 151 Mass. 359, 5 L.R.A. 724; Hachl v. Wabash R. Co., 119 Mo. 325.

⁷⁰ Id.: Cole v. German S. & L. Soc., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416. See Riding v. Smith, 1 Ex. Div. 91; Kelly v. Partington, 5 B. & Ad. 645; Morris v. Langdale, 2 B. & P. 284; Ashley

v. Harrison, 1 Esp. 48; Pilmore v. Hood, 5 Bing. N. C. 97; Allsop v. Allsop, 5 H. & N. 534; Bentley v. Reynolds, 1 McMull. 16, 36 Am. Dec. 251; Underhill v. Welton, 32 Vt. 40; ch. 24.

⁷¹ Ward v. Weeks, 7 Bing. 211; Jennings v. Davis, 187 Fed. 703, 109 C. C. A. 451; Beckham v. Seaboard A. L. R., 127 Ga. 550, 12 L.R.A.(N.S.) 476; Seith v. Commonwealth E. Co., 241 Ill. 252, 24 L.R.A.(N.S.) 978, 132 Am. St. 204; Haskel & B. C. Co. v. Przedzianski, 170 Ind. 1, 14 L.R.A.(N.S.) 972, 127 Am. St. 352; Claypool v. Wigmore, 34 Ind. App. 35; Stephenson v. Corder, 71 Kan. 475, 114 Am. St. 500, 66 L.R.A. 246; Logan v. Cincinnati, etc. R. Co., 139 Ky. 202;

engaged in the business of butchering for selling diseased sheep as sound and healthy it appeared that the plaintiff had engaged one G. to take some of the mutton which might be on hand and sell it; but in consequence of a report that the plaintiff had purchased the defendant's diseased sheep G. refused to perform his contract. The defendant was not liable for G.'s refusal, nor for damages suffered by the plaintiff in consequence of his customers refusing to deal with him by reason of that report.⁷² In an action against several persons, some of whom had sold the plaintiff's husband liquors on the day of his death and others of whom had done so previously, and were charged with having caused him to become an habitual drunkard, death was held to be the result of the sales last made and the fact that the liquor last obtained was drank because he was an habitual drunkard did not make those who had antecedently sold him liquor jointly liable with the other defendants, because the latter's intervening acts were independent and the proximate cause of the wrong.⁷³ This principle does not apply where the intervening act of a third person is not direct, wilful or criminal, as where a person who is intoxicated is run over by a train while lying on a track situated between his home and the place where he procured the liquor which produced that condition.⁷⁴ If there intervenes

Bellino v. Columbus C. Co., 188 Mass. 430; *McVay v. Brooklyn, etc. R. Co.*, 113 App. Div. (N. Y.) 724; *Fanizzi v. New York, etc. R. Co.*, id. 440; *Penny v. Atlantic C. L. R. Co.*, 153 N. C. 296, 32 L.R.A.(N.S.) 1209; *Baker v. Thompson*, 228 Pa. 543; *Marsh v. Giles*, 211 Pa. 17; *Chicago, etc. R. Co. v. Jackson*, 40 Tex. Civ. App. 273. See *Adler v. Pruitt*, 169 Ala. 213, 32 L.R.A.(N.S.) 889; § 1215.

⁷² *Crain v. Petrie*, 6 Hill, 522, 41 Am. Dec. 765; *Butler v. Kent*, 19 Johns. 223, 10 Am. Dec. 219.

⁷³ *Tetzner v. Naughton*, 12 Ill. App. 148. See *Shugart v. Egan*, 83 Ill. 56.

The rule is otherwise if the wrong complained of is the making of an

habitual drunkard of the plaintiff's husband. *Earp v. Lilly*, 217 Ill. 582.

⁷⁴ *Schroeder v. Crawford*, 94 Ill. 357; *Emory v. Addis*, 71 Ill. 273; *Currier v. McKee*, 99 Me. 364 (intoxicated person injured in self-defense by person whom he assaulted while intoxicated).

The Indiana court announced a rule contrary to that stated in the text in *Krach v. Heilman*, 53 Ind. 517; *Collier v. Early*, 54 Ind. 559. But these cases are much restricted by *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42, and are in effect overruled by *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 355, 3 Am. Neg. Cas. 48, 49 Am. Rep. 168.

between the defendant's act or omission a wilful, malicious and criminal act committed by a third person, which act defendant had no reason to apprehend, the connection between the original wrong and the result is broken.⁷⁵

§ 42. **Same subject.** Where the immediate cause of the injury is the wrongful act of a third person the injured party has, of course, an action against him; and this, in some early cases, was thought to bar an action against any antecedent actor more remotely responsible; but it now seems to be settled that the liability of the more immediate party does not relieve any other party whose act can properly be treated as the efficient and proximate or concurrent cause. A vendor of property, who had been paid for it, was induced by the defendant's false and malicious representation that he had a lien on it and was entitled to control its custody, to refuse to deliver it, whereby the purchaser suffered injury; he was entitled to his action although he had a remedy on his contract against the vendor. Knowingly making a false claim of lien was the *gravamen* of the action and the special damage alleged, namely, the non-delivery of the property, was sufficiently connected with the wrongful act to support the action.⁷⁶ In one case it appeared that the defendant, being about to sell a public house, falsely represented to B., who had agreed to purchase it, that the receipts were £180 a month; B. having, to the knowledge of the defendant, communicated this representation to the plaintiff, who became the purchaser instead of B., an action was maintainable for the circuitous deceit practiced.⁷⁷

A stage-coach by the negligence of the driver was precipitated into a dry canal; the lock-keeper thereafter negligently opened

⁷⁵ *Southwestern P. C. Co. v. Reitzler* (Tex. Civ. App.), 135 S. W. 237; *Shugart v. Egan*, 83 Ill. 56; *Mars v. Delaware & H. C. Co.*, 54 Hun 625; *Roach v. Kelly*, 194 Pa. 24, 75 Am. St. 685, stated in § 16; *White v. Conly*, 14 Lea 51. In the last case W. and C. quarreled and fought; during the fight W.'s son stabbed C. and caused his death.

This was done without the knowledge of W.

⁷⁶ *Green v. Button*, 2 Cr. M. & R. 707.

⁷⁷ *Pilmore v. Hood*, 5 Bing. N. C. 97. See *Langridge v. Levy*, 2 M. & W. 519; *Levy v. Langridge*, 4 id. 337; *Richardson v. Dunn*, 8 C. B. (N. S.) 655; § 1170.

the gates of the canal and a passenger was drowned therein. Under Lord Campbell's act ⁷⁸ the Irish court of queen's bench held that the death of the passenger was "caused" by the negligence of the driver. O'Brien, J., said: "The precipitation of the omnibus into the lock was certainly one cause of her death, inasmuch as she would not have drowned but for such precipitation. It is true that the subsequent letting of the water into the lock was the other and more proximate cause of her death, and that she would not have lost her life but for such subsequent act, which was not the necessary consequence of the previous precipitation by the negligence of the defendant's servant. But in my opinion the defendant is not relieved from liability for his primary neglect by showing that but for such subsequent act the death would not have ensued." ⁷⁹ A railroad company placed a push-car in the hands of a foreman to be used for specific purposes; he loaned it for another purpose, and while the borrower was using it the plaintiff was injured through the negligence of the borrower. The company was liable though such injury occurred at a time when there was no relation between it and the man who ran the car.⁸⁰ A railroad company must answer for an injury to a passenger caused by an obstacle left on its depot platform by its licensee.⁸¹

Cases may be stated where the wrongful conduct of one person affords the opportunity or occasion for the illegal acts of another or for an injury from other causes; as where a street-car driver permits boys to ride on the platform without paying fare and on their being ordered to get off one of them pushes another, who is injured. In such cases the injury is too remote,⁸² unless

⁷⁸ 9 and 10 Viet., ch. 93.

⁷⁹ *Byrne v. Wilson*, 15 Irish C. L. (N.S.) 332-342; *Eaton v. Boston, etc. R. Co.*, 11 Allen 500, 87 Am. Dec. 730; *Spooner v. Brooklyn City R. Co.*, 54 N. Y. 230, 13 Am. Rep. 570, 9 Am. Neg. Cas. 587; *Noe v. Rapid R. Co.*, 133 Mich. 152.

⁸⁰ *Erie R. Co. v. Salisbury*, 66 N. J. L. 233, 55 L.R.A. 578, 10 Am. Neg. Rep. 584. The court divided, 6 to 5.

⁸¹ *Irwin v. Missouri Pac. R. Co.*,

81 Kan. 649, 26 L.R.A.(N.S.) 739.

⁸² *Lott v. New Orleans, etc. R. Co.*, 37 La. Ann. 337, 55 Am. Rep. 500; *Cuff v. Newark, etc. R. Co.*, 16 Am. Neg. Cas. 668, 35 N. J. L. 30, 10 Am. Rep. 205; *Scholes v. North London R. Co.*, 21 L. T. (N. S.) 835; *Marks v. Rochester R. Co.*, 41 App. Div. 66. See *McGhee v. Norfolk & S. R. Co.*, 147 N. C. 142, 24 L.R.A.(N.S.) 119.

it was such as would probably result; and the same rule applies where inaction offers an opportunity for injury. The neglect of duty by bailees and agents renders them liable for losses resulting, in co-operation with such neglect by the torts of third persons.⁸³ The cases collected in the note following will give the reader an insight into various branches of the subject of consequential damages.⁸⁴

⁸³ *Norcross v. Norcross*, 53 Me. 163; *Mason v. Thompson*, 9 Pick. 280, 20 Am. Dec. 471; *Shaw v. Berry*, 31 Me. 478, 52 Am. Dec. 628; *Sibley v. Aldrich*, 33 N. H. 553, 66 Am. Dec. 745; *Sasseen v. Clark*, 37 Ga. 242; *Clute v. Wiggins*, 14 Johns. 175; *McDaniels v. Robinson*, 26 Vt. 316.

⁸⁴ *Quinette v. Bisso*, 5 L.R.A. (N.S.) 303, 136 Fed. 825, 69 C. C. A. 503; *Smith v. Maginnis*, 75 Ark. 472; *Florida East Coast R. Co. v. Wade*, 53 Fla. 620; *Chicago & E. R. Co. v. Dinius*, 170 Ind. 222; *Dobyns v. Yazoo, etc. R. Co.*, 119 La. 72; *King v. Pittsburgh, etc. R. Co.*, 13 Ohio N. P. (N. S.) 201; *Campbell v. Railway T. Co.*, 95 Minn. 375; *Luehrmann v. Laclede G. L. Co.*, 127 Mo. App. 213; *Adams v. Lancashire, etc. R. Co.*, L. R. 4 C. P. 739; *Smith v. Dobson*, 3 M. & Gr. 59; *Rigby v. Hewitt*, 5 Ex. 240; *Greenland v. Chaplin*, id. 243; *Barnes v. Ward*, 9 C. B. 392; *Collins v. Middle L. Com'rs*, L. R. 4 C. P. 279; *Harrison v. Great Northern R. Co.*, 3 H. & C. 231; *Butterfield v. Forrester*, 11 East 60; *Martin v. Great Northern R. Co.*, 16 C. B. 179; *General Steam Nav. Co. v. Mann*, 14 C. B. 127; *Holden v. Liverpool G. Co.*, 3 C. B. 1; *Cotton v. Wood*, 8 C. B. (N. S.) 568; *Flower v. Adam*, 2 Taunt. 314; *Ellis v. London, etc. R. Co.*, 2 H. & N. 424; *Singleton v. Williamson*, 7 H. & N. 410; *Skelton v. London, etc. R. Co.*, L. R. 2 C. P. 631; *Suth. Dam. Vol. I.*—11.

Thompson v. Northeastern R. Co., 2 B. & S. 106; *Bridge v. Grand Junction R. Co.*, 3 M. & W. 244; *Glover v. London, etc. R. Co.*, 3 Q. B. 25; *The Flying Fish*, 34 L. J. (Adm.) 113; *Everard v. Hopkins*, 1 Bulst. 332; *Hughes v. Quentin*, 8 C. & P. 703; *Peacock v. Young*, 21 L. T. (N. S.) 527; *Priestley v. Maclean*, 2 F. & F. 288; *Sneesby v. Lancashire R. Co.*, L. R. 9 Q. B. 263; *Smith v. Condry*, 1 How. 35, 11 L. ed. 37; *Loker v. Damon*, 17 Pick. 284; *State v. Thomas*, 19 Mo. 613; *Oil Creek, etc. R. Co. v. Keighron*, 74 Pa. 316; *Tarleton v. McGawley*, Peake 270; *Carrington v. Taylor*, 11 East, 571; *Keeble v. Hickeringill*, id. 574; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Hanover R. Co. v. Coyle*, 55 Pa. 396; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Bartlett v. Hooksett*, 48 N. H. 18; *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 396; *Dimock v. Suffield*, 30 Conn. 129; *Foshay v. Glen Haven*, 25 Wis. 288, 3 Am. Rep. 73; *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600; *Howard v. North Bridgewater*, 16 Pick. 189; *Kingsbury v. Dedham*, 13 Allen, 186, 90 Am. Dec. 191; *Tisdale v. Norton*, 8 Mete. (Mass.) 388; *Page v. Bucksport*, 64 Me. 51, 18 Am. Rep. 239, 1 Am. Neg. Cas. 289; *Bigelow v. Reed*, 51 Me. 325, 15 Am. Neg. Cas. 304; *Lake v. Milliken*, 62 Me. 240, 16 Am. Rep. 456; *Cobb v. Standish*, 14 Me. 198; *Merrill v. Hampden*, 26 Me.

§ 43. **Wilful or malicious injuries.** The authorities are not agreed as to whether, in cases of wilful or malicious injuries, injuries caused by reckless or illegal acts or by positive fraud, the damages are so strictly confined to proximate consequences as when none of these elements is present. On principle, at least where exemplary damages are allowed, it is not readily seen why the doctrine of proximate cause should be varied because of the presence or absence of facts which characterize the wrong. In Indiana the existence of any such reason is denied.⁸⁵ In Arkansas a series of cases establish the rule that mental suffering, unaccompanied by physical injury or any other element of recoverable damages, cannot be made the sub-

234; *Lawrence v. Mt. Vernon*, 35 Me. 100; *Davis v. Bangor*, 42 Me. 522; *Jewett v. Gage*, 55 Me. 538, 92 Am. Dec. 615; *Cook v. Charlestown*, 98 Mass. 80; *Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722; *Chicago v. Hoy*, 75 Ill. 530; *Pittsburgh*, etc. R. Co. v. *Iddings*, 28 Ind. App. 504; *Wallin v. Eastern R. Co.*, 83 Minn. 149, 54 L.R.A. 481; *Butler-R. Co. v. Williams*, 84 Minn. 447; *Fezler v. Willmar*, etc. R. Co., 85 Minn. 252, 11 Am. Neg. Rep. 397; *Schreiner v. Great Northern R. Co.*, 86 Minn. 245, 58 L.R.A. 75, 12 Am. Neg. Rep. 568; *Illinois Cent. R. Co. v. Seamans*, 79 Miss. 106, 12 Am. Neg. Rep. 478; *Leeds v. New York Tel. Co.*, 64 App. Div. (N. Y.) 484; *Harrison v. Weir*, 71 id. 248; *Koch v. Fox*, id. 288; *Chambers v. Carroll*, 199 Pa. 371, 16 Am. Neg. Rep. 419; *Forrow v. Arnold*, 22 R. I. 395; *Butts v. Cleveland*, etc. R. Co., 110 Fed. 329, 49 C. C. A. 69, 10 Am. Neg. Rep. 455; *Reynolds v. Pierson*, 29 Ind. App. 273; *Simonson v. Minneapolis*, etc. R. Co., 88 Minn. 89.

⁸⁵ "There is, in truth, no case that has been recognized as sound that holds that the rule as to the responsibility of the wrongdoer is different in cases of actionable negligence

from that which prevails in cases of wilful or malicious torts. There is a difference as to the measure of damages, for where the tort is malicious, exemplary damages may be recovered, but such damages cannot be recovered in cases of negligence. This consideration has, however, no influence upon the question of a negligent wrongdoer's responsibility for the consequences resulting from his act." *Indianapolis*, etc. R. Co. v. *Pitzer*, 109 Ind. 179, 189, 58 Am. Rep. 387, 8 Am. Neg. Cas. 233; *Russell v. State*, 32 Ind. App. 243; *Burnap v. Wight*, 14 Ill. 301. Compare *Kline v. Kline*, 158 Ind. 602, 58 L.R.A. 397. See *Gatzow v. Buening*, 106 Wis. 1, 49 L.R.A. 475, 80 Am. St. 17; note to *Gilson v. Delaware*, etc. C. Co., 36 Am. St. 821, in which numerous cases are summarized and the conclusion reached that there is no essential difference between the measure of liability for wilful and negligent torts, and that in both cases the injury complained of must be a natural and direct result, the only exceptions being where a wilful tort consists in the unlawful assumption of dominion over another's property and where a carrier deviates from its route. See *Luterman*

ject of an independent action for damages even where the act or neglect was wilful.⁸⁶ And if there be another ground for the recovery of damages in order that mental suffering may be recovered for it must be connected therewith though such suffering be caused wilfully; the necessary connection does not exist between the insulting conduct of an employee and the loss sustained by a passenger by having his baggage carried beyond his destination.⁸⁷ In some other states, as will be seen in the next section, such distinction is recognized. The elements stated are aggravations which juries are apt to regard in determining their verdicts and which courts consider in passing on them.⁸⁸ It was said by Baldwin, J.:⁸⁹ "When a trespass is committed in a wanton, rude and aggravated manner, indicating malice or a desire to injure, the jury ought to be liberal in compensating the party injured in all he has lost in property, in expenses for the assertion of his rights, in feeling or reputation," and to superadd to such compensation a sum for punishment. In a case of wilful negligence the trial court instructed the jury that they might take into consideration all the circumstances and see whether there was anything to satisfy them that the defendant had behaved in an improper and unjustifiable manner; and if so, they need not give damages strictly, but might give them with a liberal hand. This instruction was approved. Pollock, C. B., said: "It is universally felt by all persons who have had occasion to consider the question of compensation that there is a difference between an injury which is the mere result of such negligence as amounts to little more than an accident,

v. Romey, 143 Iowa, 233.

The intent of a defendant is material only where the act which occasions the injury is not unlawful or where it affects the amount of the recovery. Walbridge v. Walbridge, 80 Kan. 567.

⁸⁶ St. Louis, etc. R. Co. v. Taylor, 84 Ark. 42, 13 L.R.A.(N.S.) 159; Chicago, etc. R. Co. v. Moss, 89 Ark. 187; Pierce v. St. Louis, etc. R. Co., 94 Ark. 489.

⁸⁷ Chicago, etc. R. Co. v. Moss, *supra*.

⁸⁸ Merest v. Harvey, 5 Taunt. 442; Wright v. Gray, 2 Bay 464; McDaniel v. Emanuel, 2 Rich. 455; Detroit Daily Post v. McArthur, 16 Mich. 447; West v. Forrest, 22 Mo. 344; Huckle v. Money, 2 Wils. 205; McAfee v. Crofford, 13 How. 447, 14 L. ed. 217.

⁸⁹ Pacific Ins. Co. v. Conard. Baldwin 142.

and an injury, wilful or negligent, which is accompanied with expressions of insolence. I do not say that in actions of negligence there should be vindictive damages, such as are sometimes given in actions of trespass; but the measure of damage should be different according to the nature of the injury and the circumstances with which it is accompanied. . . . The courts have always recognized the distinction between damages given with a liberal and a sparing hand.”⁹⁰ For this reason all the circumstances of the injurious act are provable and to be considered by the jury.⁹¹ In an action of tort for a wilful injury to the person the manner and manifest motive of the wrongful act may be proved as affecting the damages; for when the mere physical injury is the same it may be more aggravated in its effects upon the mind if it is done in wanton disregard of the rights and feelings of the plaintiff than if it is the result of mere carelessness.⁹² The same view is expressed by another court: “The common sense of mankind has never failed to see that the damage done by a wilful wrong to person or reputation and, in some cases, to property, is not measured by the consequent loss of money. A person assaulted may not be disabled or even disturbed in his business, and may not be put to any outlay in repairs or medical services. He may not be made poorer in money directly or consequentially. He may incur no pecuniary damages whatever. . . . When the law gives an action for a wilful wrong it does it on the ground that the injured person ought to receive pecuniary amends from the wrong-doer. It assumes that every such wrong brings damage upon the sufferer, and that the principal damage is mental and not physical. And it assumes further, that this is actual and not metaphysical damage, and deserves compensation. When this is once recognized it is just as clear that the wilfulness and wickedness of the act must constitute an important element in the computation for the plain reason that we all feel our indig-

⁹⁰ *Emblen v. Myers*, 6 H. & N. 54; *Bixby v. Dunlap*, 56 N. H. 462.

⁹¹ *Braeegirdle v. Orford*, 2 M. & S. 79; *Snively v. Fahnestock*, 18 Md. 391; *Treat v. Barber*, 7 Conn. 279; *Edwards v. Beach*, 3 Day 447;

Churchill v. Watson, 5 Day 140, 5 Am. Dec. 130; *Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570.

⁹² *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383; *Booker v. Trainer* (Mo. App.), 157 S. W. 848.

nation excited in direct proportion with the malice of the offender, and that the wrong is aggravated by it.⁹³

§ 44. **Same subject.** There are, however, authorities which go to the extent of holding that where a wrong is done wilfully and with knowledge of all the facts which make the doing of it an aggravation the scope of the natural and proximate consequence of such wrong is thereby enlarged.⁹⁴ Where a tenant, whose wife was sick at the expiration of the lease was denied a reasonable time in which to vacate the premises without unnecessary risk to her, and the landlord, knowing she was pregnant and confined to her bed by heart disease, began tearing down the house, thereby making a noise and causing a dust, which aggravated the wife's illness, who, though removed from the premises the next day, died a week later, after having had a miscarriage, it was decided that the rule of the court of final appeal⁹⁵ denying a recovery for injuries due solely to fright and excitement, unaccompanied by actual, immediate, personal injury had no application. "In this case, however, the act of the defendants was in itself wrongful. It was a wilful and violent trespass upon the plaintiff's house for which an action will lie; and if the death of the plaintiff's wife can be clearly and directly traced to it as a natural and necessary consequence which they might, or should, have reasonably anticipated the

⁹³ *May v. Western U. Tel. Co.*, 157 N. C. 416, 37 L.R.A.(N.S.) 912; *Krehbiel v. Henkle*, 152 Iowa 604; *Welch v. Ware*, 32 Mich. 77; *Davis v. Standard Nat. Bank*, 50 App. Div. (N. Y.) 210; *De Leon v. McKernan*, 25 N. Y. Misc. 182; *Rigney v. Monette*, 47 La. Ann. 648; *Taylor v. Howard*, 110 Ala. 468; *Railway Co. v. Beard*, 56 Ark. 309; *Watson v. Dilts*, 116 Iowa 249, 57 L.R.A. 559. See §§ 1028, 1029.

⁹⁴ *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 161 Ky. 212; *St. Louis S. R. Co. v. Alexander* (Tex. Civ. App.), 141 S. W. 135; *Wilson v. St. Louis, etc. R. Co.*, 160 Mo. App. 649; *Prescott v. Robinson*, 74 N. H. 460, 17 L.R.A.(N.S.) 594, 124

Am. St. 987; *Gulf, etc. R. Co. v. Luther*, 40 Tex. Civ. App. 517; *Bouillon v. Laclede C. L. Co.*, 148 Mo. App. 462, citing the text (defendant's agent unlawfully entered the plaintiff's house and used violent language to her nurse, which resulted in a miscarriage by the plaintiff; defendant was liable though its agent had no knowledge of the plaintiff's condition). See *Huskie v. Griffin*, 75 N. H. 345, 27 L.R.A.(N.S.) 966, 139 Am. St. 718, and cases cited; *Lurman v. Jarvie*, 82 App. Div. (N. Y.) 37.

⁹⁵ *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 1 Am. Neg. Rep. 21, 56 Am. St. 604, 34 L.R.A. 781. See §§ 21-24.

defendants are liable even although no actual blow was struck in the course of the destruction of the building. The defendants knew her condition and the risk which was involved in their contemplated act, and it would be ridiculous to say that, without the shadow of a right, they could tear the house down from over her head with no liability for the consequences unless she chanced to be hit by a falling beam."⁹⁶ Substantially the same rule was applied where the defendant, intending to have a practical joke, represented to a married woman, who was in an ordinary state of health and mind, that her husband had met with a fearful accident; the statement was made with intent that it should be believed, and was believed; in consequence a violent nervous shock was produced which rendered the plaintiff ill. Her right to maintain an action was vindicated, and judgment rendered on a verdict for £100 on account of the injury caused by the shock.⁹⁷ In an action for maliciously and wilfully making false statements respecting the plaintiff in his capacity as an apprentice to the defendant, and which had the effect to

⁹⁶ *Preiser v. Wielandt*, 48 App. Div. (N. Y.) 569, 7 Am. Neg. Rep. 558; *Williams v. Underhill*, 63 id. 223; See quotation from *Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 38 L.R.A. 512, 5 Am. Neg. Rep. 367, in note to § 21.

In *Garrison v. Sun P. & P. Ass'n*, 207 N. Y. 1, 45 L.R.A.(N.S.) 766, (stated in § 1221) it is said: The rule must be regarded as well recognized that in an action brought for the redress of a wrong intentionally, wilfully and maliciously committed the wrongdoer will be held responsible for the injuries which he has directly caused, even though they lie beyond the limit of natural and apprehended results as established in cases where the injury was unintentional.

⁹⁷ *Wilkinson v. Downton*, [1897] 2 Q. B. 57. After referring to cases which are discussed in §§ 21-24, and admitting that the case was with-

out precedent, the court said: A more serious difficulty is the decision in *Allsop v. Allsop*, 5 H. & N. 534, which was approved by the House of Lords in *Lynch v. Knight*, 9 H. of L. Cas. 577. In that case it was held by Pollock, C. B., Martin, Bramwell, and Wilde, BB., that illness caused by a slanderous imputation of unchastity in the case of a married woman did not constitute such special damages as would sustain an action for such slander. That case, however, appears to have been decided on the ground that in all the innumerable actions for slander there were no precedents for alleging illness to be sufficient special damage and that it would be of evil consequence to treat it as sufficient, because such a rule might lead to an infinity of trumpetry or groundless actions. Neither of these reasons is applicable to the present case. Nor could such a rule

deprive the plaintiff of the employment on which he relied for support, there was a recovery for injury to the feelings. Such an accusation would naturally cause the plaintiff mental suffering and anxiety in reference not only to the estimation in which he would be likely to be held by his employer, or by others to whom the fact of his discharge might become known, but also as to its effect upon his income through the loss of his situation.⁹⁸ Mental suffering and humiliation are elements of damage for unlawful expulsion from a labor union and the publication of the fact of expulsion in its organ.⁹⁹ And such suffering may be recovered for against the members of a union causing the discharge of a workman from successive employments by threatening strikes and inflicting penalties, these things being done maliciously and oppressively and being accompanied by threats of personal violence.¹ And so where malice and insult are shown and physical inconvenience has followed.² A false accusation of dishonesty is a ground upon which recovery for mental suffering may be rested, and may be had in an action for an assault.³ One who makes an excavation which causes surface water to flood land, knowing that result will follow, cannot escape liability for the damage done by an unprecedented flood.⁴ In Vermont it is not necessary that an act be wanton in order that liability may attach for all the injurious consequences which result from it. If it is voluntary and not obligatory it is enough. Thus where the defendant shot at a fox that the plain-

be adopted as of general application without results which it would be difficult or impossible to defend. Suppose that a person is in a precarious and dangerous condition, and another person tells him that his physician has said that he has but a day to live. In such a case, if death ensued from the shock caused by the false statement, I cannot doubt that at this day the case might be one of criminal homicide, or that if a serious aggravation of illness ensued damages might be recovered. See *Nelson v. Crawford*, 122 Mich. 466, 80 Am. St. 577.

⁹⁸ *Lombard v. Lennox*, 155 Mass. 70, 31 Am. St. 528; *Lopes v. Connolly*, 210 Mass. 487, 38 L.R.A. (N.S.) 986. See *London Guarantee & Acc. Co. v. Horn*, 206 Ill. 493, 99 Am. St. 185, 101 Ill. App. 355.

⁹⁹ *St. Louis S. R. Co. v. Thompson*, 102 Tex. 89.

¹ *Carter v. Oster*, 134 Mo. App. 146.

² *Voss v. Bolzenius*, 147 Mo. App. 375.

³ *Lonergan v. Small*, 81 Kan. 48, 25 L.R.A. (N.S.) 976.

⁴ *Southern R. Co. v. Lewis*, 165 Ala. 555, 138 Am. St. 77.

tiff's dog had driven to cover and accidentally hit the dog, he was liable.⁵ Where a dog was wantonly and maliciously shot at, with intent to kill it, and was set wildly in motion and that motion continued, without the interruption of any other agency, until the dog got into its owner's house and there knocked down and injured his wife the defendant was liable for her injury.⁶ In a case in which recovery for injury to business was sought the court said: 'The defendant's conduct was so lawless and malicious that on that ground alone he might properly be held responsible for damages more indefinite than in ordinary instances where elements of malice and oppression are lacking.'⁷ In another case it was observed: We have no doubt that where the act charged was wilfully, wantonly or maliciously done, and especially where its obvious purpose was to wound, humiliate or oppress another, substantial damages may be given for the mental suffering it entailed.⁸ The wilful maintenance of a nuisance is attended with enlarged liability.⁹ And where a trespass upon property is committed other acts which may not constitute an actionable wrong may be considered in aggravation of damages—as where loud, profane and lewd language is used in the hearing of a woman in a delicate condition, though the defendant is ignorant of her condition.¹⁰ A passenger wrongfully and intentionally ejected from a car may recover for mental suffering and fright and terror if they naturally ensue.¹¹

The effect of fraud in causing a loss on the amount recoverable beyond the measure of damages in analogous cases of breach of contract and tort is manifest in many particulars. A differ-

⁵ Wright v. Clark, 50 Vt. 130, 28 Am. Rep. 496.

⁶ Isham v. Dow, 70 Vt. 588, 67 Am. St. 691, 5 Am. Neg. Rep. 106, 45 L.R.A. 87.

⁷ Gildersleeve v. Overstolz, 90 Mo. App. 518, 530.

⁸ Hickey v. Welch, 91 Mo. App. 4, 14; Cooper v. Hopkins, 70 N. H. 271, 279; Kimball v. Holmes, 60 N. H. 163; Kline v. Kline, 158 Ind. 602, 58 L.R.A. 397; Dunn v. Western U.

Tel. Co., 2 Ga. App. 845; Davidson v. Lee (Tex. Civ. App.), 139 S. W. 904. See Yazoo, etc. R. Co. v. May, 104 Miss. 422, 44 L.R.A. (N.S.) 1138.

⁹ Lawton v. Herrick, 83 Conn. 417.

¹⁰ May v. Western U. Tel. Co., 157 N. C. 416, 37 L.R.A. (N.S.) 912.

¹¹ Cincinnati N. T. Co. v. Rosnagle, 84 Ohio 310, 35 L.R.A. (N.S.) 1030.

ence is made on this ground when there is a breach of the contract to sell and convey lands and where there is a confusion of goods. Where one sells a chattel and delivers possession, so that he is taken to have warranted the title, his vendee cannot recover damages until he is dispossessed by the owner; but if he sells property with a false and fraudulent representation of ownership his vendee may recover damages for the deceit before he is disturbed in his possession and according to the measure of damages applicable to a breach of warranty.¹² It was held by Lord Kenyon that an action lay for firing on negroes on the coast of Africa and thereby deterring them from trading with the plaintiff, and that damages might be recovered for loss of their trade.¹³ Where a dealer in drugs and medicines carelessly labels a deadly poison and sends it so labeled into market he will be liable to all persons who, without fault, are injured by using it as such medicine as it purports to be.¹⁴ So a party who fraudulently sold a gun falsely representing it to have been made by a particular maker and to be well made was liable to the purchaser whose son was injured by its explosion.¹⁵ Without regard to the question of warranty a vendor of a disinfectant powder put up in a tin can who knows that it was likely to cause injury to a person who might open it, unless special care is taken in doing so, the danger not being such as presumably would be known to or appreciable by the purchaser unless warned of it, is bound to give such warning or answer for the consequences of his neglect to the purchaser.¹⁶ A person who puts up and sells canned food to a dealer is liable to a consumer for the consequences of eating it.¹⁷ In several states the expenses of the suit, above taxable costs, to obtain redress for

¹² *Case v. Hall*, 24 Wend. 102, 35 Am. Dec. 605.

¹³ *Tarleton v. McGawley*, Peake 205.

¹⁴ *Thomas v. Winchester*, 6 N. Y. 397; *Waters-P. O. Co. v. Deselms*, 212 U. S. 159, 53 L. ed. 453.

¹⁵ *Langridge v. Levy*, 2 M. & W.

519; *Levy v. Langridge*, 4 id. 337. See *Rose v. Beattie*, 2 N. & McC. 538; *Fultz v. Wycoff*, 25 Ind. 321.

¹⁶ *Clarke v. Army & N. Co-op. Soc.*, [1903] 1 K. B. 155.

¹⁷ *Tomlinson v. Armour*, 75 N. J. L. 748, 19 L.R.A.(N.S.) 923.

such wrongs, are allowed to be considered by the jury;¹⁸ but in some states it is otherwise.¹⁹

SECTION 4.

CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT.

§ 45. Recoverable only when contemplated by the parties.

In an action founded upon a contract only such damages can be recovered as are the natural and proximate consequence of its breach; such as the law supposes the parties to it would have apprehended as following from its violation if at the time they made it they had bestowed proper attention upon the subject and had full knowledge of all the facts.²⁰ As otherwise expressed, the damages which are recoverable must be incidental to the contract and be caused by its breach; such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was entered into.²¹ Direct damages are always recoverable, and consequential losses

¹⁸ *Dibble v. Morris*, 26 Conn. 416; *Roberts v. Mason*, 10 Ohio St. 278; *Seeman v. Feeney*, 19 Minn. 79; *Titus v. Corkins*, 21 Kan. 722; *Marshall v. Betner*, 17 Ala. 832; *Thompson v. Powning*, 15 Nev. 210; *New Orleans, etc. R. Co. v. Albritton*, 38 Miss. 243, 12 Am. Neg. Cas. 186, 75 Am. Dec. 98; *Stovall v. Caverly*, 139 Ga. 243, (statute).

¹⁹ *Earle v. Tupper*, 45 Vt. 274; *Howell v. Scoggins*, 48 Cal. 355.

²⁰ *Gourley v. American Hardwood Lumber Co.*, 185 Mo. App. 360; *Davis v. New England Cotton Yarn Co.*, 77 N. H. 403; *Cassell's Mill v. Strater G. Co.*, 166 Ala. 274; *St. Louis, etc. R. Co. v. Sanders*, 91 Ark. 153; *Leonard v. New York, etc. Tel. Co.*, 41 N. Y. 544, 567, 1 Am. Rep. 446; *Meyer v. Haven*, 70 App. Div. (N. Y.) 529; *Smith v. Western U. Tel. Co.*, 83 Ky. 104.

A party to a contract is chargeable with knowledge of what he observes before entering upon the per-

formance of his contract, though the latter was previously made. *Trout v. Watkins L. & U. Co.*, 148 Mo. App. 621.

Notice of the consequences of failure to deliver to a connecting carrier is in time if given after performance of the contract of carriage. See *Southern R. Co. v. Lewis*, 165 Ala. 451.

²¹ *Williams v. Barton*, 13 La. 404; *Jones v. George*, 61 Tex. 345, 354, 48 Am. Rep. 280; *Howe v. North*, 69 Mich. 272, 281; *Globe R. Co. v. Landa C. O. Co.*, 190 U. S. 540, 47 L. ed. 1171; *Owen v. United States*, 44 Ct. of Cls. 440, citing the text; *Dickerson v. Finley*, 158 Ala. 149, citing the text; *Alabama C. Co. v. Geiss*, 143 Ala. 591, citing the text; *Hooks S. Co. v. Planters' C. Co.*, 72 Ark. 275; *Erie City I. Works v. Tatum*, 1 Cal. App. 286; *Howard v. Central R. Co.*, 9 Ga. App. 617, 1017; *Illinois Cent. R. Co. v. Hopkinsville C. Co.*, 132 Ky. 578; *Mil-*

must be compensated if it can be determined that the parties contracted with them in view.²² It is not in the least essential to the existence of this liability that an actual breach of the agreement should have been in the minds of the parties or either of them. For anything which amounts to a breach of contract, whether foreseen or unforeseen, the party who is responsible therefor must answer.²³ Here an important distinction is to be noticed between the extent of responsibility for a tort and that for breach of contract. The wrong-doer is answerable for all the injurious consequences of his tortious act which, according to the usual course of events and general experience, were likely to ensue and which, therefore, when the act was committed, he may reasonably be supposed to have foreseen and anticipated.²⁴ But for breaches of contracts the parties are not chargeable with damages on this principle. Whatever foresight, at the time of the breach, the defaulting party may have of the probable consequences he is not gener-

ford v. Bangor R. & E. Co., 104 Me. 233, 30 L.R.A.(N.S.) 531; Brown v. Cowles, 72 Neb. 896; Birdsinger v. McCormick H. Mach. Co., 183 N. Y. 487, 3 L.R.A.(N.S.) 1047; Spears v. Fields, 72 S. C. 395; Sweeney v. Lewis C. Co., 66 Wash. 490, quoting the text. *Mastoras v. Chicago, M. & St. P. Ry. Co.*, 217 Fed. 153; *McFadden v. Shanley*, 16 Ariz. 91; *J. B. Carr Co. v. Southern Ry. Co.*, 12 Ga. App. 830; *Dice's Adm'r v. Zweigart's Adm'r*, 161 Ky. 646; *Erie City Iron Works v. Cushnoe Paper Co.*, 113 Me. 229; *Pipolo v. Fred T. Ley & Co.*, 216 Mass. 246; *C. W. Kettering Mercantile Co. v. Sheppard*, — N. M. —, 142 Pac. 1128; *Detmer-Wallen Co. v. Delaware, L. & W. R. Co.*, 89 Misc. (N. Y.) 252; *Cornelius v. Lytle*, 246 Pa. 205; *Lanston Mono type Mach. Co. v. Times-Dispatch Co.*, 115 Va. 797.

²² *Givens v. North Augusta E. & I. Co.*, 91 S. C. 417; *Manufacturers'*

A. S. Co. v. Galbraith, 196 Fed. 472; *Johnson v. Wild Rice B. Co.*, 116 Minn. 246; *Rhodes v. Baird*, 16 Ohio St. 581; *Brayton v. Chase*, 3 Wis. 456; *Bridges v. Stickney*, 38 Me. 361; *Paducah L. Co. v. Paducah W. S. Co.*, 89 Ky. 340, 25 Am. St. 536, 7 L.R.A. 77; *Meyer v. Haven*, 70 App. Div. (N. Y.) 529; *Feland v. Berry*, 130 Ky. 328; *New York Market G.'s Ass'n v. Adams D. G. Co.*, 115 App. Div. (N. Y.) 42; *Western U. Tel. Co. v. Crawford*, 29 Okla. 143, 35 L.R.A.(N.S.) 930; *Hoskins v. Scott*, 52 Ore. 271; *Harris v. Columbia W. & L. Co.*, 114 Tenn. 328.

²³ *Wilson v. Dunville*, 6 L. R. Ire. 210; *Hamilton v. Magill*, 12 id. 186, 202.

²⁴ *Grimes v. Bowerman*, 92 Mich. 258, quoting the text; *Western U. Tel. Co. v. Ford*, 8 Ga. App. 514; *Hillsdale C. & C. Co. v. Pennsylvania R. Co.*, 229 Pa. 61.

ally held for that reason to any greater responsibility; he is liable only for the direct consequences of the breach, such as usually occur from the infraction of like contracts and were within the contemplation of the parties when the contract was entered into as likely to result from its non-performance.²⁵

²⁵ *Hadley v. Baxendale*, 9 Ex. 341, 2 Am. Neg. Rep. 400; *Candee v. Western U. Tel. Co.*, 34 Wis. 479, 17 Am. Rep. 452; *Pacific Exp. Co. v. Darnell*, 62 Tex. 639; *Thomas, etc. Mfg. Co. v. Wabash, etc. R. Co.*, 62 Wis. 642, 51 Am. Rep. 725; *Jones v. Nathrop*, 7 Colo. 1; *Smith v. Osborn*, 143 Mass. 185; *Frohreich v. Gammon*, 28 Minn. 476; *Western U. Tel. Co. v. Hall*, 124 U. S. 444, 31 L. ed. 479; *Detroit W. L. Works v. Knaszak*, 13 N. Y. Misc. 619; *Simpson Brick-Press Co. v. Marshall*, 5 S. D. 528, citing the text; *Guetzkow v. Andrews*, 92 Wis. 214, 52 L.R.A. 209, 53 Am. St. 909; *Dwyer v. Administrators*, 47 La. Ann. 1232; *Carnegie v. Holt*, 99 Mich. 606; *North v. Johnson*, 58 Minn. 242; *Sloggy v. Crescent C. Co.*, 72 Minn. 316; *McConaghy v. Pemberton*, 168 Pa. 121; *Rockefeller v. Merritt*, 22 C. C. A. 617, 76 Fed. 909, 35 L.R.A. 633; *Central T. Co. v. Clark*, 34 C. C. A. 354, 93 Fed. 293; *Krebs Mfg. Co. v. Brown*, 108 Ala. 508, 54 Am. St. 188; *Slaughter v. Denmead*, 88 Va. 1019; *Skirm v. Hilliker*, 66 N. J. L. 410; *Witherbee v. Meyer*, 155 N. Y. 449; *De Ford v. Maryland S. Co.*, 113 Fed. 72, 51 C. C. A. 59; *Lynn v. Seley*, 29 N. D. 420; *Freeman v. Clark*, — Tex. Civ. App. —, 177 S. W. 1188; *Birmingham W. W. Co. v. Ferguson*, 164 Ala. 494, citing the text; *Same v. Vinter*, 164 Ala. 490; *Western U. Tel. Co. v. Westermoreland*, 151 Ala. 319; *Nichols v. Rasch*, 138 Ala. 372; *Crutcher v. Choctaw, etc. R. Co.*, 74 Ark. 358; *Hunt v.*

San Lorenzo W. Co., 150 Cal. 51, 7 L.R.A. (N.S.) 913, citing the text; *Williams v. Atlantic C. L. R. Co.*, 56 Fla. 735, 24 L.R.A. (N.S.) 134, 131 Am. St. 169; *Ryan C. Co. v. Gardner*, 154 Ill. App. 565; *McRae v. Hill*, 126 id. 349; *Union F. Works v. Columbia I. & S. Co.*, 112 id. 183; *Bennett v. Dyer*, 102 Me. 361; *Hetherington v. Firth Co.*, 210 Mass. 8; *Sargent v. Mason*, 101 Minn. 319, quoting the text; *American Exp. Co. v. Jennings*, 86 Miss. 329, 109 Am. St. 708, citing the text; *Frisbie v. Fidelity C. Co.*, 133 Mo. App. 30; *Hubbard v. Gould*, 74 N. H. 25; *Morton v. Witte*, 147 App. Div. 94; *Peyser v. Lund*, 89 id. 195; *Newsome v. Western U. Tel. Co.*, 153 N. C. 153; *Illinois Cent. R. Co. v. Johnson*, 116 Tenn. 624; *Hurxthal v. Boom Co.*, 53 W. Va. 87, 97 Am. St. 954; *Foss v. Hineman*, 144 Wis. 146; *St. Louis S. R. Co. v. May* (Tex. Civ. App.), 44 S. W. 408; *Lamon v. Speer H. Co.*, 198 Fed. 53, 119 C. C. A. 1; *Kopezynski v. Bolecom-V. L. Co.*, 71 Wash. 93.

The rule was strictly applied in a case in which it was held that the vendor of diseased sheep who sold them without knowledge of their condition was not responsible for damages resulting to the vendee from their being placed with cattle, the vendor not being informed this would be done. *Weaver v. Penny*, 17 Ill. App. 628. The last reason given is of doubtful cogency. See *Packard v. Slack*, 32 Vt. 9; *Smith v. Green*, 1 C. P. Div. 92, where it is said that one who sells diseased

Those damages which arise upon the direct, necessary and immediate effects are always recoverable because every person

sheep may be charged with knowledge that the purchaser intends, or is almost certain, to put them with other sheep. See also, ch. 14.

An employee who quits the service of his employer in violation of his contract is not liable for the loss of property following his act through the inability of the master to procure other help. *Riech v. Bolch*, 68 Iowa 526.

A carrier who has not contracted to transport cattle received from a connecting carrier in the cars in which they came to his care and who has no notice that they are of a kind which it is unlawful to unload in the state in which they are received is not liable to the shipper because they were seized and sold to pay a fine for such unloading, although the shipper protested against it. *McAlister v. Chicago, etc. R. Co.*, 74 Mo. 351.

Barges were not returned to their owner at the time agreed, and on account of the delay were swept from their moorings by an extraordinary ice gorge and lost. "All that the defendants could foresee by ordinary forecast as a result of the breach of their contract to return the boats would be the expense to the plaintiff in taking them himself. They are liable for damages, the primary and immediate result of the breach of their contract, and not for those which arise from a conjunction of this fault with other circumstances that are of an extraordinary nature." *Jones v. Gilmore*, 91 Pa. 310, 1 Am. Neg. Cas. 929. See *Parmalee v. Wilks*, 22 Barb. 539, stated in § 37.

For the breach of a contract to repair a tool, the loss of the material

on hand when it ought to have been repaired may be recovered for; but not the profits which might have been made by working up such material with the tool, they being unusual, considering the value of the implement, and notice not having been given him who was to repair it. *Sitton v. Maedonald*, 25 S. C. 68.

The immediate result of the breach of a contract not to engage in the hotel business within a designated city during the time the plaintiff was the proprietor of a certain hotel therein, the agreement being part of the consideration for its purchase, is the diversion of patronage therefrom; depreciation in the value of the hotel property is secondary; this last cannot be recovered for unless specially claimed. *Lashus v. Chamberlain*, 5 Utah, 140. Compare *Burckhardt v. Burckhardt*, 42 Ohio St. 474, 51 Am. Rep. 842, in which it was held that one who purchased the real estate, personal property, firm name and good-will of a partnership business might prove as an element of his damage the value of the property with and without the good will and trade-mark, and the difference in such value might, in the absence of more specific proof, be taken as the measure of damages. The Utah court remark of this case that it appears to stand alone.

The code of Georgia, expressing the rule deduced from the decisions of the court therein (*Coweta Falls Mfg. Co. v. Rogers*, 19 Ga. 417, 65 Am. Dec. 602; *Cooper v. Young*, 22 Ga. 269, 68 Am. Dec. 502; *Red v. Augusta*, 25 Ga. 386), provides that "remote or consequential damages are not allowed unless they can be

is supposed to foresee and intend the direct and natural results of his acts; those which ensue in the ordinary course of things,

traced solely to the breach of the contract or are capable of exact computation, such as the profits which are the immediate fruit of the contract and are independent of any collateral enterprise entered into in contemplation of the contract." Sec. 2944. Under this provision it has been held that the purchaser of a sawmill and outfit cannot recover against his vendor, who furnished machinery of a quality inferior to that called for by the contract, damages sustained from abandoning the business in which he had been engaged and in getting ready to use the mill, improvements made to carry on the business of running the mill loss of profits, purchase of material, payments made for help, nor for his personal services. The measure of his damages was the difference between the value of the machinery contracted for and the value of that delivered at the time of delivery, or such difference as ascertained by a resale within a reasonable time thereafter. *Willingham v. Hooven*, 74 Ga. 233, 248, 58 Am. Rep. 435.

Damages from injury to grain because of the failure of a warranted machine to work to the capacity specified, and which was sold with the understanding that it was to be used in securing a large crop, were held not recoverable; they could not be fairly considered such as would naturally arise from the breach of the contract or to have been contemplated by the parties as a probable result. *Wilson v. Reedy*, 32 Minn. 256; *Osborne v. Poket*, 33 Minn. 10, *Brayton v. Chase*, 3 Wis. 456. These cases carry the rule to the extreme. The Wisconsin case is probably over-

ruled by cases referred to in *Thomas, etc. Mfg. Co. v. Wabash, etc. R. Co.*, 62 Wis. 642, 650, 51 Am. Rep. 725. *Contra Smeed v. Foord*, 1 E. & E. 602. See ch. 14.

The breach of a contract to furnish articles to be used in completing a building does not make the contractor liable for the loss of the rent, no extrinsic facts being alleged. *Liljengren F. & L. Co. v. Mead*, 42 Minn. 420.

Though the breach of a contract to furnish guards for the shops and work-houses in a prison enables an incendiary to set fire to the building, and the loss resulting is the direct and immediate consequence of the fire, it was not, in legal contemplation, of the failure to provide a watch. *Tennessee v. Ward*, 9 Heisk. 100, 133. This ruling is open to question. The agreement to maintain a guard, considered as a precaution contracted for to insure the safety of the plaintiff's property, was such as was apparently intended to prevent, among other things, the loss which occurred, and hence that loss may properly be considered as within the contemplation of the parties when they contracted as a consequence of a breach. *Paducah L. Co. v. Paducah W. S. Co.*, 89 Ky. 340, 25 Am. St. 536, 7 L.R.A. 77. See § 672.

A warehouseman who agrees to store goods at a particular place is liable to the bailor for the loss of those intrusted to him and which are stored in another place and destroyed by fire, the latter having insured them at the place where the contract provided they were to be stored. If the destruction of the goods must have inevitably taken

considering the particular nature and subject-matter of the contract.²⁶ It is conclusively presumed that a party violating his contract contemplates the damages which directly ensue from the breach.²⁷ There are fixed rules for measuring damages of a pecuniary nature which apply to all persons without

place in the event they had been stored as agreed the bailee might have been released. *Lilley v. Doubleday*, 7 Q. B. Div. 510. To the same effect: *Mortimer v. Otto*, 206 N. Y. 89. Compare *McRae v. Hill*, 126 Ill. App. 349.

A warehouseman who neglects to ship one bale of cotton out of a larger quantity is not liable for the cost of insurance for one day on the whole lot nor for interest on money which was borrowed because of his refusal to so do, no notice having been given him of the liability of the owner for these expenses. *Swift v. Eastern W. Co.*, 86 Ala. 294.

Injury to health, feelings or reputation is not to be considered in awarding compensation for a wrongful discharge from employment. *Westwater v. Grace Church*, 140 Cal. 339.

²⁶ *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487; *Hadley v. Baxendale*, 9 Ex. 341; *Mott v. Chew*, 137 Fed. 197; *Occidental C. M. Co. v. Comstock T. Co.*, 125 Fed. 244; *Sanitary Dist. v. McMahon*, 110 Ill. App. 516; *Candler v. Washoe Lake R. etc. Co.*, 28 Nev. 151; *Dunning v. Reid*, 76 N. J. L. 384; *Smith v. Hicks*, 14 N. M. 560, 19 L.R.A. (N.S.) 938. See § 663.

One who agrees to procure an assignment of a mortgage being foreclosed and then to forbear for a specified time to enable the promisee to enforce it, and who, after procuring such assignment, sells it to one who immediately proceeds to a sale and thereby extinguishes the prom-

isee's interest in the mortgaged premises before the expiration of the agreed period of forbearance is liable for the net value of the promisee's interest. *Gallup v. Miller*, 25 Hun 298.

Recovery may be had for mental anguish resulting from breach of contract to properly embalm a body whereby decomposition sets in before burial. *Lay v. Reid*, 11 Ala. App. 231, 65 So. 855.

²⁷ *Birmingham W. W. Co. v. Ferguson*, 164 Ala. 494, quoting the three preceding propositions.

Whether the parties who entered into a contract had in mind the damages which might follow its breach or not does not in the least vary the question of their liability or the measure of recovery under ordinary circumstances; this is governed by the injury proximately resulting. *Collins v. Stephens*, 58 Ala. 543; *Dougherty v. American U. Tel. Co.*, 75 Ala. 168, 177, 51 Am. Rep. 435; *Cohn v. Norton*, 57 Conn. 480, 492, 5 L.R.A. 572; *Belt v. Washington W. P. Co.*, 24 Wash. 387; *Farmers' L. & T. Co. v. Eaton*, 114 Fed. 14, 51 C. C. A. 640; *Eckington & S. H. R. Co. v. McDevitt*, 18 D. C. App. Cas. 497.

A railroad company which violates its contract to fence its track laid through a farm is supposed to have contemplated that animals on the farm would be exposed to injury from its trains; that damage would be done by trespassing animals and pasture injured. *Louisville, etc. R. Co. v. Sumner*, 106 Ind. 55, 55

regard to their actual foresight of the particular elements. And this is also true of the direct damages from torts.²⁸

§ 46. **Illustrations of liability under the rule.** In an action to recover damages for the breach of a contract to harvest oats, where the petition stated that by reason of such breach the oats were entirely lost, the verdict given for their value was retained, the court having refused to instruct the jury that they were to be guided by the general rule of damages, namely, the difference between the contract price and what the labor would have cost, and having instructed that the plaintiff was entitled to recover the value if he took all reasonable precaution to prevent such loss.²⁹ Where³⁰ a party contracted with a manufacturer of bar iron to furnish pig iron in prescribed quantities at specified times, and made default, in consequence of which the manufacturer was obliged to get and use an inferior quality of iron in order to carry on his business, and thereby suffered loss, it was said: "When the vendor fails to comply with his contract the general rule for the measure of damages undoubtedly is the difference between the contract and the market price of the article at the time of the breach."³¹ This is for the evident reason that the vendee can go into the market and obtain the article contracted for at that price. But when the circumstances of the case are such that the vendee cannot thus supply himself the rule does not apply, for the reason of it ceases.³² . . . If an article of the same quality cannot be procured in the market its market price cannot be ascer-

Am. Rep. 719; *Same v. Power*, 119 Ind. 269; *Lake Erie & W. R. Co. v. Power*, 15 Ind. App. 179; *McDaniel v. United R. Co.*, 165 Mo. App. 678.

²⁸ *Eten v. Luyster*, 60 N. Y. 252; *Lowenstein v. Chappell*, 30 Barb. 241; *Horner v. Wood*, 16 Barb. 389; § 13.

²⁹ *Houser v. Pearce*, 13 Kan. 104. See *Prosser v. Jones*, 41 Iowa 674; *Usher v. Hiatt*, 18 Kan. 195, both favoring the view that the loss of crops in consequence of the loss of

service is too remote under ordinary circumstances. The text is cited in *Anderson Elec. Co. v. Cleburne W. I. & L. Co.*, 23 Tex. Civ. App. 328, 337.

³⁰ *McHose v. Fulmer*, 73 Pa. 365.

³¹ *Browning v. Simons*, 17 Ind. App. 45, citing the text.

³² *Bank v. Reese*, 26 Pa. 143; *Laporte I. Co. v. Brock*, 99 Iowa 485, 61 Am. St. 245, citing the text; *Chalice v. Witte*, 81 Mo. App. 84, citing the text; *Southern I. & E. Co. v. Holmes L. Co.*, 164 Ala. 517, citing the text.

tained and we are without the necessary *data* for the application of the general rule. This is a contingency which must be considered to have been within the contemplation of the parties, for they must be presumed to know whether such articles are of limited production or not. In such a case the true measure is the actual loss which the vendee sustains in his own manufacture by having to use an inferior article, or not receiving the advance on his contract price upon any contracts which he himself had made in reliance upon the fulfillment of the contract by the vendor. We do not mean to say that if he undertakes to fill his own contracts with an inferior article, and, in consequence, such article is returned on his hands, he can recover of his vendor, besides the loss sustained on his contracts, all the extraordinary loss incurred by his attempting what was clearly an unwarrantable experiment. His legitimate loss is the difference between the contract price he was to pay his vendor and the price he was to receive. This is a loss which springs directly from the non-fulfillment of the contract."

The rule under consideration was comprehensively stated in an early case.³³ In general the delinquent party is holden to make good the loss occasioned by his delinquency. His liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. Remote or speculative damages, although susceptible of proof and deducible from the non-performance, are not allowed. It was agreed between the owner of a rice mill and a planter that if the latter would bring his rice to the former's mill it should have priority in being beaten. Rice so brought was not so beaten, but was kept to await another turn, and before it was beaten the mill and the rice were consumed by an accidental fire. It was held that damages for the loss could not be assessed as the consequence of the breach of the contract.³⁴ The damages for a breach of con-

³³ *Miller v. Mariner's Church*, 7 Me. 55, 20 Am. Dec. 341.

³⁴ *Ashe v. De Rossett*, 5 Jones 299, 72 Am. Dec. 552.

Suth. Dam. Vol. I.—12.

The breach of a contract to store effects in a particular room and their removal to another room does not make the party who broke the

tract must be such as the party suffers in respect to the particular thing which is the subject of the contract, and not such as has been accidentally occasioned or supposed to be occasioned in his business or affairs.³⁵ The defendant agreed to rent to the plaintiff a store for a year, to commence some weeks in the future. Relying upon this agreement the plaintiff sold his lease of a store he then occupied to M., agreeing to give possession about the time he would be entitled to occupy the store rented of the defendant, M. allowing the plaintiff to occupy a part of the store in the meantime. The defendant refused to give the lease in accordance with his agreement. The plaintiff's goods were packed by him to put them in the space they were permitted to occupy in M.'s store, and suffered some damage therefrom. It was held that this damage was not the result of the defendant's breach of contract; nor was he entitled to interest on the value of his stock of goods, which, by the defendant's refusal to fulfill his contract, the plaintiff had been obliged to keep elsewhere and was prevented from exposing for sale for the period of fifteen days, as the defendant's act did not necessarily prevent a sale of the stock for that length of time.³⁶ In a similar case the lessor was not liable to the lessee for money paid for clerk hire nor for losses resulting from the purchase of goods. While the former may have supposed that the latter would make preparations to occupy the store he could not know what it would be necessary for him to do.³⁷ One merchant agreed with another that he would not

contract liable for their loss by fire in the room to which they were removed, though like goods in the other room were but slightly injured. *McRae v. Hill*, 126 Ill. App. 349. *Contra* *Lilley v. Doubleday*, 7 Q. B. Div. 510.

³⁵ *Coppola v. Kraushaar*, 102 App. Div. (N. Y.) 306; *Batchelder v. Sturgis*, 3 Cush. 201; *Hayden v. Cabot*, 17 Mass. 169; *State v. Thomas*, 19 Mo. 613, 61 Am. Dec. 580; *Webster v. Woolford*, 81 Md. 329; *Clark v. Moore*, 3 Mich. 55;

Johnson v. Matthews, 5 Kan. 118; *Doud v. Duluth M. Co.*, 55 Minn. 53; *Florida Cent. & P. R. Co. v. Bucki*, 16 C. C. A. 42, 68 Fed. 864.

³⁶ *Lowenstein v. Chappell*, 30 Barb. 241.

³⁷ *Cohn v. Norton*, 57 Conn. 480, 492, 5 L.R.A. 572; *Friedland v. Myers*, 139 N. Y. 432.

Loss of profits is too remote to be considered for the breach of such a contract. *Alexander v. Bishop*, 59 Iowa 572.

enter judgment on a bond given him except on a contingency named. The contract was violated, and as a result the fact that judgment was entered was published in a commercial journal known as the "Black List," with the effect of injuring the plaintiff's credit. Such publication was an event the parties could have foreseen.³⁸

A case of first impression came before one of the appellate courts of Illinois not long since. The vendor of a safe warranted it to be burglar proof if directions given for locking it were observed; these were incomplete and the safe was opened by burglars without the use of force and money therein was taken. It was said: It seems to be no undue stretch of the well-established rule that if the damages suffered be such as may reasonably be supposed to have been in the contemplation of both parties at the time of the contract as the probable result of its breach, to hold that the very intervention of the burglar was the essential element that both parties contemplated as being the thing to be guarded against and concerning which the warranty was interposed. If so, then the consequence that followed was the natural and proximate result of the breach, and the recovery was right.³⁹ A late case in the English Court of Appeal is in harmony with the view that the intervention of a criminal act of a third party does not limit the liability of the defendant.⁴⁰ A vendor of powder broke his contract to

³⁸ Blair v. Kinch, 10 L. R. Ire. 234.

³⁹ Deane v. Michigan S. Co., 69 Ill. App. 106.

A contrary view has been expressed by a divisional court in Ontario on the ground that the defects in the warranted door of a vault were not the reason the burglars broke it open, as the same result would have followed if those defects were nonexistent. *Dennison v. Taylor*, 6 Ont. L. R. 93. See *Tennessee v. Ward*, stated and criticized in note to § 45.

⁴⁰ *De La Bere v. Pearson*, [1908] 1 K. B. 280, affirming [1907] 1 K.

B. 483. The defendant undertook to give financial advice, and was applied to by the plaintiff therefor, and also for the name of a "good stockbroker." A person not a member of the exchange was recommended. The defendant knew of his non-membership, but did not know that the person recommended was an undischarged bankrupt, a fact which might have been easily ascertained. The plaintiff furnished the broker money for investment, which he immediately misappropriated. The connection between the breach of the defendant's contract and the loss of the money was sufficiently close to

furnish the plaintiff with the papers necessary to lawfully land the powder, knowing that the failure to do so would make plaintiff liable for the violation of law in attempting to import an interdicted article. The defendant was liable for the fine paid by the plaintiff.⁴¹ A corporation which deducts a part of the wages of an employee to pay a physician employed under a contract to provide competent medical service to him and his family is liable for the death of the child of the employee caused by the breach of the contract.⁴² Where there was a delay of four months in delivering a wheel and pinion to a street railway company, in consequence of which its earning power was largely reduced, the defendant, not having been apprised of the facts, was not liable for the losses.⁴³ The breach of a contract between two railroad companies which confers a license upon one of them to run its trains over the track of the other does not make the party guilty thereof liable to the other for damage sustained to property which it was unable to carry because of such violation and which it was obliged to unload from its cars at a place where it was exposed to rain and mud.⁴⁴ The damages resulting from the foreclosure of a mortgage are not proximately caused by the breach of a contract to loan the mortgagor money.⁴⁵ The lessor of personalty must deliver it in a condition for its safe use by the lessee; failing to do so, he is liable for any damages resulting from defects therein.⁴⁶ It is the proximate cause of the refusal of the purchaser of shares of stock to accept the same

impose liability for all the funds misappropriated, though they exceeded the sum specified by the plaintiff in his communication to the defendant. On the last question the judges were in some doubt, which, however, they resolved in the plaintiff's favor.

⁴¹ *Hecla P. Co. v. Sigua I. Co.*, 157 N. Y. 437; *Sutton v. Wanamaker* (N. Y. Misc.), 95 Supp. 525.

⁴² *American T.-P. Co. v. Guy*, 25 Ind. App. 558, following *Wabash R. Co. v. Kelly*, 153 Ind. 119, holding

an employer liable to an employee for the malpractice of its hospital surgeon, money being deducted from the wages of employees for the support of the hospital.

⁴³ *Central T. Co. v. Clark*, 34 C. C. A. 354, 92 Fed. 293.

⁴⁴ *Railway Co. v. Neel*, 56 Ark. 279.

⁴⁵ *Savings Bank v. Asbury*, 117 Cal. 96.

⁴⁶ *Moriarty v. Porter*, 22 N. Y. Misc. 536.

that the vendor shall become liable for assessments thereon.⁴⁷ If poor seed is sold in lieu of good, a crop of inferior quality and of less value is the natural result.⁴⁸

Where the defendant contracted to make and deliver dies to be used in the manufacture of lanterns, in which business the plaintiff's assignor proposed to engage when, so far as appeared, the dies were furnished, it was not contemplated that he would rent premises and employ men in preparation for carrying on the business to be established, the natural and obvious consequence of the breach would be to compel him to obtain dies elsewhere; the assignee of the contract, of whose connection with it the defendant had no notice, could only recover such damages as were contemplated when the contract was made.⁴⁹ Pursuant to a contract of bailment the defendant delivered to the plaintiff, without warranty, seed which he believed to be clean, which was to be sown on the plaintiff's land, the produce thereof to be returned and delivered to and paid for by the defendant at a fixed price. Such seed was not pure, and the plants grown from the foreign seed, having become scattered on the ground during the harvesting, came up the following year. The damage thus caused was too remote.⁵⁰ But it is otherwise where there is a breach by a landlord of his contract to furnish his tenant with fertilizer.⁵¹ The scope of the liability of the party in default will vary with the known objects of the parties to the contract. On the breach of a contract to furnish a side track for use for the shipment of goods which justifies the manufacturer in abandoning the enterprise undertaken in reliance thereon he may recover the expense incurred on the faith of the performance of the contract and

⁴⁷ *Gay v. Dare*, 103 Cal. 454; *Hudson v. Seeley S. Co.*, 19 Cal. App. 213.

⁴⁸ *Hoopes v. East*, 19 Tex. Civ. App. 53.

⁴⁹ *Rochester L. Co. v. Stiles & P. Co.*, 135 N. Y. 209.

⁵⁰ *Stewart v. Sculthorp*, 25 Ont. 544.

But in *McMullen v. Free*, 13 Ont. 57, the vendor of seed grain, which

was impure by reason of the presence of the seed of noxious weeds, was liable to a farmer to whom he sold such seed for the damage done his farm by reason of the growth of such weeds, though the crop raised from the seed of the grain was not injured. See § 670 *et seq.*

⁵¹ *Herring v. Armwood*, 130 N. C. 177, 57 L.R.A. 958.

losses in the removal of the plant, to the place where the facilities were to be furnished, its rental value during the period of removal and re-establishment, and the cost of transporting the goods made there to the nearest shipping point.⁵² The failure to prosecute a writ of *ne exeat* to effect as provided in a bond does not involve liability for injury to credit or reputation, or interruption or hinderance in business, or pain of body or mind; the direct effects of the breach are the costs and expenses incurred in defense of the suit, in procuring release from arrest, the loss of labor while detained and the cost of support.⁵³

§ 47. **Liability not affected by collateral ventures or financial condition of a party.** Parties, when they enter into contracts, may well be presumed to contemplate the ordinary and natural incidents and consequences of performance or non-performance; but they are not supposed to know the condition of each other's affairs, nor to take into consideration any existing or contemplated transactions, not communicated nor known, with other persons.⁵⁴ Few persons would enter into contracts of any considerable extent as to subject-matter or time if they should thereby incidentally assume the responsibility of carrying out, or be held legally affected by, other arrangements over which they have no control and the existence of which are unknown to them. In awarding damages for the non-performance of an existing contract the gains or profits of collateral enterprises in which the party claiming them has been induced to engage by relying upon the performance of such a contract, and of which no notice has been given the other party, cannot be included. In an action for breach of a warranty of a horse

⁵² *Martin v. Seaboard A. L. R.*, 70 S. C. S.

⁵³ *Burnap v. Wight*, 14 Ill. 300.

⁵⁴ *Cuscachs v. Sewerage & W. Board*, 116 La. 510; *Winslow & M. Co. v. Hoffman*, 107 Md. 621, 17 L.R.A.(N.S.) 1130; *Postal Tel. & T. Co. v. Sunset C. Co.*, 102 Tex. 148; *Foss v. Heineman*, 144 Wis. 146; *Maluey v. Hatten L. Co.*, 140 Wis.

381; *Horner v. Wood*, 16 Barb. 386; *Cuddy v. Major*, 12 Mich. 368; *Masterton v. Mayor*, 7 Hill 61; *Story v. New York R. Co.*, 6 N. Y. 85; *Bridges v. Stickney*, 38 Me. 361; *Barnard v. Poor*, 21 Pick. 378; *Fox v. Harding*, 7 Cush. 516; *Brauer v. Oceanic S. N. Co.*, 34 N. Y. Misc. 127; *Hay v. Williams*, 8 Ky. L. Rep. 434 (Ky. Super. Ct.).

the plaintiff cannot recover as special damage the loss of a bargain for its resale at a profit, though the contract for such resale had actually been completed before the unsoundness was discovered.⁵⁵ The principle that there cannot be a recovery of losses sustained because of the financial condition of the party to a broken contract is of general application.⁵⁶

§ 48. Distinction between consequential liability in tort and on contract. The distinction between the liability for consequential damages resulting from a tort and the damages recoverable for a breach of contract is forcibly illustrated by comparing an English case⁵⁷ with two Wisconsin cases.⁵⁸ In the first case a carrier negligently induced the plaintiff and his wife and child to leave the train in the night at a wrong station; no conveyance could be had, and they were obliged to take a long walk through the rain to reach their destination.

⁵⁵ *Cooper v. National F. Co.*, 132 Ga. 529; *Waynesville W. Mfg. Co. v. Berlin M. Works*, 144 N. C. 689; *Fraser v. Bentel*, 161 Cal. 390, quoting the text; *Clare v. Maynard*, 6 Ad. & El. 519; *Walker v. Moore*, 10 B. & C. 416; *Lawrence v. Wardwell*, 6 Barb. 423; *Williams v. Reynolds*, 6 B. & S. 495; *Harper v. Miller*, 27 Ind. 277; *Jones v. National P. Co.*, 13 Daly, 92; *Detroit W. L. Works v. Knazak*, 13 N. Y. Misc. 619; *Searamanga v. English*, 1 Com. Cas. 99; *Brauer v. Oceanic S. N. Co.*, 66 App. Div. (N. Y.) 605; *Witherbee v. Meyer*, 155 N. Y. 446; *Dean P. Works v. Astoria I. Works*, 40 Ore. 83.

The text is quoted with approval in *Mitchell v. Clarke*, 71 Cal. 163, 60 Am. Rep. 529, an action for the breach of a contract to pay the plaintiff's creditor a sum of money intrusted to the defendant for that purpose. Damages resulting to the plaintiff by reason of his creditor's attaching and selling his property were not the natural consequence of the breach. To the same effect

are *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534; *Cohn v. Norton*, 57 Conn. 480, 493, 5 L.R.A. 572; *Wetmore v. Pattison*, 45 Mich. 439; *Hunt v. Oregon Pac. R. Co.*, 36 Fed. 481, 1 L.R.A. 842; *Illinois Cent. R. Co. v. United States*, 16 Ct. of Cls. 312, 334; *Cates v. Sparkman*, 73 Tex. 619; *Houston, etc. R. Co. v. Hill*, 63 Tex. 384, 51 Am. Rep. 642 (allowing a recovery of profits on sales made before the breach, but denying them on sales which might have been made).

⁵⁶ *Smith v. O'Donnell*, 8 Lea 468; *Travis v. Duffau*, 20 Tex. 49; *Deyo v. Waggoner*, 19 Johns. 241.

⁵⁷ *Hobbs v. London, etc. R. Co.*, L. R. 10 Q. B. 111.

⁵⁸ *Walsh v. Chicago, etc. R. Co.*, 42 Wis. 23, 24 Am. Rep. 376; *Brown v. Same*, 54 Wis. 342, 7 Am. Neg. Cas. 203. The Walsh case is cited approvingly in *North German Lloyd S. Co. v. Wood*, 18 Pa. Super. 488, 493. See *Milford v. Bangor R. & E. Co.*, 104 Me. 233, 30 L.R.A. (N.S.) 531.

In consequence of the exposure and fatigue the wife was taken sick. The action to recover damages was considered as being brought on the contract for carriage, and they were held too remote. In the earlier of the Wisconsin cases the action was upon a contract to convey the plaintiff and about eighty others from one station to a given place and back on a named day by a special train, which was to leave on the return trip at a stated hour. It was alleged that they were conveyed to the place designated, but no cars were furnished to convey them back, and the breach was charged to be wilful and fraudulent; that by reason thereof the plaintiff was greatly injured in bodily health, suffered great pain and anxiety of mind, lost much time from business and was subjected to indignities and insults from employees of the carrier. It was held, the action being upon contract, that the trial court erred in charging that, if the defendant's conduct was wilful and malicious, the jury might award full compensatory, though not punitive, damages, "embracing such loss of time, such injury to health, such annoyance and vexation of mind, and such mental distress and sense of wrong as the jury might find was the immediate result of the defendant's misconduct, and must necessarily and reasonably have been expected to arise therefrom to the plaintiff." Such damages were too remote; they could not have been in contemplation when the contract was made. The court quoted and adopted the reasoning of the several judges in the English case. The other Wisconsin case was an action for negligence, and the facts were nearly like those in the Hobbs case. Recovery was allowed for the sickness caused by the necessary walk of the female plaintiff to her destination.⁵⁹

§ 49. **Same subject; criticism of the Hobbs case.** The doctrine of the Hobbs case which is stated in the preceding section made some impression upon the law in similar cases in a few states; its influence is most seen in cases ruled soon after the opinions of the judges who decided it were received in this country.⁶⁰ As has been stated elsewhere⁶¹ the tendency of

⁵⁹ This case is discussed in § 36, where other cases on the subject are collected.

⁶⁰ See *Walsh v. Chicago, etc. R.*

Co., 42 Wis. 23, 24 Am. Rep. 376; *Indianapolis, etc. R. Co. v. Birney*, 71 Ill. 391.

⁶¹ § 36.

American authority is in opposition to the view promulgated therein.⁶² In addition to the cases cited in the previous discussion attention is directed to a Texas decision in which the English case and those which have followed it are said to be rested upon too narrow ground⁶³ and which holds that a railway company which has violated its contract by carrying a passenger beyond his destination is liable to him for the discomfort, inconvenience, sickness, expenses, costs and charges which are the direct, natural and proximate result, and to another case in that state which ruled that a carrier must answer in an action for the breach of its contract to a passenger for personal injuries resulting from the derailment of the train in which he was being carried.⁶⁴ The Hobbs case stands but little better in England than it does in this country; indeed, it is practically overruled there. The court of appeal, queen's bench division, has unanimously held that it is a probable result of turning horses which have been transported on a railway out of a stable in which it had been contracted they should be sheltered that some of them would take cold while their owner was finding room for them elsewhere, and that damages resulting might be recovered.⁶⁵ The question has also been passed upon in Canada, and the view there taken is rested on a basis which is entirely satisfactory. In that case a passenger was ejected from a street car after an altercation with the conductor which put him in a state of perspiration; he took cold and suffered from rheumatism and bronchitis. The defendant contended that the right interfered with was

⁶² Massachusetts may be an exception to the rule, it being held there that in an action for the breach of a contract to carry on a railroad there is no connection between the agreement and the arrest of the passenger by the conductor of the train, who was a police officer and who wrongfully refused to receive the ticket tendered and delivered the passenger to another police officer by whom he was confined in a cell with the result that illness fol-

lowed. *Murdock v. Boston & A. R. Co.*, 133 Mass. 15.

⁶³ *I. & G. N. R. Co. v. Terry*, 62 Tex. 380.

⁶⁴ *El Paso & N. R. Co. v. Sawyer*, 54 Tex. Civ. App. 387. See § 934.

⁶⁵ *McMahon v. Field*, 7 Q. B. Div. 591; *Pounder v. Northeastern R.*, [1892] 1 Q. B. 385, seems to be in harmony with the Hobbs' case. But see *Cobb v. Great Western R.*, [1894] App. Cas. 419.

one of contract, and that, as the illness was not reasonably contemplated at the time the contract was made, there was no liability on account of it. The recovery on account of the illness was sustained by the divisional court and the court of appeal. It was said in the opinion of the supreme court that when one, whether in performance of a contract or not, takes charge of the person or property of another there arises a duty of reasonable care; and if by his own act he creates circumstances of danger and subjects the person or property to risk without exercising reasonable care to guard against injury or damage, he is responsible for such injury and damage as arises as the direct or natural and probable consequence of the wrongful act.⁶⁶

§ 50. **Liability under special circumstances; Hadley v. Baxendale.** The leading English case⁶⁷ on the scope of recovery for the breach of a contract established two propositions which have been very generally accepted: "Where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of

⁶⁶ Toronto R. Co. v. Grinstead, 24 Can. Sup. Ct. 570.

⁶⁷ Hadley v. Baxendale, 9 Ex. 353, 2 Am. Neg. Rep. 400.

cases, not affected by any special circumstances; from such a breach of contract.”⁶⁸ The first of these rules has been considered in the preceding sections. It is to be remembered that there is no relaxation of the rule confining the recovery to the damages naturally and proximately resulting from the breach in cases where there are such known special circumstances. Indeed, the same strictness exists to confine the recovery to the immediate consequences. The general principle of compensation is that it should be equal to the injury. It is a rule based on that principle that the amount of the benefit which a party to a contract would derive from its performance is the

⁶⁸ *Griffin v. Colver*, 16 N. Y. 489; *Rochester L. Co. v. Stiles & P. P. Co.*, 135 N. Y. 209; *Faber L. Co. v. O'Neal*, 160 Fed. 596, 87 C. C. A. 498; *Cassells' Mill v. Strater G. Co.*, 166 Ala. 274, citing the text; *Cape Girardeau & C. R. Co. v. Wingerter*, 124 Mo. App. 426, citing the text; *Clark Mfg. Co. v. Western U. Tel. Co.*, 152 N. C. 157, 27 L.R.A.(N.S.) 643, citing the text; *Fowles v. Atlantic C. L. R. Co.*, 83 S. C. 501; *Southwestern Tel. & T. Co. v. Solomon*, 54 Tex. Civ. App. 306; *Tirry v. Hogan*, — Mo. App. —, 163 S. W. 873; *Mankes v. Fishman*, 163 App. Div. (N. Y.) 789; *Merritt v. Adams County Land & Investment Co.*, 29 N. D. 496; *Missouri, K. & T. Ry. Co. v. Foote*, — Okla. —, 149 Pac. 223.

Criticisms upon the language used in the extract quoted in the text have been made by various judges and writers; but the principles enunciated therein have received general approval. Occasionally a judge intimates that the conditions of business have so changed since that case was decided that it is no longer applicable in its entirety. See *Daugherty v. American U. Tel. Co.*, 75 Ala. 168, 178, 51 Am. Rep. 435; *Wilson v. Newport*

D. Co., L. R. 1 Ex. 177; *Southern R. Co. v. Lewis*, 165 Ala. 451.

Some of the criticisms relate to the time notice of the special circumstances must be given. In some cases the rule of the principal case is varied. *Bourland v. Choctaw, etc. R. Co.*, 99 Tex. 407, 3 L.R.A.(N.S.) 1111, 122 Am. St. 647. See §§ 45, 902. It has been held that notice thereof is timely if it is given so that the damage resulting from the breach may be averted by compliance with the contract. *Baker Mfg. Co. v. Clayton*, 46 Tex. Civ. App. 384. It is said in *Harper F. Co. v. Southern Exp. Co.*, 148 N. C. 87, 30 L.R.A.(N.S.) 483, 128 Am. St. 588, that *Hadley v. Baxendale* is important rather as laying down general principles than as a decision on the particular facts. In evidence of this it may be noted that as a matter of fact the proof showed that the defendant's clerk was notified that the plaintiff's mill would be stopped while the shaft was being repaired. Just why this fact was ignored in the opinion of the judges does not appear, possibly because the notice was given the day before the shaft was delivered, which is not, it seems, a very satisfactory explanation. And in another case:

measure of his damages if it be broken.⁶⁹ It is a rule of interpretation, too, that the intention of the parties is to be ascertained from the whole contract, considered in connection with the surrounding circumstances known to them. If it appear by such circumstances that the contract was entered into, and known by both parties to be entered into, to enable one of them to serve or accomplish a particular purpose, whether to secure a special gain or to avoid an anticipated loss, the liability of the other for its violation will be determined and the amount of damages fixed with reference to the effect of the breach in hindering or defeating that object. The proof of such circumstances makes it manifest that such damages were within the contemplation of the parties. Looking alone at a contract of this character, silent as to the circumstances which were in view, such damages are consequential and sometimes appear to arise very remotely and collaterally to the undertaking violated. But when the contract is considered in connection with the extrinsic facts there is established a natural and proximate relation of cause and effect between its breach and the injury to be compensated.⁷⁰ If all such facts as are admissible to justify the proof of consequential damages were recited in the contract as the law connects them with it when

We are gratified to note that the modern tendency of judicial decisions is to break away from and leave behind the strictness of what was once supposed by some courts to be the doctrine of *Hadley v. Baxendale*. To the mind of the writer it has never seemed to be entirely right and just to permit a wrongdoer to say that he ought not to be held liable because he did not know or suppose that his wrongful conduct would cause the other party as much injury as it did. *Key, C. J., in Western U. Tel. Co. v. Goldwire* (Tex. Civ. App.), 152 S. W. 503, stated in § 969.

⁶⁹ *Atlanta, etc. R. Co. v. Thomas*, 60 Fla. 412; *Albany P. Co. v. Hugger*, 4 Ga. App. 771; *Crowley v.*

Burnes B. Mfg. Co., 100 Minn. 178; *Mudge v. Adams*, 37 Tex. Civ. App. 186; *Alder v. Keighley*, 15 M. & W. 117; *Guetzkow v. Andrews*, 92 Wis. 214, 52 L.R.A. 209, 53 Am. St. 909; *Blagen v. Thompson*, 23 Ore. 239, 18 L.R.A. 315; *Myers v. Bender*, 46 Mont. 497, citing the text.

⁷⁰ *Nelson v. Wilson*, 157 Iowa 80, (breach of contract to maintain a division fence is cause for the recovery for injury to animals resulting from their over-eating the defendant's corn, to which they got access through an insufficient fence); *Neal v. Jefferson*, 212 Mass. 517; *Johnson v. Wild Rice B. Co.*, 118 Minn. 24; *Berghuis v. Schultz*, 119 Minn. 87; *Mead v. Kalberg*, 70 Wash. 517; *Machine Co. v. Com-*

known, or if the legal obligation which the law imposes by reason of them had been expressed in words by the parties, such damages would be direct and not consequential.

In a case in Wisconsin the plaintiff was a butcher, and the defendant agreed to furnish him with what ice he might require for a season, knowing that the plaintiff needed it to preserve fresh meat. About the last of July the defendant stopped supplying ice and refused to furnish any more, in consequence of which plaintiff lost considerable meat. This loss the plaintiff recovered. The court say: "As the defendant was acquainted with all the special circumstances in respect to this contract—knew for what purpose the ice agreed to be furnished by him was to be used,—he should fully indemnify the plaintiff for the loss he sustained by the non-delivery of the ice; and he was therefore justly chargeable in damages for the meat spoiled in consequence of the inability of the plaintiff to procure ice elsewhere."⁷¹ This case was not one of simple contract of sale. The special circumstances, known to both

press Co., 105 Tenn. 187, 204, 53 L.R.A. 482, quoting the text; Choctaw, etc. R. Co. v. Rolfe, 76 Ark. 220; Skinner v. Gibson, 86 Kan. 431; Tygart v. Albritton, 5 Ga. App. 412; Gagnon v. Sperry, 206 Mass. 547; Crowley v. Burnes B. Mfg. Co., 100 Minn. 178; Trout v. Watkins L. & U. Co., 148 Mo. App. 621; Hedden v. Schneblin, 126 id. 478, citing text; Wall v. St. Joseph A. I. & C. S. Co., 112 id. 659; Harper F. Co. v. Southern Exp. Co., 148 N. C. 87, 30 L.R.A. (N.S.) 483, 128 Am. St. 588; Chislom & M. Mfg. Co. v. United States C. Co., 111 Tenn. 202, quoting the text. See § 913.

Where the article shipped is of such a character that the parties may be fairly supposed to have had in contemplation at the time of contracting the special purpose in shipping it or its present use in a given way, damages may be recovered

with reference thereto. Story L. Co. v. Southern R. Co., 151 N. C. 23.

In Fox v. Everson, 27 Hun 335, the defendant sold the plaintiff clover seed with which was mixed plaitain seed. A recovery was allowed for the difference between the value of pure seed and that actually sown and for the depreciation in value of the farm on account of the plaitain seed. It was contended that there was no liability for the last item because it was not proven that the defendant knew the seed was bought for the purpose of being sown. The contention was overruled because that is the purpose for which such seed is usually purchased. But the vendor was not apprised of the fact that the seed sold was to be mixed with timothy seed, and hence was not liable for the loss of the latter.

⁷¹ Hammer v. Schoenfelder, 47 Wis. 455. See Manning v. Fitch,

parties, made it more than that in its aims and consequences, although the terms in which it was made, considered alone, imported only a contract of sale. The vendor, knowing the purpose for which the ice was wanted, was held, by implication, to undertake to deliver it as agreed in order that the vendee should not suffer loss on his fresh meat from his inability to preserve it for want of ice. Such being the contract,

138 Mass. 273; *Beeman v. Banta*, 118 N. Y. 538, 16 Am. St. 779; *Sargent v. Mason*, 101 Minn. 319, citing the text.

The text is cited in *New Orleans, etc. R. Co. v. Meridian W.-W. Co.*, 18 C. C. A. 519, 72 Fed. 227, where it was alleged that the defendant had failed to perform its contract to furnish at the plaintiff's shops the required pressure of water, which it had contracted to furnish for all purposes for which it might be desired or used; that one of such purposes was the extinguishment of fires in the plaintiff's shops, of which the defendant had knowledge; that at the time the fire which burned the shops broke out there was less than half the required pressure, and that, in consequence, the shops were burned. A good cause of action was stated.

In *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280 (see s. c., 56 Tex. 149, 42 Am. Rep. 689), the plaintiff applied to the defendant, a druggist, for a quantity of Paris green; by mistake he was supplied with chrome green, a substance similar in appearance but not possessing the same properties. The vendor knew that the article called for was desired to prevent the destruction of the plaintiff's cotton crop by the cotton worm, which had for years been very destructive. Without knowing the mistake the chrome green was applied to the cotton, and failed to produce the desired result.

Evidence was given to show that Paris green would have had a beneficial effect. It was ruled that there was not a technical warranty that Paris green was delivered, but an implied contract that such was the fact. In answer to the contention that it is not enough to entitle a party to recover damages for breach of contract to show that without the breach relied on the injury would not have been received when it results from an unforeseen or unexpected cause, or from a cause which no reasonable human exertion could counteract, the court observed, "but if it appears that the contract was made for the express purpose of avoiding a loss likely to occur from a known natural cause, which could be controlled and avoided; that this was known to the contracting parties, and that compliance with the contract would have prevented the injury by destroying the thing which immediately inflicts it, then it is believed that the breach of such a contract must be said, within the meaning of the law, to be the direct cause of the injury. In such case there is 'an immediate and natural relation between the act complained of and the injury without the intervention of other and independent cause;' for a cause which is subject to control and contemplated by the parties to a contract, looking to its avoidance or control, cannot be said to be an 'independent cause.'"

the loss which occurred from its breach was the direct consequence thereof. It is to be observed that the implication from the vendor's knowledge of the special circumstances required the performance of no additional act to fulfill the contract. It merely enjoined on him the duty to perform it in view of more serious consequences than those which usually follow a vendor's default. The principle that the injured party is entitled to compensation proportioned to the actual injury is paramount, and overrides any rule not adapted to measure compensation in such a special case. The vendor is thus admonished that if he fails to deliver the property as agreed he cannot satisfy the injury to the vendee by paying the difference of a higher market price unless the article can be obtained in market; that the loss will be the value of the property which the ice was needed to preserve.⁷² Where a vendor broke his contract to supply ice to a local dealer for the entire season at a fixed price, the latter recovered the increased price he was obliged to pay for ice bought from other parties and for the loss of profits he would have realized from his business from the time he was compelled to suspend the same because of inability to procure ice from any source.⁷³

⁷² The contract in suit provided that the manufacturer should furnish, deliver and put in running order by a specified day machinery for a cotton-seed oil mill. By reason of a breach a quantity of seed purchased for grinding was damaged. Parol evidence was received to show that time was of the essence of the contract, and that the purchase of seed in advance of the period fixed or the completion of the mill was within the contemplation of the parties. *Van Winkle v. Wilkins*, 81 Ga. 93, 12 Am. St. 299; *Dennis v. Stoughton*, 55 Vt. 371; *Goodloe v. Rogers*, 10 La. Ann. 631; *Lobdell v. Parker*, 3 La. 328. Compare *Brayton v. Chase*, 3 Wis. 456, which is inconsistent with *Hammer v. Schoenfelder*, 47 id. 455, stated *supra*.

⁷³ *Border City I. & C. Co. v. Adams*, 69 Ark. 219.

In a late case in one of the Texas courts of civil appeals the general rule was applied because the court was bound by the rulings of the supreme court. It was said, however, that, so far as the carrier is concerned, it could not have declined to accept the shipment; it could not have enforced a stipulation against its negligence, nor have charged more nor less than the fixed rate. "The notice given after the freight was shipped and before it was delivered did not impose an additional contract upon it. It required it to do no more than it had previously contracted to do, and that was to forward the freight with reasonable promptness, and notice of the special

§ 51. Same subject; illustrations and discussion of the rule.

In a case ⁷⁴ in which the plaintiff had contracted to sell a large quantity of bullets of a certain quality and at a fixed price, he made a contract with the defendant by which the latter agreed to manufacture and deliver to him the same quantity and quality of bullets; at the time of making it he informed the defendant of his arrangement and that he was contracting with him for the bullets in order to fulfill that agreement. The contract between these parties was in writing, but did not contain any allusion to the special object of making it. It was held, notwithstanding, that it was competent to prove such antecedent contract and parol proof was admissible to establish that the defendant was informed that the plaintiff made the contract in question with a view to performing the other; and that the proper measure of damages was the difference between the price at which the defendant was to furnish the bullets and that the plaintiff was to receive. It appeared that the market price advanced so that the bullets could not be obtained below the latter price; the market price was considerably higher, but the recovery was limited as above stated, for that gave the plaintiff compensation for his actual loss, and that was in contemplation by the parties when the contract was made. Where the contract relates to commodities commonly purchasable in the market the purchaser is made whole when he recovers the difference between the contract price and the value of the article in the market at the time and place of delivery, because he can supply himself with this article by going into market and making his

damages that would accrue to the consignee by reason of continued delay in such shipment, given after the shipment had begun, would just as effectually enable the railway company to guard against further breach of its contract as would such notice given at the time the contract was made. To our minds damages arising from the breach of a contract, after notice is given of the consequences of such breach, are

just as much within the contemplation of the party breaching said contract as if such notice had been given at or before the contract was made, where no additional contractual obligations are sought to be imposed by reason of such notice." *Hassler v. Gulf, etc. R. Co.*, (Tex. Civ. App.) 142 S. W. 629.

⁷⁴ *Messmore v. New York S. & L. Co.*, 40 N. Y. 422.

purchase at such price, and these are all the damages he is ordinarily entitled to recover, for nothing beyond this was within the contemplation of the parties when they contracted.⁷⁵ If, however, the vendor knows that the purchaser has an existing contract for a resale at an advanced price and that the purchase is made to fulfill such a contract the profits on such resale are those contemplated by the parties. In other words, on the ordinary contract of sale the damages contemplated are those which would result with reference to market value if the subject of the contract have such a value; otherwise, on the basis of its actual value as it may be ascertained by proof or for the use to which the property is commonly applied, whether known or not.⁷⁶ But if the contract of purchase is made with a view to a known resale already contracted or any known special use the damages which are contemplated to result from the vendor's breach are those which would naturally follow on the basis of the contract for resale or other special use, known to the vendor when the contract was made. The contemplation of damages will include such as ordinarily arise according to the intrinsic nature of the contract and the surrounding facts and circumstances made known to the parties at the making of it.⁷⁷

⁷⁵ *Wiggins v. Jackson*, 31 Okla. 292, quoting the text. See § 651 *et seq.*

⁷⁶ *Rhodes v. Baird*, 16 Ohio St. 573; *Borries v. Hutchinson*, 18 C. B. (N.S.) 465; *Coles v. Standard L. Co.*, 150 N. C. 183.

⁷⁷ *Lillard v. Kentucky D. & W. Co.*, 134 Fed. 168, 67 C. C. A. 74; *Lazier G. E. Co. v. Dubois*, 130 Fed. 834, 65 C. C. A. 172; *Ramsey v. Capshaw*, 71 Ark. 408; *Pulaski S. Co. v. Miller's Creek L. Co.*, 138 Ky. 372; *Carlson v. Stone-O.-W. Co.*, 40 Mont. 434; *Shurter v. Butler*, 43 Tex. Civ. App. 353; *Tulane Educational Fund's Adm'rs v. Baccich*, 129 La. 469; *Davis v. Talcott*, 14 Barb. 611; *Cobb v. I. C. R. Co.*, 38 Iowa 601; *Haven v. Wakefield*, 39 Ill.

509; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128; *Wienne v. Kelley*, 34 Iowa, 339; *Van Arsdale v. Rundel*, 82 Ill. 63; *Rogers v. Bemus*, 69 Pa. 432; *Hineckley v. Beckwith*, 13 Wis. 31; *Leonard v. New York, etc. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Hexter v. Knox*, 63 N. Y. 561; *True v. International Tel. Co.*, 60 Me. 9; *Fletcher v. Tayleur*, 17 C. B. 21; *Squire v. Western U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Cory v. Thames I. Works Co.*, L. R. 3 Q. B. 181; *Borradale v. Bruntun*, 8 Taunt. 535; *In re Trent & H. Co.*, L. R. 6 Eq. 396; *Dobbins v. Duquid*, 65 Ill. 464; *Richardson v. Chynoweth*, 26 Wis. 656; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Benton v. Fay*, 64 Ill. 417;

Suth. Dam. Vol. I.—13.

This may be illustrated by several cases. Plaintiff was a coal merchant and had contracted to supply coal to steamers; he had also contracted for coal with the defendant, who knew the purpose for which the coal was wanted. The defendant broke its contract by failing to furnish coal as fast as it was needed; in consequence a steamer was delayed, a claim made on the plaintiff for damages and a suit brought to enforce that claim. The defendant refused to defend such suit, which was defended by the plaintiff, who satisfied the judgment therein and then sued the defendant for reimbursement. His right to recover was held to be within the rule of *Hadley v. Baxendale*.⁷⁸ In another case⁷⁹ the defendant supplied a defective chain to a firm of stevedores for use in discharging a cargo from a vessel owned by a third party. He was taken to have known that such firm would employ men to do the unloading, and was liable for the injury received by a man so employed through a defect in the chain, notwithstanding such defect might have been discovered by the employer in the exercise

Grindle v. Eastern Exp. Co., 67 Me. 317, 24 Am. Rep. 31; *Hamilton v. Magill*, 12 L. R. Ire. 186, 204; *Kramer v. Messner*, 101 Iowa 88; *Guetzkow v. Andrews*, 92 Wis. 214, 52 L.R.A. 209, 53 Am. St. 909; *Aguis v. Great Western C. Co.*, [1897] 1 Q. B. 413; *Chalice v. Witte*, 81 Mo. App. 84; *Uhlig v. Barnum*, 43 Neb. 584; *Waco Artesian W. Co. v. Cauble*, 19 Tex. Civ. App. 417; *Drug Co. v. Byrd*, 92 Fed. 290, 34 C. C. A. 351; *Central T. Co. v. Clark*, id. 354, 92 Fed. 293; *Liman v. Pennsylvania R. Co.*, 4 N. Y. Misc. 539, citing the text; *Blagen v. Thompson*, 23 Ore. 239, 18 L.R.A. 315; *Machine Co. v. Compress Co.*, 105 Tenn. 187, 53 L.R.A. 482; *M'Neil v. Richards*, [1899] 1 Ire. 79; *Hirschhorn v. Bradley*, 117 Iowa 130; *Trigg v. Clay*, 88 Va. 330, 335, 29 Am. St. 723. See § 695 and § 861, in which *Lepa v. Rogers*, [1893] 1 Q. B. 31, is fully stated;

also *United States T. Co. v. O'Brien*, 143 N. Y. 284, stated in § 861.

The failure to deliver as agreed an article not obtainable in the market may be cause for imposing liability for the loss of profits on a resale and also for increased expense on account of freight and insurance because of the delay. There cannot be a recovery for the loss sustained by the purchaser on account of a subsale unless the vendor had notice of it. *Borries v. Hutchinson*, 18 C. B. (N.S.) 445; *Hinde v. Liddell*, L. R. 10 Q. B. 265.

⁷⁸ *Aguis v. Great Western C. Co.*, [1899] 1 Q. B. 413, approving *Hammond v. Bussey*, 20 Q. B. Div. 79, and doubting *Baxendale v. London, etc. R. Co.*, L. R. 10 Ex. 35, and *Fisher v. Val de Travers A. Co.*, 1 C. P. Div. 511; *Scott v. Foley*, 5 Com. Cas. 53.

⁷⁹ *Mowbray v. Merryweather*, [1895] 1 Q. B. 857, [1895] 2 id. 640.

of reasonable care. Such injury was the natural consequence of the defect. The defendant's agent guaranteed that a theater troupe to whom he sold tickets should arrive at their destination by a stated time, which they did not do. A recovery was allowed of the damages sustained by missing engagements on account of the delay, but not for missing other engagements because of the breaking up of the troupe through failure to pay its members, which failure resulted from the loss of the money which would have been received from keeping the first-mentioned engagements; that result could have been avoided by a like sum of money realized from any other source.⁸⁰ The defendant contracted with the owner of a vessel to tow her to a designated point, where she was to be loaded, and to keep a tug there for the removal of the vessel. No tug was kept there in pursuance of the contract, and none was available for service there. The defendant failed to move the vessel to a place of safety, and in consequence of a storm she was greatly damaged and was sunk. The liability of the defendant was co-extensive with the loss suffered by the plaintiff.⁸¹ And the same measure of liability attends the breach of a contract to admit a ship into a dock at a given time, if she is lost in consequence of being left in a position of danger.⁸²

The breach of a contract for building a motor railway, entered into for the purpose of securing by performance the enhancement of the value of land, renders the party in default liable for the loss of the profits the purchaser of such land would have made if the road had been built.⁸³ But this rule does not apply as a defense to an action by a railroad company upon a subsidy contract.⁸⁴ One who has broken his contract with the stockholders of a corporation to loan it money is not bound to foresee that they would give their notes to another as a bonus

⁸⁰ *Foster v. Cleveland, etc. R. Co.*, 56 Fed. 434. See note to § 52.

⁸¹ *Loud L. Co. v. Peter*, 20 Ohio C. C. 73; *Boutin v. Rudd*, 27 C. C. A. 526, 82 Fed. 685.

⁸² *Wilson v. Newport D. Co., L. R.* 1 Ex. 177.

⁸³ *Blagen v. Thompson*, 23 Ore. 239, 18 L.R.A. 315; *Belt v. Washington W. P. Co.*, 24 Wash. 387. See § 703.

⁸⁴ *Coos Bay R. Co. v. Nosler*, 30 Ore. 547.

to obtain a loan, and is not liable for the value of their shares.⁸⁵

§ 52. **Market value; resale; special circumstances.** Where an article without market value was bargained for for a particular and exceptional purpose, unknown to the seller, the vendor was liable for the damages which would have been sustained if it had been used for the purpose for which he supposed it would be used.⁸⁶ If the vendor has notice that his vendees have contracted to resell the article he will be liable for the loss of profits by such resale if he fails to fulfill his contract, though he was not informed of the price in the contract to resell, unless there is a market value for the article or the reselling price is of an unusual or exceptional character.⁸⁷ Since the decision of *Hadley v. Baxendale*⁸⁸ the rule first stated in that case for ascertaining damages which are recoverable for breach of contract, namely, that they be such as arise "naturally, i. e., according to the usual course of things from such breach of contract itself," has been generally assented to; as also what is said in the opinion of Alderson, B., to the effect that if a contract be made under special circumstances, which are unknown to the party breaking it, they cannot be taken into consideration for the purpose of enhancing the damages; that such a defaulting party, at the most, can only be supposed to have had in his contemplation the amount of injury which would arise from such a breach generally in the great multitude of cases unaffected by special circumstances.⁸⁹ His

⁸⁵ *Kelly v. Fahrney*, 38 C. C. A. 103, 97 Fed. 176.

⁸⁶ *Cory v. Thames I. Works Co.*, L. R. 3 Q. B. 181.

⁸⁷ *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487; *Horne v. Midland R. Co.*, L. R. 8 C. P. 131; *Lewis v. Rountree*, 79 N. C. 122; *Guetzkow v. Andrews*, 92 Wis. 214, 52 L.R.A. 209, 53 Am. St. 909; *Snell v. Cottingham*, 76 Ill. 161; *Kirby L. Co. v. Cummings*, 57 Tex. Civ. App. 291, citing the text.

⁸⁸ 9 Ex. 341.

⁸⁹ *Griffin v. Colver*, 16 N. Y. 490;

Western U. Tel. Co. v. Graham, 1 Colo. 230; *Sanders v. Stuart*, 1 C. P. Div. 326; *Great Western R. Co. v. Redmayne*, L. R. 1 C. P. 329; *Masterton v. Mayor*, 7 Hill 61; *Cuddy v. Major*, 12 Mich. 368; *Johnson v. Mathews*, 5 Kan. 118; *Lawrence v. Wardwell*, 6 Barb. 423; *Portman v. Middleton*, 4 C. B. (N. S.) 322; *Gee v. Lancashire, etc. R. Co.*, 6 H. & N. 211; *Hales v. London, etc. R. Co.*, 4 B. & S. 66; *Travis v. Duffau*, 20 Tex. 49; *Fox v. Harding*, 7 Cush. 516; *Dickerson v. Finley*, 158 Ala. 149, citing this section; *Hooks S.*

observations, however, in favor of a more extended liability, embracing damages brought within the contemplation of the parties at the time of contracting by communication of special circumstances, have been the subject of some criticism and conflict of opinion. In England, however, the cases have been uniformly decided in conformity to the doctrine of that case;⁹⁰ but there have been *dicta* in several of a contrary tendency, especially with reference to its application to carriers, who were supposed to have no option to refuse to accept goods offered for transportation, in view of enlarged responsibility on account of special circumstances unless an increased compensation be paid.⁹¹ The tendency of the decisions there ap-

Co. v. Planters' C. Co., 72 Ark. 275; Albany P. Co. v. Hugger, 4 Ga. App. 771, citing the text; Clyde C. Co. v. Pittsburg, etc. R. Co., 226 Pa. 291, 26 L.R.A.(N.S.) 1191.

Delay in shipping goods is not attended with liability for an increased customs duty which takes effect intermediate the date when they should have arrived if there had been no delay and the date when they reached their destination. Emu Gravel & R. Co. v. Gibson, 3 New South Wales St. Rep. 204. See Commonwealth, P. C. Co. v. Weber, *id.* 516.

⁹⁰ Agius v. Great Western C. Co., [1899] 1 Q. B. 413.

If the goods contracted for are of a particular shape and description, and the party who is to furnish them knows that the contract is substantially like one the purchaser has made with a customer of his, and that it is made to enable the purchaser to fulfill such contract, and there is no market for the goods, the latter may recover as damages for the breach the profit he would have made had he been able to supply his customer, and also damages recovered against him by the latter for the resulting breach. In esti-

mating such last-mentioned damages the judgment of a foreign court will be regarded as establishing a reasonable sum for their computation. The liability of the purchaser to his customer for a penalty if he failed to keep his contract with him must have been known to the original vendor. Grebert-Borgnis v. Nugent, 15 Q. B. Div. 85.

⁹¹ See §§ 900, 913, 914. In *Borries v. Hutchinson*, 18 C. B. (N. S.) 445, and in *Smeed v. Foord*, 1 E. & E. 602, the damages were larger and the recovery sustained by reason of the defendant having notice of the purpose of the other party in making the contract. *Hobbs v. London, etc. R. Co.*, L. R. 10 Q. B. 111; *Smith v. Green*, 1 C. P. Div. 92; *Simpson v. London, etc. R. Co.*, 1 Q. B. Div. 274; *Wilson v. General I. S. Co.*, 47 L. J. (N. S.) (Q. B.) 239.

See, as to the liability of carriers and the particularity of the notice they are entitled to as a condition precedent to liability for unusual damages, *British Columbia S. M. Co. v. Nettleship*, L. R. 3 C. P. 499; *Horne v. Midland R. Co.*, L. R. 7 C. P. 583, 8 *id.* 136.

In *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473 (ap-

pears to be to require the special purpose of the contract to be so far in view when the contract is made that it is reason-

proved in *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. 85), the plaintiff contracted for the purchase of wheels and axles, he designed to use in the manufacture of wagons; and the wagons he had contracted to sell and deliver to a Russian company by a certain day, or forfeit two roubles a wagon per day. The defendant, who contracted to sell the wheels and axles, was informed of the other contract, but not of the amount of the penalties. Some delay occurred in the plaintiff's deliveries, by the defendant's fault, and in consequence the plaintiff had to pay £100 in penalties; and the action was brought to recover that sum of the defendant. There was no market in which the goods could be obtained, and it was therefore contended in behalf of the defendant that only nominal damages could be recovered. The court held the defendant liable for substantial damages, not for the penalties the plaintiff had been obliged to pay, the defendant having no notice of them, but the reasonable value of the use of the wagons during the delay. A verdict of £100 was sustained. But the court, by Blackburn, J., remarked: "If we thought that this amount could only be come at by laying down as a proposition of law that the plaintiffs were entitled to recover the penalties actually paid to the Russian company, we should pause before we allowed the verdict to stand." After referring to *Hadley v. Baxendale* he continued: "But an inference has been drawn from the language of the judgment, that whenever there has been notice, at the time of the contract, that some unusual consequence is likely to ensue, if the con-

tract is broken the damages must include that consequence; but this is not, as yet, at least, established law. In *Mayne on Damages* (p. 10, 2d ed. by Lumley Smith), in commenting on *Hadley v. Baxendale*, 2 Am. Neg. Rep. 400, it is said: 'The principle laid down in the above judgment, that a party can only be held responsible for such consequences as may be reasonably supposed to have been in the contemplation of both parties at the time of making the contract, and that no consequence which is not the necessary result of a breach can be supposed to have been so contemplated, unless it was communicated to the other party, are, of course, clearly just. But, it may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to show that he was told that he would be answerable for them, and consented to undertake such a liability. . . . The law says that every one who breaks a contract shall pay for its natural consequences; and, in most cases, states what those consequences are. Can the other party, by merely acquainting him with a number of further consequences, which the law would not have implied, enlarge his responsibility, without any contract to that effect?' We are not aware of any case in which *Hadley v. Baxendale* has been acted upon in any such way as to afford an answer to the learned author's doubts; and, in *Horne v. Midland R. Co.*, L. R. 8 C. P. 131, much that fell from the judges in the exchequer chamber tends to confirm those doubts." In this case the court held that the

able to infer a tacit acceptance of it as made for the accomplishment of that object, and a tacit consent to be bound to

plaintiff was not entitled to damages for the delay, exceeding the penalty he was bound for and had paid to his vendee.

In *Hinde v. Liddell*, L. R. 10 Q. B. 265, the defendant contracted to supply the plaintiff two thousand pieces of grey shirtings, to be delivered on the 20th of October, certain, at so much per piece, the defendant being informed that they were for shipment. Shortly before the 20th of October the defendant informed the plaintiff that he would be unable to complete his contract by the time specified; and, thereupon, the plaintiff endeavored to get the shirtings elsewhere, but, there being no market in England for it, that kind of shirtings could only be procured by a previous order to manufacture it. The plaintiff, therefore, in order to ship according to his contract with his sub-vendee, procured two thousand pieces of other shirtings, of a somewhat superior quality, at an increase of price, which the sub-vendee accepted, but paid no advance in price to the plaintiff who recovered against the defendant the excess over the contract price.

In *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. 85, it is said that a vendor who contracts with a purchaser knowing that the latter has a foreign customer for the articles contracted for must understand that if such purchaser fails to fulfill his contract he will be liable to his customer for damages: and while the judgment of a foreign court will not be held binding as to the amount of damages, it will be assumed that the sum fixed thereby is reasonable.

In *Simpson v. London, etc. R. Co.*, 1 Q. B. Div. 274, the plaintiff, a

manufacturer of cattle food, was in the habit of sending samples of his goods to cattle shows, with a show tent and banners, and attending there himself to attract custom. He intended to exhibit some of these samples at the Newcastle show, and delivered them for transmission to the defendants. The contract was made with the defendants' agent at a cattle show at Bedford, where the plaintiff had been exhibiting his samples, and where the defendants had an agent and office on the show ground for the purpose of seeking traffic. The evidence as to the terms of the contract was that a consignment note was filled up by the plaintiff's son consigning the goods as "boxes of sundries" to "Simpson & Co., the show ground, Newcastle on Tyne," and that he indorsed the note "must be at Newcastle on Monday certain," meaning the next Monday, the 20th of July. Nothing was expressly said as to the plaintiff's intention to exhibit the goods at Newcastle, nor as to the goods being samples. They did not arrive until several days after time, and when the show was over. It was found that the plaintiff obtained custom by exhibiting his samples at shows, but no evidence was given as to his prospects with regard to the Newcastle show in particular. A verdict by consent was entered for £20 beyond a sum which had been paid in, with leave to move to enter the verdict for the defendants, if the court should be of opinion that the plaintiff was not entitled to recover for either loss of time in waiting for the goods or loss of profits. It was held that the plaintiff was entitled to the verdict. Cockburn, C. J., said: "The

more than the ordinary damages, in case of default, on that account; otherwise the damages in respect to that object are not deemed to have been within the contemplation of the parties. This is probably also the doctrine of the American courts.⁹² The parties are not supposed to actually intend to pay damages by any other than a legal standard unless they formally

law, as it is to be found in the reported cases, has fluctuated; but the principle is now settled that, whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object." See *Kennedy v. American Exp. Co.*, 22 Ont. App. 278.

In *Jameson v. Midland R. Co.*, 50 L. T. Rep. 426, the plaintiff delivered a parcel at the defendant's office addressed to M., Stand 23, Show Ground, etc.; nothing was said by him. The label so addressed was sufficient notice that the parcel was being sent to a show, and the defendant was liable for the loss of profits and expenses resulting from its delay.

⁹² Notice to a carrier, after goods have been shipped, of circumstances which render special damages a probable consequence of delay does not affect the original contract so as to render it liable for such damages although the subsequent delay is unreasonable. *Bradley v. Chicago, etc. R. Co.*, 94 Wis. 44; *Missouri, etc. R. Co. v. Belcher*, 35 S. W. 6 (Tex. Sup. Ct.); *Clyde C. Co. v. Pittsburg, etc. R. Co.*, 226 Pa. 391, 26 L.R.A. (N.S.) 1191. See *Kolb v. Southern R. Co.*, 81 S. C. 536, distinguishing *obiter* remarks in other cases as to the

effect of subsequent notice of further delay in delivering goods.

If the bill of lading is silent as to the time goods are to be delivered the fact that notice was given the carrier that unusual loss would result if there was delay in delivery may be shown by parol. *Central T. Co. v. Savannah, etc. R. Co.*, 69 Fed. 683.

"In the absence of a definite contract for carriage to a given point by a given time, with such reasons for its making as would naturally lead the agent of the carrier to contemplate the profits the passenger expected to realize, it is clear that the damage claimed for the failure to realize such profits is too uncertain and remote." *Southern R. Co. v. Myers*, 32 C. C. A. 19, 87 Fed. 149. See *Foster v. Cleveland, etc. R. Co.*, 56 Fed. 434, stated in § 51.

Where the work contracted to be done was of little value as compared with the damages claimed because it was not properly done the court said: Where the damages arise from special circumstances, and are so large as to be out of proportion to the consideration agreed to be paid for the services to be rendered under the contract, it raises a doubt at once as to whether the party would have assented to such a liability had it been called to his attention at the making of the contract unless the consideration to be paid was also raised so as to correspond in some respect to the liability assumed. To make him liable for the special dam-

liquidate them, whether there are special circumstances or not. They know the legal principle of compensation and the rules subsidiary to it; and when they do not liquidate the damages they are content to enter into the contract and leave the measure of liability to be decided by the law; they know that it will require them to make compensation in case of a breach for damages which directly arise therefrom in view of the intrinsic nature of the contract and of the special circumstances known to them when it was made which disclose some particular object different from or beyond that which would be suggested by the mere words of the contract.⁹³

ages in such a case there must not only be knowledge of the special circumstances, but such knowledge "must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." In other words, where there is no express contract to pay such special damages the facts and circumstances in proof must be such as to make it reasonable for the judge or jury trying the case to believe that the party at the time of the making of the contract tacitly consented to be bound to more than ordinary damages in case of his default. *Hooks S. Co. v. Planters' C. Co.*, 72 Ark. 275, citing the text.

⁹³ *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487. In this case Church, C. J., said, referring to the English cases: "Some of the judges in commenting upon it (the doctrine under consideration) have held that a bare notice of special circumstances which might result from a breach of the contract, unless under such circumstances as to imply that it formed the basis of the agreement, would not be sufficient. I concur with the view expressed in these

cases, and I do not think that the court in *Hadley v. Baxendale* intended to lay down any different doctrine." But the defendant in this case was held to be liable for the loss sustained on a contract which the plaintiffs had with the New York Cent. R. Co., by reason of the defendant's breach, and that loss was held to be brought within the contemplation of the parties by mere notice, generally, that there was a contract depending on the defendant's performance.

In *Liman v. Pennsylvania R. Co.*, 4 N. Y. Misc. 539, the plaintiff was under contract to exhibit one R. in Chicago for two weeks, and four days before the time fixed therefore applied to the defendant at its office in New York and stated the circumstances; the defendant agreed to deliver to R. a railroad ticket to Chicago, but failed to do so. Judgment in favor of the plaintiff for the sum paid for the ticket and profits on R.'s engagement was affirmed. The court did not interpret *Booth v. Spuyten Duyvil Rolling Mill Co.*, *supra*, as intending that a contracting party may, notwithstanding that he has been sufficiently informed of the existence of a certain other contract, the performance of which is

Doubtless it is essential, in order to bring within the contemplation of the parties damages different from and larger in amount than those which usually ensue, that the special circumstances out of which they naturally proceed shall have been known to the party sought to be made liable in such manner, at the time of contracting, as to make it manifest to him that if compensation in case of a breach on his part is accorded for actual loss it must be for a loss resulting from that

dependent upon performance of the proposed contract with him, to put him upon reasonable inquiry in respect thereto, shield himself against consequential damages by wilfully or deliberately abstaining from the inquiry. If, under such circumstances, a party refrains from inquiry he cannot set up his ignorance to limit his liability.

A manufacturer contracted to furnish machinery and make essential repairs upon the plant of a compress company by a fixed date, which was known by both parties to be the beginning of the season for the operation of the plant, which could only be operated during a part of the year; both parties also knew that it was the intention to have the plant in readiness for the opening of the season. The notice to the defendant was sufficient to make it liable for special damages resulting from its delay. *Machine Co. v. Compress Co.*, 105 Tenn. 187, 53 L.R.A. 482; *Neal v. Pender-H. H. Co.*, 122 N. C. 104, 65 Am. St. 697.

In *Snell v. Cottingham*, 72 Ill. 161, it was held that a contractor who fails to finish a railroad by the time limited in his contract cannot be held for the loss occasioned to the owner of the road by reason of another contract between him and a third party, for the use of the road after the time it should have been completed, even though he may have

known of the existence and the terms of such other contract at the time of entering into his own, unless he expressly agrees to such a rate of damages. A similar doctrine is laid down in *Bridges v. Stickney*, 38 Me. 369; *Hunt v. Oregon Pac. R. Co.*, 36 Fed. 481, 1 L.R.A. 842. See *Clark v. Moore*, 3 Mich. 55.

The Illinois case is, probably, not to be taken as declaring a general principle. The decision was doubtless influenced by the damages which would have been recovered if the rule had been applied. It is said in the opinion: Had it been known, that it was expected appellees would be held responsible for such extraordinary damages, it is hardly probable that they would have entered into the contract, for the consequences of a failure for only a few days would be most disastrous. The damages insisted upon exceed \$44,000, a sum enormously out of all proportion to the amount to be paid for the entire work. The same distinction is made in other cases. Thus, it is said in *Booth v. Spuyten Duyvil R. M. Co.*, *supra*: It is sufficient to hold, what appears to me to be clearly just, that he is bound by the price unless it is shown that the price is extravagant, or of an unusual or exceptional character. See *Guetzkow v. Andrews*, 92 Wis. 214, 52 L.R.A. 209, 53 Am. St. 909.

special state of things which those circumstances portended.⁹⁴ Damages are not the primary purpose of contracts, but are given by law in place of and as a compensation and equivalent for something else which had been agreed to be done and has not been done. What the damages would ordinarily be on such a default is immaterial if the contracting party assumed the obligation he has broken with a knowledge of a peculiar state of facts connected with the contract which indicated that other damages would result from a breach, and the latter are claimed. To confine the injured party's recovery in such case to the lighter damages which usually follow such a breach, where no such known special facts exist, and exclude those which were thus brought within the contemplation of the parties, would be to sacrifice substantial rights to arbitrary rule; to set aside the principle which entitles a party to compensation commensurate with his injury to give effect to a rule formulated to render that principle effectual; it would be to apply a subordinate rule where it has no application instead of the principle, which is paramount and always applicable.⁹⁵ What are the usual damages which result from the breach of a contract? There is certainly no customary amount, nor is there any rule of damages which is universal like the principle for allowance of due compensation. If it is a contract of sale and the vendor refuses to complete it, one rule is to ascertain that compensation by the difference between the contract price and the market value, because if the article which is the subject of the contract can be obtained in market at a market price the vendee is thereby enabled to supply himself without loss unless the price has increased. That rule goes no further, but the principle does. Where the vendee cannot obtain the article in the market, nor at all if the vendor refuses to perform his contract, that rule is not applicable, and then resort must be had to other elements of value; and recourse is had to the principle to determine the measure of redress; even a contract of resale made by the ven-

⁹⁴ Alabama C. Co. v. Geiss, 143 Adm'rs v. Baeceich, 129 La. 469, Ala. 591, quoting the text.

⁹⁵ Tulane Educational Fund's quoting the text.

dee and of which the vendor had no notice may be considered.⁹⁶ And if the goods were not bought for resale and had no market value, but were intended for some special use, the damages would be computed according to the value for the use to which the property was most obviously adapted unless the vendor knew of the intention to apply them to a different one.⁹⁷

⁹⁶ *France v. Gaudet*, L. R. 6 Q. B. 199; *McHose v. Fulmer*, 73 Pa. 365; *Carroll-P. B. & T. Co. v. Columbus Mach. Co.*, 5 C. C. A. 190, 55 Fed. 451; *Hockersmith v. Hanley*, 29 Ore. 27, citing the text; *Kirby L. Co. v. Cummings* (Tex. Civ. App.), 122 S. W. 273, citing the text; *Armeny v. Madson & B. Co.*, 111 Ill. App. 621, citing the text. See *Tulane Educational Fund's Adm'r's v. Baccich*, *supra*, stated in § 798.

France v. Gaudet, *supra*, was an action for the conversion of the property sold, and hence is not to be considered as authority to the full extent of the proposition to which it is cited. If the article the vendor has contracted to supply or an article of the same quality cannot be procured in the market, it is presumed that such fact was within the contemplation of the parties to the contract. *McHose v. Fulmer*, *supra*. But this rule is denied in an English case (*Thol v. Henderson*, 8 Q. B. Div. 457). There was a contract to deliver goods which were not obtainable in the market; the purchaser had entered into a contract for their sale. The vendor had no knowledge of the particular contract, but was aware that the goods were ordered for the purpose of reselling them. Such knowledge was held not to bring the case within the rule of *Hadley v. Baxendale*, so as to allow the recovery of profits which would have been made if there had not been a breach of the contract. This is too strict an applica-

tion of the rule, because it was immaterial to the vendor who his purchaser's customer was; the former had knowledge sufficient to act as an incentive to the prompt fulfillment of his contract and to apprise him of the fact that its breach would especially damage the vendee. See *Loescher v. Disterberg*, 26 Ill. App. 520, which is in harmony with *McHose v. Fulmer*, *supra*.

In *Hamilton v. Magill*, 12 L. R. Ire. 186, one of the points especially relied upon by the defendant was that at the time the contract in suit was made the plaintiff had not actually completed his contract for the sale of the property purchased, and that the case should be treated as if the defendant had no other notice than that it was bought for resale generally. The answer of the court was that it appears "illogical and contrary to principle that a person who, having an offer, enters into a contract with another, which if carried out would enable him to accept that offer, but refrains from actually accepting it until he has entered into the contract, should be in a worse position than one who makes a contract for sale on the chance of afterwards purchasing from another the goods which he has previously contracted to sell. To establish such a distinction would place the speculator in a more advantageous position than the prudent merchant."

⁹⁷ *Cory v. Thames I. Works Co.*, L. R. 3 Q. B. 181; *Machine Co. v. Compress Co.*, 105 Tenn. 187, 53

Their delivery in the case where a contract of resale existed would have enabled the vendee to obtain the reselling price, and in the other to avoid the loss which has otherwise resulted from being deprived of the property. Such recoveries are not unusual. It may be said that sales are generally made of articles having a market value. True. But there is no uniform relativeness between the contract and market prices. The defaulting vendor will pay nominal damages when the market price is less than the contract price and substantial damages, according to the excess of the former at the time the goods should have been delivered. When the vendor refused to deliver ice according to his contract, knowing when he made the agreement that it was wanted as a means of preserving fresh meat in the prosecution of the vendee's business, and the ice could not be obtained in market, what should be deemed the usual damages for a breach of the contract? Certainly not what had been the market price when ice was plenty and could be had from other sources; but its value when it should, according to the contract, have been delivered and when the vendor, as the fact probably may be, alone could supply it, and when the vendee must have it or lose a certain amount of meat or suspend business notwithstanding his best endeavors by other means to preserve the meat or continue his business.⁹⁸ A vendor of undersized bottles may be liable to his vendee for the abandonment of his business because of the refusal of his patrons to deal with him, if he is unable to procure bottles of full size.⁹⁹ The failure to supply water for irrigation is attended with liability for the loss of fruit trees growing on the land which was to have been irrigated in their growing state, and in arriving at their value the difference between

L.R.A. 482; *Ideal W. Co. v. Garvin Mach. Co.*, 92 App. Div. 187.

In *Alabama C. Co. v. Geiss*, 143 Ala. 591, the loss sustained by a purchaser of lumber which might have been obtained in the market did not include a forfeiture which he released his contractor from, the loss

of profits or interest on the investment.

⁹⁸ *Hammer v. Schoenfelder*, 47 Wis. 455; *Border City L. & C. Co. v. Adams*, 69 Ark. 219.

⁹⁹ *North Baltimore B. G. Co. v. Altpeter*, 133 Wis. 112.

the value of the land with and without them at the time of their destruction may be considered.¹

If the contract is made to serve a particular purpose, not communicated and known to both parties, nor indicated by its subject-matter and the loss in respect to that purpose is so exceptional as neither to be within the contemplation of the parties at the making of the contract, nor within the first branch of the rule laid down in *Hadley v. Baxendale*, it cannot be recovered; but where the injury is within such contemplation if the parties give the subject consideration when the contract is made they are admonished by the prevalence of the principle of compensation in the law that, if they do not perform, the alternative of making reparation on the scale of equivalence to the actual injury will be compulsory; and there is no need of any agreement to submit to such a legal consequence. The law as laid down in *Hadley v. Baxendale* has been generally accepted in this country; it includes all such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.² And in accordance with the doctrine of that case it is sufficient if the special circumstances under which the contract was actually made were communicated to the party sought to be charged, and the damages resulting from the breach are such as both parties would reasonably contemplate would be the amount of the injury which would ordinarily follow from a breach under those circumstances. As said by Selden, J.: "The broad general rule . . . is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and

¹ *Hanes v. Idaho L. Co.*, 21 Idaho, 512.

² 9 Ex. 353; *Gross v. Heckert*, 120 Wis. 314.

in respect to the cause from which they proceed.”³ And this leads naturally to the consideration of the certainty which is necessary to warrant the recovery of damages.

SECTION 5.

REQUIRED CERTAINTY OF DAMAGES.

§ 53. **Must be certain in their nature and cause.** Damages must be certain both in their nature and in respect to the cause from which they proceed.⁴ Judge Selden said that the

³ *Griffin v. Colver*, 16 N. Y. 494; *Savannah, etc. R. Co. v. Pritchard*, 77 Ga. 412, 418, 4 Am. St. 92; *Benjamin v. Puget Sound C. Co.*, 12 Wash. 476, quoting the text; *Collins v. Lavelle*, 19 R. I. 45, citing the text; *Northwestern S. B. Mfg. Co. v. Great Lakes E. Works*, 181 Fed. 38, 104 C. C. A. 52; *Tevis v. Ryan*, 13 Ariz. 120; *Roberts v. Krafts*, 141 Cal. 20 (injury to trees and crops by reason of breach of contract to supply water); *Hale v. Milliken*, 5 Cal. App. 344; *Carolina P. C. Co. v. Columbia I. Co.*, 3 Ga. App. 483; *Louisville & N. R. Co. v. Coyle*, 123 Ky. 854, 8 L.R.A.(N.S.) 433, citing the text; *Crowley v. Burns B. & Mfg. Co.*, 100 Minn. 178; *Brown v. Weir*, 95 App. Div. 78. See *Connersville W. Co. v. McFarlan C. Co.*, 166 Ind. 123, 3 L.R.A.(N.S.) 709; *Benziger v. Miller*, 50 Ala. 206, stated in note to § 80; *Pendleton v. Cline*, 85 Cal. 142, stated in note to § 695; *Lamb v. Buker*, 34 Neb. 485, stated in note to § 605.

In a late case the defendant contended for the rule that not only must the parties have notice of the contract for the furtherance of which the plaintiff made the contract in suit, but there must be something in the terms of the latter, read in the light of surrounding cir-

cumstances, which shows an intention on the part of the vendor to assume a larger engagement, a wider responsibility, than is assumed in ordinary contracts for the sale and delivery of merchandise. The answer was that where notice is brought home to the vendor that the goods are purchased to be put to a particular use he is chargeable with the consequences of a failure to perform and with the results which such notice fairly apprised him would follow upon his default. *Industrial Works v. Mitchell*, 114 Mich. 29, citing *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487; *Richardson v. Chynoweth*, 26 Wis. 656; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156.

⁴ *Western U. Tel. Co. v. Ivy*, 177 Fed. 63, 100 C. C. A. 481; *Lane v. Storke*, 10 Cal. App. 347; *American P. F. Co. v. Elliott*, 151 N. C. 393, 31 L.R.A.(N.S.) 910, quoting the text; *Flynn v. Judge*, — App. Div. —, 133 N. Y. Supp. 794; *Hawkins v. Hubbell*, 127 Tenn. 312; *Truitt v. Osler*, 4 Del. 555; *Langston Monotype Mach. Co. v. Times-Dispatch Co.*, 115 Va. 797.

“To entitle plaintiff to recover present damages for apprehended

requisite that the damages must not be the remote, but the proximate consequence is in part an element of the required certainty.⁵ In the preceding pages the requirement that the damages be the natural and proximate result of the act complained of has been discussed; but mainly with reference to the consequences as a whole. Now it remains to consider the certainty necessary not only in regard to the consequences as a whole but also in detail. A fatal uncertainty may infect a case where an injury is easily provable, but the alleged responsible cause cannot be sufficiently established as to the whole or some part of that injury.⁶ So it may exist where a known and provable wrong or violation of contract appears, but the alleged loss or injury as a result of it cannot be shown with reasonable certainty.⁷ Many of the illustrations already given apply to the first, as where the injury is not the natural or proximate

future consequences, there must be such a degree of probability of their occurring, as amounts to a reasonable certainty." *Lauth v. Chicago Union Traction Co.*, 244 Ill. 244. See also, *Chicago City Ry. Co. v. Henry*, 62 Ill. 142; *Edward v. Illinois Central R. Co.*, 184 Ill. App. 107; *Amann v. Chicago Consol. Traction Co.*, 243 Ill. 263.

⁵ *Griffin v. Colver*, 16 N. Y. 494; *Russell v. Fernandez*, 131 La. 76.

⁶ *Foehr v. New York S. L. R. Co.*, 40 Pa. Super. 7; *First Nat. Bank v. Thurman*, 69 Iowa 693; *Ulrich v. Pateros W. D. Co.*, 67 Wash. 328; *American P. F. Co. v. Elliott*, *supra*; *Evans v. Cincinnati, etc. R. Co.*, 78 Ala. 341. See *Evans v. Cumberland Tel. & T. Co.*, 135 Ky. 66, 135 Am. St. 444; *Beiser v. Grever & T. Co.*, 11 Ohio Dec. 444.

As where there was a breach of a contract to elect one president of a bank for a term of years at an agreed annual salary, when the election, if there had been no breach, could have been for only one year, to which time the recovery of the

salary was limited. *Witham v. Cohen*, 100 Ga. 670; *Kenyon v. Western U. Tel. Co.*, 100 Cal. 454; *Cothran v. Witham*, 123 Ga. 190, 69 L.R.A. 101.

Another example is afforded by a contract so vague and indefinite that it does not furnish a safe, satisfactory or proper basis for computing the damages caused by its breach. *Hart v. Georgia R. Co.*, 101 Ga. 188. See *Fletcher v. Dold P. Co.*, 41 App. Div. (N. Y.) 30.

If, in an action of tort, it be impossible to distinguish between the damage arising from the actionable injury and the damage which has another origin the jury must make the best estimate in their power, and award compensation for the actionable injury. *Jenkins v. Pennsylvania R. Co.*, 67 N. J. L. 331, 57 L.R.A. 309. See *Ogden v. Lucas*, 48 Ill. 492; *Harrison v. Adamson*, 86 Iowa 693; *Washburn v. Gilman*, 64 Me. 163, 18 Am. Rep. 246; *Chicago & N. R. Co. v. Hoag*, 90 Ill. 339; *Mark v. Hudson River B. Co.*, 103 N. Y. 28.

⁷ *Eisleben v. Brooks*, 179 Fed. 86,

result of the act complained of; then the relation of cause and effect does not exist between the alleged cause and the alleged injury. This uncertainty may be further illustrated by the case of one who complained that the defendant had taken his flat from his ferry, and that being obliged to go in search of it in order to cross the river he left his horses attached to a wagon standing on the bank, and while he was gone they ran into the river and were drowned.⁸ Their loss was not a natural consequence of the taking of the flat which the defendant could foresee as a probable result of his wrongful act; there was a more immediate cause in the negligence of the owner; and after the event it cannot be ascribed with the requisite certainty to the defendant's act although it was the beginning of the series

102 C. C. A. 380; *Somers v. Musolf*, 86 Ark. 97; *Kuechle v. Springer*, 145 Ill. App. 127; *Connersville W. Co. v. McFarlan C. Co.*, 166 Ind. 123, 3 L.R.A. (N.S.) 709, citing the text; *Denton v. Nashville T. Co.*, 112 Tenn. 320; *My Laundry Co. v. Schmeling*, 129 Wis. 597; *Re Publishers' Syndicate*, 7 Ont. L. R. 223. See *Sweet v. Western U. Tel. Co.*, 139 Mich. 322.

The rule is applicable where there has been a breach of contract by a water company to supply water to a municipality for extinguishing fires. *Pothinger v. Owensboro W. Co.*, 6 Ky. L. Rep. 453. See *Pacific P. L. Co. v. Western U. Tel. Co.*, 123 Cal. 428; *Kenyon v. Same*, 100 Cal. 454.

The pecuniary interest a husband has in the chance that an embryo not quickened into life would become a living child is so absolutely uncertain that the loss of that chance cannot be recovered for. *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 5 Am. Neg. Cas. 364, 42 Am. St. 733, 26 L.R.A. 46.

The certainty that the damages flowed from the breach of a contract is well shown if the jury find that

Sutli. Dam. Vol. I.—14.

the result is such as the common experiences of life, viewed through the application of the sense usually possessed by impartial men of ordinary prudence, show to be the usual effect. The mere fact that the finding rests upon probability only, or is made by drawing inferences from circumstantial evidence is not fatal to it. *McDaniel v. United R. Co.*, 165 Mo. App. 678; *Salinger v. Salinger*, 69 N. H. 589. See § 69.

The damages caused the assignor of accounts for discount and collection because of failure to use care in collecting them, whereby the patronage of customers was lost, are too speculative to be recoverable. *Engel v. Georgiacles*. — App. Div. —, 140 N. Y. Supp. 93.

The breach of a contract to extend a debtor further credit may result in his being obliged to quit business and deprive him of the ability to pay his creditors; but it does not justify the recovery by a creditor of the amount of his claim against the party who broke his contract. *Lefkovitz v. First Nat. Bank of Gadsden*, 152 Ala. 521.

⁸ *Gorden v. Butts*, 2 N. J. L. 334.

of facts which culminated in that loss.⁹ A grantee of land cannot recover damages for the breach of the grantor's covenant against incumbrances because of an existing inchoate right of dower in the premises a sum paid by himself to an auctioneer for selling them to a person who refuses to complete the purchase on discovering the incumbrance.¹⁰

In an action for the wrongful revocation of an agreement to submit a controversy to arbitration the plaintiff is not entitled to recover damages for the trouble and expense incurred in making the agreement; but he can recover for his loss of time and for his trouble and necessary expenses in preparing for a hearing, such as employing counsel, taking depositions, paying witnesses and arbitrators, so far as such preparations are not available for a subsequent trial in court.¹¹ Where it was agreed that a pending action between the parties should be discontinued and submitted to arbitration and one of them subsequently revoked the submission the other recovered the costs and expenses he incurred in the discontinued suit.¹² And where one of the parties had released a cause of action against a third person upon the agreement of the other to pay such a sum as should be awarded the one who revoked the submission was liable for the costs of the other incurred in the arbitration, and also for the amount of his claim for the loss of his cause of action.¹³ The Vermont cases cited are distinguished from one in which the contract to arbitrate was wholly executory when the breach occurred. "Where nothing has been done in partial execution of the covenant, and the covenant does not fix anything by way of penalty or liquidated dam-

⁹ See *Cuello v. Fuster*, 3 Porto Rico Fed. 193; *Walker v. Goe*, 3 H. & N. 395, 4 id. 350; *Dubuque Ass'n v. Dubuque*, 30 Iowa 176; *Hofnagle v. New York, etc. R.*, 55 N. Y. 608; *Davis v. Fish*, 1 G. Greene 406, 48 Am. Dec. 387; *Lewis v. Lee*, 15 Ind. 499; *Ashley v. Harrison*, 1 Esp. 49; *Barber v. Lesiter*, 7 C. B. (N. S.) 175; *Collins v. Cave*, 4 H. & N. 225; *Everard v. Hopkins*, 2 Bulst. 332; *Walker v. Moore*, 10 B. & C. 416;

Hayden v. Cabot, 17 Mass. 169; *Green v. Mann*, 11 Ill. 613; *Hargous v. Ablon*, 3 Denio 406, 45 Am. Dec. 481; *Brayton v. Chase*, 3 Wis. 456; *Chatterton v. Fox*, 5 Duer 64.

¹⁰ *Harrington v. Murphy*, 109 Mass. 299.

¹¹ *Pond v. Harris*, 113 Mass. 114.

¹² *Hawley v. Dodge*, 7 Vt. 237.

¹³ *Day v. Essex County Bank*, 13 Vt. 97.

ages, the loss arising from a refusal to fulfill is usually wholly conjectural because it is impossible to prove that the party would have profited by the arbitration.¹⁴

A defendant chartered the plaintiff's vessel from Liverpool to Puerto Cabello at a stipulated freight; a clause was afterwards added to the charter-party allowing the defendant to send on a part of the cargo to Maracaibo, with a proviso that any expense incurred by so doing should be borne by the charterer. Under pretense of an attempt by the master to evade the customs on the part so shipped the custom-house authorities at Puerto Cabello wrongfully imposed a fine of \$500 on him and detained the vessel for several months; but would have allowed her to depart if the fine had been paid, which the master had not the means to pay and did not. The government agreed afterwards to pay the master \$5,000 for the wrongful detention, but did not. It was held that the owner of the vessel could recover from the charterer neither the loss sustained by the detention nor the expense incurred in repairing the damage to the ship in consequence thereof, nor for the costs of legal proceedings taken by him in respect to the ship, nor for the fine.¹⁵ Where the object of a bonus contract providing for the erection of a mill was to enhance the value of the property in the place in which the mill was to be the damages resulting from the sale of the mill without requiring the vendee to bind himself to fulfill the conditions of the original contract, as it stipulated for if a sale should be made, and the burning of the mill, without any obligation on the vendee's part to rebuild and operate it for the period re-

¹⁴ *Munson v. Straits of Dover S. S. Co.*, 43 C. C. A. 57, 102 Fed. 926.

When a party to a submission agreement has covenanted therein to pay the award by revoking the submission he breaches the covenant, and if, pursuant to the agreement, a pledge has been deposited to secure the payment of the award it may be foreclosed to the extent of the damages fixed by statute for

the revocation of a submission. The damages so fixed for preparing for and conducting the arbitration may be recovered notwithstanding the submission provides that the fees of arbitrators and witnesses shall be paid equally by the parties. *Union Ins. Co. v. Central T. Co.*, 157 N. Y. 633, 44 L.R.A. 227.

¹⁵ *Sully v. Duranty*, 33 L. J. (Ex.) 319.

quired, are not clearly ascertainable in their nature and origin, but are speculative.¹⁶ One named as a director of a proposed corporation persuaded others so named and others who expected to become members of it not to do so. For the misrepresentations made to accomplish such result the person making them was not liable to those who were proposed as directors for the loss of the profits resulting from the failure to organize the corporation.¹⁷ It will not be assumed that a fatal uncertainty appearing at the time of the trial will be removed by subsequent events.¹⁸

§ 54. **Liability for the principal loss extends to details and incidents.** Where the alleged wrong or breach of contract is shown with the requisite certainty to be the cause of the injury in question it is also to be deemed the cause of all the concomitant and incidental details which are constituent parts of the injury, including necessary and judicious expenditures made to stay or efface the wrong or limit its consequences.¹⁹ A riparian owner brought an action for polluting the waters of a stream running through his farm. He recovered for the loss of an opportunity of renting his grist-mill, the diminution in the rental value of his farm and the inconveniences he was put to in the use of the same, resulting directly from the conduct of the defendant.²⁰ A plaintiff's house was injured by the partial falling in of the partition wall between it and the defendant's house, which was caused by digging too near the wall for the purpose of deepening the cellar under it. No notice was given by the defendant of his intention to deepen his cellar, and evidence was offered to show that the excavation was done in a careless and negligent manner, and also to show that the business of the plaintiff was interrupted for several days. The court held that the plaintiff was entitled to such

¹⁶ *Hudson v. Archer*, 9 S. D. 240.

¹⁷ *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. 151.

¹⁸ *Byrne M. Co. v. Robertson*, 149 Ala. 273.

¹⁹ *McDaniel v. Crabtree*, 21 Ark. 431; *Smith v. Condry*, 1 How. 35; *Loker v. Damon*, 17 Pick. 284;

Chalice v. Witte, 80 Mo. App. 84, 95, quoting the text; *New Haven & N. Co. v. Hayden*, 117 Mass. 433; *Thayer-M. B. Co. v. Campbell*, 164 Mo. App. 8. See *O'Brien v. Illinois S. Co.*, 203 Fed. 436, 121 C. C. A. 546; §§ 26, 1250.

²⁰ *Gladfelter v. Walker*, 40 Md. 3.

damages as would be sufficient to reinstate the wall and the house in as good condition as they were prior to the injury, and to compensate him for the loss consequent upon the interruption of his business; and to show the latter he might prove its usual profits prior to the wrong.²¹ If a collision between

²¹ *Brown v. Werner*, 40 Md. 15; *White v. Moseley*, 8 Pick. 356; *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66; *Allison v. Chandler*, 11 Mich. 542; *Collins v. Lavelle*, 19 R. I. 45, citing the text; *Moore S. Co. v. Boston I. Co.*, 210 Mass. 364. See § 70.

Walrath v. Redfield, 11 Barb. 368 (see s. c., 18 N. Y. 457), was an action on the case for damages to the plaintiffs' saw-mill and other property occasioned by the defendant in constructing a dam and dike below such mill, and thereby causing the water to flow back upon the mill, and rendering it incapable of being used. The plaintiffs were held entitled to recover the value of the use of their mill during the time they were necessarily deprived of its use, and the amount which it was permanently diminished in value by the erection of the dam; but could not recover the amount of a loss upon saw logs on hand at the time of the injury, sustained either in consequence of a deterioration in their value or by a depression in the market price. The damages in respect to the logs were too speculative, uncertain, remote and contingent to be allowed even upon proof that the plaintiffs could not, by the use of ordinary diligence, have procured the logs to be sawed elsewhere, and could not have disposed of them before sawing. In actions of tort, where there has been no wilful injury, the plaintiff can only recover the damages necessarily resulting from the act com-

plained of, and he cannot conduct himself in such a manner as to make them unnecessarily burdensome.

A more reasonable rule and one in better accord with the principle of holding a wrong-doer liable for such consequences as would naturally and in the usual course of things result from his conduct was laid down in *McTavish v. Carroll*, 17 Md. 1, an action for damages for obstructing a right of way for repairing a mill-race. The declaration alleged that the obstruction prevented the repair of the race, whereby the mill became idle and could not be worked, and the plaintiff lost the custom and trade thereof, "and the use of the same for grinding his own grain, and was, therefore, at great expense, obliged to carry it to other mills." Held, that under this declaration, evidence that the plaintiff was owner of a large body of land around his mill, and was accustomed to grind the grain raised thereon at this mill for his cattle, horses, hands and family, and in consequence of its stoppage had been compelled to carry his grain to another mill, at a greater distance, is admissible. *Hinekley v. Beckwith*, 13 Wis. 31.

But in such a case it has been ruled there can be no recovery for diminished profits arising from the manufacture of flour. *Todd v. Minneapolis, etc. R. Co.*, 39 Minn. 186.

A more satisfactory rule is sustained by *Terre Haute v. Hudnut*,

vessels results in disabling one of them so that her owners cannot use her for a voyage for which she has been engaged, though no regular charter-party has been entered into, the damages resulting from the loss of the profits of such voyage are the result of the collision.²² If logs are deliberately stored in a stream navigable for their transportation, so as to prevent the entry of logs owned by another, and in a stream which empties into the one so blocked, the person who is responsible therefor is liable to the other for the wages and board of the latter's men while waiting a reasonable time to get his logs out, for the expense of moving one crew of men out and another in, for the increased cost of driving the logs the next season, and for interest on the contract price for making the drive during such time as the payment thereof was delayed; but not for the loss of supplies left in the woods.²³

§ 55. **Only the items which are certain are recoverable.** The charterer of a vessel who was subjected to expense in getting her off from a gas pipe which was an unlawful obstruction to the navigation of a river, and upon which she caught in passing while navigating with due care, may maintain an action against those who laid the pipe to recover for such expense, but for not for any delay in his business or other consequential damages.²⁴ Where the defendant was enjoined from removing his negroes and upon an order of seizure they were taken out of his possession and a decree subsequently rendered in his favor, it was held his damages would, ordinarily, be what their labor would have been worth had they continued in his possession. But he would also be entitled to damages for any loss that was the direct, proximate and natural consequence of their removal out of his possession, which were not remote and specu-

112 Ind. 542, where the operations of a mill which had an established business were suspended by an overflow, and machinery in it was damaged to such an extent as to make repairs necessary. The net earnings of the past and present were proven as a basis for estimating the damages.

²² *Owners of The Gracie v. Owners of The Argentino*, 14 App. Cas. 519; affirming *The Argentino*, 13 Prob. Div. 191.

²³ *McPheters v. Moose River L. D. Co.*, 78 Me. 329.

²⁴ *Benson v. Walden, etc. G. L. Co.*, 6 Allen 149.

lative, involving inquiries collateral to the consideration of the wrongful act. And so he could not recover counsel fees incurred in defending the suit nor expenses involved in employing an agent to attend to his other business whilst he was engaged in such defense; nor what would or might have been the profits of his business had not his possession of the negroes been interrupted.²⁵ The plaintiff's oxen were stolen in Vermont and taken to the defendant, and being found in his possession in New York were demanded and refused. The plaintiff then successfully resorted to legal process to gain possession, but incurred expense therein. He was not entitled to recover such expense as part of his damages for the conversion in a subsequent action.²⁶ These expenses were not rejected because a remote or uncertain incident of the wrong, but because they were costs of a judicial proceeding in which such allowable expenses are collectible, and if not thus compensated cannot be recovered.²⁷ The expense of regaining property tortiously taken is a part of the injury and recoverable.²⁸ Where goods wrongfully seized are taken from the wrong-doer by another their owner may, in an action against the former, recover the amount paid the other wrong-doer to get them back.²⁹ In an action upon an attachment bond the rule restricting the recovery to the natural and proximate damages will exclude any claim for injuries to credit and business,³⁰ and for mental suffering.³¹ But where a party took a lease of a ferry and covenanted to maintain and keep the same in good order, but instead of doing so diverted travelers from the usual landing to another landing owned by himself, by means whereof a tavern-stand belonging to the plaintiff situate on the first landing was so reduced in business as to become tenantless, it was

²⁵ *McDaniel v. Crabtree*, 21 Ark. 431; *Jenkins v. Commercial Nat. Bank*, 19 Idaho 290.

²⁶ *Harris v. Eldred*, 42 Vt. 39.

²⁷ *Atchison, etc. R. Co. v. Citizens' T. & P. Co.*, 16 N. M. 163.

²⁸ *Bennett v. Lockwood*, 20 Wend. 223, 32 Am. Dec. 532.

²⁹ *Keene v. Dilke*, 4 Ex. 388.

³⁰ *State v. Thomas*, 19 Mo. 613, 61 Am. Dec. 580; *Weeks v. Prescott*, 53 Vt. 57, 74; *Braunsdorf v. Fellner*, 76 Wis. 1; *Anderson v. Sloane*, 72 Wis. 566, 78 Am. St. 885; *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519. See ch. 25.

³¹ *Tisdale v. Major*, 106 Iowa 1, citing this section.

held in an action by the landlord for breach of the contract that he might recover as damages the loss of rent on the tavern-stand.³² Where a negro hired to make a crop was taken away by the owner in the middle of the year, whereby the crop was entirely lost, the proper measure of damages was the hire of the negro paid in advance, the rent of the land and the expenses incurred for the purpose of making the crop.³³

§ 56. **Recovery for successive consequences.** Where the injury to be recovered for consists of several items, variously related consequentially to the alleged cause, the right to each must be decided upon the same principles as where only one inseparable injurious effect is in question. It may happen that such items are successive, and the first may in some sort operate as cause in respect to later effects. When this is the case a recovery for items subsequent to the first will depend on whether the act complained of is the efficient cause of the entire damage as represented by all such items, and whether they are consequences which ought reasonably to have been contemplated to ensue, or, in case of contract, whether they may fairly be supposed to have been within the contemplation of the parties at the time of contracting. This is well illustrated by an English case. The defendant contracted to deliver a threshing machine to the plaintiff, a farmer, within three weeks. It was the latter's practice, known to the defendant, to thresh his wheat in the field and send it thence direct to market. At the end of three weeks plaintiff's wheat was ready in the field for threshing, and, on his remonstrating at the delay in the delivery of the machine, the defendant several times assured him it should be sent forthwith. The plaintiff, having successfully tried to hire another machine, was obliged to carry home and stack the wheat, which, while so stacked, was damaged by rain. The machine was afterwards delivered and the price paid. The wheat was then threshed, and it was found necessary, owing to its deterioration by rain, to kiln-dry it. When dried and sent to market it sold for a less price than it would have fetched had it been threshed

³² Dewint v. Wiltse, 9 Wend. 325.

³³ Hobbs v. Davis, 30 Ga. 423.

at the time fixed by the contract for the delivery of the machine and then sold, the market price of wheat having meanwhile fallen. It was held, in an action for the non-delivery of the machine, that the plaintiff was entitled to recover for the expense of stacking the wheat, the loss from the deterioration by the rain and the expense of kiln-drying it, but not for the loss by the fall in the market, the latter being too uncertain to have been contemplated and not the natural result of the breach.³⁴ There is much reason for holding that the latter loss was also recoverable.³⁵ The case referred to is much more satisfactory than cases which hold that a farmer cannot recover damages resulting to his crops from delayed delivery or the failure to work as warranted of a harvesting machine sold with knowledge that it was to be used in securing the purchaser's grain.³⁶

§ 57. Illustrations of the rule of the preceding section. In an action for negligent driving, whereby the plaintiff's horse was injured, it appeared that the horse was sent to a farrier for six weeks for the purpose of being cured and at the end of that time it was ascertained that it was damaged to the extent of 20*l*. The plaintiff recovered for the keep of the horse at the farrier's, the amount of the farrier's charges and the difference in its value at the time of the accident and at the end of the six weeks, but not for the hire of another horse during that period.³⁷ Had a claim been made for the loss of the use of the horse during his treatment it would have been

³⁴ Smeed v. Foord, 1 E. & E. 602.

³⁵ Flint & W. Mfg. Co. v. Beckett, 167 Ind. 491, 12 L.R.A.(N.S.) 924; Ward v. New York Cent. R. Co., 47 N. Y. 29; Sturgess v. Bissell, 46 N. Y. 462; Scott v. Boston, etc. Co., 106 Mass. 468; Sisson v. Cleveland, etc. R. Co., 14 Mich. 489; Collard v. Southeastern R. Co., 7 H. & N. 79; Weston v. Grand Trunk R. Co., 54 Me. 376, 92 Am. Dec. 552; Peet v. Chicago, etc. R. Co., 20 Wis. 594, 91 Am. Dec. 446.

³⁶ Fuller v. Curtis, 100 Ind. 237,

50 Am. Rep. 786; Prosser v. Jones, 41 Iowa 674; Wilson v. Reedy, 32 Minn. 256; Osborne v. Poket, 33 Minn. 10; Brayton v. Chase, 3 Wis. 456, probably overruled by cases referred to in Thomas, etc. Mfg. Co. v. Wabash, etc. R. Co., 62 Wis. 642, 650, 51 Am. Rep. 725. Compare Goodloe v. Rogers, 10 La. Ann. 631.

³⁷ Hughes v. Quentin, 8 C. & P. 703; Clare v. Maynard, 7 C. & P. 741.

a proper item of damages.³⁸ If a horse and vehicle are injured through a defect in a highway and in consequence thereof the horse becomes frightened and unmanageable, continues to be a kicker and becomes spoiled for driving there may be a recovery for the depreciation in his value as well as for the damage done the vehicle by the kicking and by the defect.³⁹ A tradesman took a ticket to go from L. to H. On arriving at an intermediate station he found no train ready to take him to H. the same night, as there should have been according to the published time-bill. He slept at that place and in the morning paid 1s. 4d. fare to H. In consequence of the delay he failed to keep appointments with his customers, and was detained for many days. The latter was deemed within the contemplation of the parties. The court told the jury that the plaintiff would have been entitled to charge the company with the expense of getting to H., but he had no right to cast upon it the remote consequences of remaining the night at the intermediate place. He was entitled to the fare thence to H., and perhaps the 2s. for his bed and refreshments. A motion for a new trial on the ground of misdirection was refused. Pollock, C. B., said: "In actions for breach of contract the damages must be such as are capable of being appreciated or estimated. Mr. Wilde was invited at the trial to state what were the damages to which the plaintiff was entitled. He said general damages. The plaintiff is entitled to nominal damages at all events, and such other damages of a pecuniary kind as he may have really sustained as a direct consequence of the breach of the contract.

³⁸ Gould v. Merril R. & L. Co., 139 Wis. 433, citing the text and interpreting the value of the use to be the value over the cost of keeping; Albert v. Bleeker St. etc. R. Co., 2 Daly, 393; Bennett v. Lockwood, 20 Wend. 223, 32 Am. Dec. 532; Walrath v. Redfield, 11 Barb. 368; Gillett v. Western R. Co., 8 Allen 560; The Glaucus, 1 Lowell 366; Sweeney v. Port Burwell H. Co., 17 Up. Can. C. P. 574.

Loss of use of an automobile

while undergoing repairs is a recoverable element of damage. Perkins v. Brown, — Tenn. —, L.R.A. 1915F, 723, 177 S. W. 1158; Andries v. Everitt-Metzger-Flanders Co., 177 Mich. 110.

³⁹ English v. Missouri Pac. R. Co., 73 Mo. App. 232. See § 26.

One of the New York county courts has denied the right to recover for the depreciation in the value of a horse caused by fright. Nason v. West, 31 N. Y. Misc. 583.

Each case of this description must be decided with reference to the circumstances peculiar to it; but it may be laid down as a rule that, generally, in actions upon contracts no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract.”⁴⁰ A subsequent English case was decided by the queen’s bench on this state of facts: The plaintiff, wife and two children of five and seven years old respectively, took tickets on the defendant’s railway from W. to H. by the midnight train. They got into the train but it did not go to H., but along another branch to E. where the party were compelled to get out. It being late at night the plaintiff was unable to get a conveyance or accommodation at an inn; and the party walked to his house, a distance of between four and five miles, where they arrived at about three o’clock in the morning. It was a drizzling night and the wife caught cold and was laid up for some time, and unable to assist her husband in his business as before, and expenses were incurred for medical attendance.⁴¹ Three items of loss and injury came under consideration: first, the inconvenience, as it was called, of having to walk home; second, the expense of the wife’s sickness; and third, the loss of her services. The last two items being coincident in time and relation to the defendant’s breach of contract were considered together. Only the first was allowed. It was remarked that the plaintiffs did their best to diminish the inconvenience to themselves, and they had no alternative but to walk; that it was not to be doubted that the inconvenience was the immediate and necessary consequence of the breach of the defendant’s contract to convey them to H. The other consequences were considered secondary. The objection to what is termed the “secondary consequence” is that it is not a consequence so certain to occur as to be among those to be anticipated from such a breach, it happening from other than the usual state of

⁴⁰ Hamlin v. Great Northern R. Co., 1 H. & N. 408. See Denton v. Same, 5 El. & Bl. 860.

⁴¹ Hobbs v. London, etc. R. Co., L. R. 10 Q. B. 111.

the weather; but it was not any more a secondary consequence than is the burning of a second building by a continuous fire or the injury to the grain by rain in *Smeed v. Foord*. It is said in the opinion that "the nearest approach to anything like a fixed rule is this: That to entitle a person to damages by reason of a breach of contract the injury for which compensation is asked should be one that may fairly be taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of. To illustrate that I cannot take a better case than the one now before us: Suppose that a passenger is put out at a wrong station on a wet night and obliged to walk a considerable distance in the rain, catching a violent cold which ends in a fever, and the passenger is laid up for a couple of months, and loses through this illness the offer of an employment which would have brought him a handsome salary. No one I think who understood the law would say that the loss so occasioned is so connected with the breach of contract as that the carrier breaking the contract could be held liable." True, there the sickness would be the cause of an accidental loss, but in the case under discussion the question was not of such a loss. On the contrary, it was the expense and loss of time incident to the sickness itself. Was not that "a result of the breach" which was natural and proximate, and to be contemplated under the other circumstances of the breach for which the defendant was held responsible?

One who has been injured may recover for the injury though in his care of himself thereafter he may have misjudged as to the proper treatment. In such an event he is not a volunteer in the case of his ailment; that was caused by the defendant, and the plaintiff's honest misjudgment is not negligence. The negligence of the defendant began a sequence of harmful effects; an intervening innocently misjudged act of the injured person aggravated them; but the latter act would have been harmless

if the original wrong were not still operative. It continues to operate more harshly, and it is from such operation that the plaintiff suffers. The original cause continues and accomplishes the whole result.⁴² A member of a society wrongfully expelled therefrom may recover because of the required publication of the fact in the society's journal, for the loss of his insurance policy, traveling card or sick benefits.⁴³

§ 58. **Same subject.** In an action under the code it appeared that the defendant delivered tickets to the plaintiff about the 1st of March, 1852, for transportation from New York to San Francisco; one entitled him to a passage to Graytown, at the mouth of the Nicaragua river, in a specified ship which was to sail on the 5th of that month; another entitled him to a passage up that river and through the lake of that name to San Juan del Sur, on the Pacific ocean, and the other from the latter place to his destination, on a steamer named, which was advertised to leave about fifteen days after the plaintiff would arrive at the starting port according to the usual course of conveyances. The plaintiff was carried on his first ticket and arrived at Graytown March 15th, where he was detained eleven days. He then started for San Juan del Sur. He arrived at a place on the way on the 31st of March when he was taken sick. There he received news that the steamer on which he was entitled to take passage under his third ticket was lost on the 27th of the previous month, but the fact was not known to the defendant at the time of selling the tickets nor until about the 20th of April. The plaintiff arrived at San Juan del Sur on the 4th of April and remained there until the 9th of May, endeavoring, but unsuccessfully, to procure a passage to San Francisco. He then returned to New York and remained sick, long after he returned home, with a fever peculiar to the climate of Nicaragua. It was held that the time he lost by reason of his detention on the isthmus, his expenses there and of his return to New York, the time lost

⁴² Hope v. Troy & L. R. Co., 40 Hun 438, 5 Am. Neg. Cas. 430, affirmed without opinion, 110 N. Y. 643. See § 1244.

⁴³ Thompson v. Grand Int. Brotherhood of L. E., 41 Tex. Civ. App. 176.

by reason of sickness after the return home and the expenses of such sickness, so far as the same were occasioned by the defendant's negligence and breach of duty, as well as the amount originally paid for his passage, were damages which the plaintiff was entitled to recover.⁴⁴

The damages which are recoverable for breach of contract are limited to the direct and immediate consequences; but the right to indemnity is not satisfied by compensation for the first item of loss if there are others so identified with it that the injury as a whole naturally comprehends all and they together constitute the immediate consequence. A party whose breach of contract leaves the other party in such a situation that sickness is its natural, immediate and probable consequence causes by the same act the direct pecuniary losses which are its usual and natural concomitants, as loss of time and the expense of medical and other attendance. If by reason of the sickness some extraordinary or unusual loss occurs for want of ability on his part to attend to his affairs it is a loss which cannot be considered as having entered into the contemplation of the parties; and the same must be the conclusion if the sickness were not the natural and probable consequence of the act complained of but the result of some other or secondary cause. Where sickness is the direct or proximate consequence of a wrongful act the pain and suffering are also elements of the injury for which compensation may be recovered.⁴⁵

⁴⁴ *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Heirn v. McCaughan*, 32 Miss. 17; *Porter v. Steamboat New England*, 17 Mo. 290; *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 353; *Pearson v. Duane*, 4 Wall. 605, 18 L. ed. 447; *The Zenobia*, 1 Abb. Adm. 80; *The Canadian*, 1 Brown Adm. 11.

⁴⁵ *Fillebrown v. Hoar*, 124 Mass. 580; *Meagher v. Driscoll*, 99 Mass. 281; *Pennsylvania R. Co. v. Books*, 57 Pa. 339, 98 Am. Dec. 229; *Ward v. Vanderbilt*, 4 Abb. App. Dec. 521; *Indianapolis, etc. R. Co. v. Birney*,

71 Ill. 391; *Klein v. Jewett*, 26 N. J. Eq. 474, 5 Am. Neg. Cas. 1; *Ransom v. New York, etc. R. Co.*, 15 N. Y. 415; *Ohio, etc. R. Co. v. Dickerson*, 59 Ind. 317, 9 Am. Neg. Cas. 279; *Whalen v. St. Louis, etc. R. Co.*, 60 Mo. 323, 12 Am. Neg. Cas. 204; *Pittsburg, etc. R. Co. v. Andrews*, 39 Md. 329, 9 Am. Neg. Cas. 421; *Johnson v. Wells, etc. Co.*, 6 Nev. 224, 3 Am. Rep. 245; *Williamson v. Prairie Oil & Gas Co.*, 94 Kan. 238, allowing recovery for future pain and suffering. See §§ 1242-1245.

The earlier cases, especially in jurisdictions in which exemplary damages are recoverable, generally held that the person whose breach of contract, fraud or other wrongful act causes another to be sued under such circumstances that the suit is an injurious consequence for which he is liable is bound to respond in damages for the expenses which are the necessary and legal incidents of the suit.⁴⁶ But not in the absence of such circumstances.⁴⁷ As given in a late case, the reason for denying counsel fees where the circumstances do not warrant the imposition of exemplary damages is that the law prescribes what costs shall be taxed and what shall be therein included as the fee of the successful party. In such case no greater fee should be recovered. The litigants should be placed on an equality. If the defendant should be successful it is clear he cannot recover from the plaintiff, in addition to the taxable costs, the fee paid by him to his attorney; nor should the plaintiff, if successful, recover from the defendant the fee he may have paid or become liable for to his attorney.⁴⁸ Counsel fees

⁴⁶ *Philpot v. Taylor*, 75 Ill. 309, 20 Am. Rep. 241; *Dixon v. Faweus*, 3 El. & El. 537; *Collen v. Wright*, 7 El. & B. 301; *Randell v. Trimmen*, 18 C. B. 786; *Anderson v. Sloane*, 72 Wis. 566, 7 Am. St. 885; *Stevens v. Handley*, Wright 121; *Roberts v. Mason*, 10 Ohio St. 277; *Peckham I. Co. v. Harper*, 41 Ohio St. 100; *Parsons v. Harper*, 16 Gratt. 64; *Marshall v. Betner*, 17 Ala. 832; *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; *Ziegler v. Powell*, 54 Ind. 173; *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316; *Eastin v. Bank*, 66 Cal. 123, 56 Am. Rep. 77; *Magmer v. Renk*, 65 Wis. 364; *Gregory v. Chambers*, 78 Mo. 294; *Bolton v. Vellines*, 94 Va. 793; *First Nat. Bank v. Williams*, 62 Kan. 431; *Stevenson v. Whitesell*, 10 Pa. Super. 306; *Winkler v. Roeder*, 23 Neb. 706, 8 Am. St. 155.

⁴⁷ *Burruss v. Hines*, 94 Va. 413;

St. Peter's Church v. Beach, 26 Conn. 355; *Henry v. Davis*, 123 Mass. 345; *Warren v. Cole*, 15 Mich. 265; *Young v. Courtney*, 13 La. Ann. 193; *Flanders v. Tweed*, 15 Wall. 450, 21 L. ed. 203; *Oelrichs v. Spain*, 15 Wall. 211, 21 L. ed. 43; *Yarbrough v. Weaver*, 7 Tex. Civ. App. 215; *Landa v. Obert*, 45 Tex. 542; *Winstead v. Hulme*, 32 Kan. 568; *Bull v. Keenan*, 100 Iowa 144; *Gibney v. Lewis*, 68 Conn. 392.

⁴⁸ *Burruss v. Hines*, *supra*.

A recovery of attorney's fees has been denied in an action by a stockholder to compel the officers of a corporation to allow an inspection of its books. *Clason v. Nassau F. Co.*, 20 N. Y. Misc. 315. And in an action against an executor *de son tort* for wrongfully withholding property and resisting proceedings to punish him for contempt. *Bishop v. Hendrick*, 82 Hun 323,

paid in the conduct of an unsuccessful suit against lot-owners to recover the amount of an assessment assigned by a city to such party in payment for the construction of a sewer, which suit failed because the assessment was invalid, are not recoverable in an action subsequently brought against the city for damages for the violation of its contract though the city had stipulated that the assessment should be valid.⁴⁹ The weight of authority is to the effect that counsel fees and court costs made necessary in the prosecution or defense of suits occasioned by the breach of contracts are not recoverable in actions *ex contractu*. There are some exceptions, such as actions on injunction,⁵⁰ and attachment bonds,⁵¹ and the like, and actions on covenants of warranty or of seizin,⁵² where there has been an eviction reasonably resisted by the grantee. "Expenditures of this class, though growing out of the alleged breach, in the sense that had there been no breach the occasion for them would not have arisen, are yet too remote to have been in the contemplation of the parties, and hence do not constitute an element of legal damage when the suit is on the contract, though the rule might be otherwise were it in case, setting out the contract as inducement merely."⁵³

If one's property is taken, injured or put in jeopardy by an-

146 N. Y. 398. And against the usurper of an office. *Palmer v. Darby*, 2 Ohio N. P. 416, 1 Ohio Dec. 48.

A plaintiff can recover attorney's fees as damages only when permitted by statute. *Spencer v. Murphy*, 6 Colo. App. 453.

One who has succeeded in an action cannot recover in a subsequent action the expense of the first. *Lowell v. House of Good Shepherd*, 14 Wash. 211; *Marvin v. Prentice*, 94 N. Y. 295.

Where provision is made by statute for a reasonable attorney's fee to be fixed by the court and it makes an allowance, it is error to allow in addition the statutory fee provided for the successful party as

part of the costs. *Montesano v. Blair*, 12 Wash. 188.

⁴⁹ *Gates v. Toledo*, 57 Ohio St. 105.

⁵⁰ See § 524.

⁵¹ See § 512.

⁵² See §§ 617-619; also §§ 83, 84.

⁵³ *Burton v. Henry*, 90 Ala. 281; *Marvin v. Prentice*, 94 N. Y. 295; *Copeland v. Cunningham*, 63 Ala. 394; *White River, etc. R. Co. v. Star R. & L. Co.*, 77 Ark. 128.

The right to recover the expenses of litigation in actions *ex contractu* must be because of fraud, deceit, breach of trust, wilful misappropriation of funds, or fraud in securing a contract or property thereunder. For expenses of litigation are not allowed for bad faith in refusing

other's neglect of duty imposed by contract or by his wrongful act any necessary expense incurred for its recovery, repair or protection is an element of the injury. It is often the legal duty of the injured party to incur such expense to prevent or limit the damages; and if it is judicious and made in good faith it is recoverable though abortive.⁵⁴

§ 59. **Required certainty of anticipated profits.** In another class of cases the question of the *certainty of damages* is more distinctly involved. They are cases in which the act complained of is plainly actionable and easy of proof, and the actual injury occasioned thereby consists in destroying or impairing arrangements from which it is alleged that pecuniary advantages would have resulted. Such effects may be produced by the refusal of a party to fulfill his contract, or by tortious acts by which some business scheme is frustrated. The pecuniary advantages which would have been realized but for the defendant's act must often be ascertained without the aid which their actual existence would afford. The plaintiff's right to recover for such a loss depends on his proving with reasonable certainty⁵⁵ that such advantages

to pay, but where the party has acted in bad faith in the transaction and dealings out of which the cause of action arose. *Traders' Ins. Co. v. Mann*, 118 Ga. 381; *McKenzie v. Mitchell*, 123 Ga. 72.

⁵⁴ *Nading v. Dennison*, 22 Tex. Civ. App. 173, quoting the text; *Nashville v. Sutherland*, 94 Tenn. 356; *Watson v. Lisbon Bridge*, 14 Me. 201; *Hughes v. Quentin*, 8 C. & P. 703; *Gillet v. Western R. Co.*, 8 Allen, 560; *Emery v. Lowell*, 109 Mass. 197; *Hoffman v. Union F. Co.*, 68 N. Y. 385; *Jutte v. Hughes*, 67 N. Y. 268; *Loker v. Damon*, 17 Pick. 284; *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408; *Mailler v. Express Propeller Line*, 61 N. Y. 312; *Smeed v. Foord*, 1 E. & E. 602; *Clark v. Russell*, 110 Mass. 133; *James v. Hodsden*, 47 Vt. 127; *First Nat. Bank v. Williams*, 62 Kan. 431, quoting the text; *Welling-Suth. Dam. Vol. I.—15.*

ton Nat. Bank v. Robbins, 71 Kan. 748, 114 Am. St. 523, quoting the text; *McGaw v. Acker*, 111 Md. 153, 134 Am. St. 592, citing the text. See § 88.

⁵⁵ *Fredonia G. Co. v. Bailey*, 77 Kan. 296; *Hattiesburg Lumber Co. v. Herrick*, 129 C. C. A. 288, 212 Fed. 834; *Southwestern Telegraph & Telephone Co. v. Memphis Tel. Co.*, 111 Ark. 474; *Yazoo & M. V. R. Co. v. Consumers' Ice & Power Co.*, — Miss. —, 67 So. 657; *Allied Silk Mfgs. v. Erstein*, — App Div. — (N. Y.), 153 N. Y. S. 976; *Bowman v. Blankenship*, 165 N. C. 519; *First State Bank of Mannsville v. Howell*, 41 Okl. 216; *Winniford v. MacLeod*, 68 Ore. 301.

"The rule that damages which are uncertain or contingent cannot be recovered does not embrace an uncertainty as to the value of the benefit or gain to be derived from

would have resulted legitimately and, therefore, that the act complained of prevented them.⁵⁶

the performance of the contract, but an uncertainty or contingency as to whether such gain or benefit would be derived at all. It only applies to such damages as are not the certain result of the breach, and not to such as are the certain result but uncertain in amount." In the latter case the law will adopt that mode of estimating the damages which is most certain and definite. *Blagen v. Thompson*, 23 Ore. 239, 254, 18 L.R.A. 315; *Occidental C. M. Co. v. Comstock T. Co.*, 125 Fed. 244; *Hoskins v. Scott*, 52 Ore. 271; *Carrico v. Stevenson* (Tex. Civ. App.), 135 S. W. 260; *Martin v. Seaboard A. L. R.*, 70 S. C. 8; *Beach v. Johnson*, 102 Miss. 419; *Bredemeier v. Pacific S. Co.*, 64 Ore. 576.

"Certainty" means reasonable certainty. *Baltimore & O. R. Co. v. Stewart*, 79 Md. 487; *Stewart v. Patton*, 65 Mo. App. 21; *Ramsay v. Meade*, 37 Colo. 465; *Phoenix P. Co. v. American C. & P. Co.*, 111 Md. 459. But it has been declared that there cannot be a recovery for lost profits unless the proof is clear and unqualified. *Iron City Toolworks v. Welisch*, 128 Fed. 693, 63 C. C. A. 245.

In *Deslandes v. Scales*, 187 Ala. 25, loss of profits from running a boarding house were held too uncertain to furnish a basis for estimation of damages.

⁵⁶ *Myerle v. United States*, 33 Ct. of Cls. 1, 26, quoting the text: *Fell v. Newberry*, 106 Mich. 542; *Lazier G. E. Co. v. Dubois*, 130 Fed. 834, 65 C. C. A. 172; *Milliken I. Co. v. United States*, 40 Ct. of Cls. 81; *Metzger v. Brineat*, 154 Ala.

397; *Southern R. Co. v. Coleman*, 153 Ala. 266; *Nichols v. Rasch*, 138 Ala. 372; *Smuggler-Union M. Co. v. Kent*, 47 Colo. 320, citing the text; *Silka v. Quinn*, 46 Colo. 596; *Mountain City M. Co. v. Cobb*, 124 Ga. 937; *Southern Bell Tel. & T. Co. v. Earle*, 118 Ga. 506; *Atchison, etc. R. Co. v. Thomas*, 70 Kan. 409; *Lynn S. Co. v. Auburn-L. S. Co.*, 103 Me. 334; *Western U. Tel. Co. v. Lehman*, 106 Md. 318; *Herron v. Raupp*, 156 Mich. 162; *Duval v. Furwerda*, 146 Mich. 13; *Emerson v. Pacific Coast & N. P. Co.*, 92 Minn. 523; *Standard F. Co. v. St. Louis M. F. Co.*, 177 Mo. 559; *Gardner v. Springfield G. & E. Co.*, 154 Mo. App. 666; *Egan v. Browne*, 128 App. Div. (N. Y.) 184; *Brooklyn Hills I. Co. v. New York, etc. R. Co.*, 80 id. 508; *Machine Co. v. Tobacco Co.*, 141 N. C. 284, 8 L.R.A.(N.S.) 255; *Wilson v. Wernwag*, 217 Pa. 82; *Jimenez v. San Juan L. & T. Co.*, 3 Porto Rico Fed. 178 (estimated future profits from the use of a disabled automobile); *Hays v. Western U. Tel. Co.*, 70 S. C. 16, 67 L.R.A. 481, 106 Am. St. 731; *Springer v. Riley* (Tex. Civ. App.), 136 S. W. 577; *Reagan R. B. Co. v. Dickson C. W. Co.*, 55 Tex. Civ. App. 509; *McGinnis v. Hardgrove*, 163 Mo. App. 20; *Sun Mfg. Co. v. Egbert*, 37 Tex. Civ. App. 512; *Parker v. McKannon*, 76 Vt. 96; *Bristol B. L. R. Co. v. Bullock E. Mfg. Co.*, 101 Va. 652; *Sedro V. Co. v. Kwapil*, 62 Wash. 385, citing the text; *Church v. Wilkerson-T. Co.*, 58 Wash. 262, 137 Am. St. 1059; *Belch v. Big Store Co.*, 46 Wash. 1; *Richey v. Union Cent. L. Ins. Co.*, 140 Wis. 486. See *Fitzgerald v.*

The grounds upon which is founded the general rule of excluding profits in estimating damages are, (1) that in the great-

Wiley, 22 App. D. C. 329; Des Allemands L. Co. v. Morgan City T. Co., 117 La. 1; Maynard v. Royal Worcester C. Co., 200 Mass. 1; Kerns v. Western U. Tel. Co., 170 Mo. App. 642; Wellington v. Spencer, 37 Okla. 461, 46 L.R.A. (N.S.) 469; Walter B. Co. v. Blackburn (Tex. Civ. App.), 67 S. W. 220; Johnson v. Wild Rice B. Co., 118 Minn. 24; Neal v. Jefferson, 212 Mass. 517, 41 L.R.A. (N.S.) 387; Randall v. Peerless M. C. Co., 212 Mass. 352; Rawlings v. Nash, 117 Md. 393; Hollweg v. Schafer B. Co., 197 Fed. 689, 117 C. C. A. 83; Bour v. Illinois Cent. R. Co., 176 Ill. App. 185; Harmon v. Frye, 103 Ark. 584; Raven Red Ash C. Co. v. Herron, 114 Va. 103, § 78; Wilkes v. Stacy, 113 Ark. 556; J. B. Carr & Co. v. Southern Ry. Co., 12 Ga. App. 830; O'Neal v. Bainbridge, 94 Kan. 518; McGinnis v. Studebaker Corp., — Ore. —, 146 Pac. 825.

If land covering deposits of phosphate has been rodded, bored and pitted and excavations made to ascertain their depth, there is sufficient evidence to form a basis for an award of damages based on the value of the phosphate. *Silver Springs, etc. R. Co. v. Van Ness*, 45 Fla. 559.

The loss resulting from the infringement of the right to maintain a noncompeting ferry is well shown by the diminution in the plaintiff's receipts: it need not be shown that the persons who patronized the defendant would have been carried by the plaintiff if his ferry was the only one. *Hatten v. Tur-*

man, 123 Ky. 844; *Morse v. Times-R. P. Co.*, 124 Iowa 707.

Though the original holder of a contract did not find it profitable when he operated under it the fact that his assignee took it and guaranteed a large profit and found it profitable shows that profits might have been made under it by the assignor. *Pennsylvania S. Co. v. New York City R. Co.*, 198 Fed. 721, 117 C. C. A. 503.

In *Wood v. Grand Valley R. Co.*, 26 Ont. L. R. 441, the plaintiff purchased bonds of a railroad company to aid in the construction of a branch line to the place in which he was doing business; the road was not built. The damages sought were for the inconvenience of doing business without the road, and the loss of profits because of the increased prosperity the road would have brought to the village in which he lived. These elements of uncertainty were too great to enter into the measure of damages, which the court placed at the sum paid for the bonds, less whatever value they had.

Profits made in violation of the laws concerning gambling or the sale of liquor are not to be regarded. § 869; *Kauffman v. Babcock*, 67 Tex. 241; *Prude v. Sebastian*, 107 La. 64; *Morris v. Western U. Tel. Co.*, 94 Me. 423.

Ordinarily, there cannot be a recovery of the gains which would have been made by the use of money not supplied according to contract: the disappointed party must be content with interest. See *Levinski v. Middlesex B. Co.*, 92 Fed. 449, 34 C. C. A. 452; *Greene v. Goddard*, 9

er number of cases such profits are too dependent upon numerous and changing contingencies to constitute a definite and trustworthy measure of damages; (2) because such loss of profits is ordinarily remote and not the direct and immediate result of a non-fulfillment of the contract; (3) the engagement to pay such loss of profits, in cases of default in performance, does not form a part of the contract, nor can it be said, from its nature and terms, that it was within the contemplation of the parties. Cases arise, however, in which loss of profits is said to be clearly within the contemplation of the parties, although not provided for by the terms of the contract, and where such profits are not open to the objection of uncertainty or remoteness. An instance of the latter kind is where the contract is entered into for the purpose, in part at least, of enabling the party to fulfill a collateral agreement from which profits would arise, of the existence of which he informed the other party prior to the making of the contract. In such cases the loss of profits from the collateral agreement is clearly within the contemplation of the parties, and is not remote or speculative.⁵⁷

Metc. (Mass.) 212. See § 76, and, for some exceptions, § 77.

In *Williams v. Stephenson*, 33 Can. Sup. Ct. 323, the trial court guessed at the profits the plaintiff was deprived of by the breach of the contract, and its action was sustained.

In actions to recover for personal injuries which disqualify the person injured from giving attention to the business in which he is engaged it is error to receive testimony of the average profits made therein as a basis for estimating damages. *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208, 41 Am. Rep. 19; *Masterton v. Mount Vernon*, 58 N. Y. 391; *Blair v. Milwaukee, etc. R. Co.*, 20 Wis. 262, 10 Am. Neg. Cas. 518. This rule is disapproved of in *Terre Haute v. Hudnut*, 112 Ind. 542, 552, and the New York case

cited pronounced not in harmony with later cases in that state. See *Wakeman v. Wheeler & W. Co.*, 101 N. Y. 205, 54 Am. Rep. 676; § 1246.

⁵⁷ Per Parker, Ch. J., in *Witherbee v. Meyer*, 155 N. Y. 446, 453; *Pacific S. M. Works v. California C. Co.*, 164 Fed. 980, 91 C. C. A. 108; *Milliken I. Co. v. United States*, 40 Ct. of Cls. 81; *Spencer M. Co. v. Hall*, 78 Ark. 336; *Sumwalt I. & C. Co. v. Knickerbocker I. Co.*, 114 Md. 403; *Independent B. Ass'n v. Burt*, 109 Minn. 323; *Chisholm & M. Mfg. Co. v. United States*, 111 Tenn. 202; *Perolin Co. v. Young*, 65 Wash. 300; *Church v. Wilkerson-T. Co.*, 58 Wash. 262, 137 Am. St. 1059; *Federal I. & B. B. Co. v. Hock*, 42 Wash. 668; *Gross v. Heckert*, 120 Wis. 314; *Pennsylvania S. Co. v. New York City R.*

If a vendor fails to deliver property pursuant to his contract the vendee, having paid for it, is deprived of such benefit as such sale completed would have conferred, which is a loss equal to the value of the property at the time it should have been delivered, with interest from that time. This value can generally be proved with certainty. If the property has not been paid for the compensation is still adjusted with reference to the value, and is the difference between the contract price and the value. Thus, the vendee is entitled to recover according to the advantage he would have derived from performance of the contract, namely, the profit he could have made by the bargain. He is entitled to such sum as would enable him to obtain the property if it is obtainable.⁵⁸ On the other hand, where a vendee breaks his contract the property is left on the vendor's hands; his loss is equal to the difference between the contract price and any less sum the property is worth when the vendee was bound to take and pay for it. The loss he suffers is the profit he would have made by the completion of the sale.⁵⁹

Co., 198 Fed. 721, 117 C. C. A. 503: Hicks v. National S. Co., 169 Mo. App. 479; Roper v. Milbourn, 93 Neb. 809; Bredemeier v. Pacific S. Co., 64 Ore. 576; Beach v. Johnson, 102 Miss. 419.

⁵⁸ Cincinnati, etc. R. Co. v. Baker, 130 Ill. App. 414.

In Haskel v. Hunter, 23 Mich. 305, an action was brought for damages for breach of a contract to sell and deliver lumber, and it appeared that a portion of the lumber had been delivered to the plaintiffs at a place other than that specified in the contract, and subject to a heavy bill of freight in consequence thereof. In the absence of any proof that the plaintiffs had accepted the same in satisfaction to that extent of the contract, or had waived their right to compensation to that extent for the breach thereof, it was not proper to deduct the

amount so delivered from the whole amount to be delivered. An instruction to the jury that the proper measure of damages is the difference between the contract price of the lumber not delivered and the wholesale price at the place of delivery was erroneous. The true measure is the difference between the contract price and what it would have cost the plaintiffs to procure, at the place of delivery, and at the time or times when it was reasonable and proper for them to supply themselves with lumber of the kind and quality they were to receive on the contract; and if it were impracticable to supply themselves, except at retail rates, they were entitled to demand those rates of the defendants.

⁵⁹ Houghton v. Furbush, 185 Mass. 251; Gordon v. Norris, 49 N. H. 376; Haines v. Tucker, 50 N. H.

§ 60. **Same subject.** In many cases the sum which shall represent the value to a vendee who has been disappointed in the receipt of property bargained for cannot be ascertained from proof of a market value, either because the article is not obtainable in market or because it is contracted for and must be obtained from the vendor to answer a particular purpose, and not for resale. Then, in applying the general rule that the damages for breach of contract are to be measured by the benefits which would have been received if the contract had been performed resort must be had to the known or customary use of the property and such practical elements of value as the case presents. If the sale is made with a warranty, express or implied, that the article is of a particular description or suitable for a designated use, on a breach by the vendor the damages are properly computed according to the actual loss in respect to that object. The ascertainment of the damages may involve an inquiry into the advantages derivable from the delivery of articles of the required description or suitable for the contemplated use, and of losses occasioned by the breach with reference to the particular purpose of the contract as known to the parties. In such cases the same degree of certainty is not always attainable and there is much conflict of authority as to the proper scope of the inquiry. The same considerations apply to the question of the proper mode of arriving at the amount of damage whatever be the nature of the contract. The injured party is entitled to gains prevented and losses sustained if his evi-

307; *Collins v. Delaporte*, 115 Mass. 159; *Ullman v. Kent*, 60 Ill. 271; *Sanborn v. Benedict*, 78 Ill. 310; *Camp v. Hamlin*, 55 Ga. 259; *McCracken v. Webb*, 36 Iowa 551; *Dustan v. McAndrew*, 44 N. Y. 72; *Hayden v. Demets*, 53 N. Y. 426; *Beardsley v. Smith*, 61 Ill. App. 340.

The loss of profits based upon the sale of town lots at prices beyond their value and which are dependent upon the working up of a

boom cannot be recovered. *Carbondale I. Co. v. Burdick*, 58 Kan. 517.

A distinction is to be made between cases where the difference between the agreed price and the ascertainable value of performance is involved and those in which the claim is based upon some thing hypothetical. *Connersville W. Co. v. McFarlan C. C.*, 166 Ind. 123, 3 L.R.A. (N.S.) 709; *Holliday v. Highland I. & S. Co.*, 43 Ind. App. 342.

dence has proved them with sufficient certainty.⁶⁰ In *Fletcher v.*

⁶⁰ *Delmer-Wallen Co. v. Delaware L. & W. R. Co.*, 89 Misc. (N. Y.) 252; *W. H. Norris Lumber Co. v. Harris*, — Tex. Civ. App. —, 177 S. W. 515; *Allen v. Field*, 130 Fed. 641, 65 C. C. A. 19; *Morgan v. Suttle*, 148 Iowa 318; *Iowa-M. L. Co. v. Conner*, 136 Iowa 674; *White v. Leatherberry*, 82 Miss. 103; *Punteney-M. Mfg. Co. v. Northwall*, 70 Neb. 688; *Kelley v. La Crosse C. Co.*, 120 Wis. 84, 102 Am. St. 971; *Sedro V. Co. v. Kwapil*, 62 Wash. 385, citing the text; *Hoge v. Norton*, 22 Kan. 374; *Brown v. Hadley*, 43 Kan. 267; *Arkansas Valley T. & L. Co. v. Lincoln*, 56 Kan. 145; *New Market Co. v. Embry*, 20 Ky. L. Rep. 1130; *Washington County W. Co. v. Garver*, 91 Md. 398; *Wiggins F. Co. v. Chicago & A. R. Co.*, 128 Mo. 224; *Stewart v. Patton*, 65 Mo. App. 21; *Wittenberg v. Mollyneaux*, 60 Neb. 583, 59 Neb. 203; *Lakeside P. Co. v. State*, 45 App. Div. (N. Y.) 112; *Burruss v. Hines*, 94 Va. 413; *Carroll-Porter B. & T. Co. v. Columbus Mach. Co.*, 5 C. C. A. 190, 55 Fed. 451; *Hitchcock v. Anthony*, 28 C. C. A. 80, 83 Fed. 779; *Safety Insulated W. & C. Co. v. Mayor*, 13 C. C. A. 375, 66 Fed. 140; *Fontaine v. Baxley*, 90 Ga. 416; *Border City I. & C. Co. v. Adams*, 69 Ark. 219; *Gordon v. Sanborn* (Tex. Civ. App.), 35 S. W. 291 (repudiation of trust); *Portable E. Mfg. Co. v. Bradley*, 158 Iowa 19; *Quarnberg v. Chamberlain*, 29 S. D. 377; *Bredemeier v. Pacific S. Co.* 64 Ore. 576.

In an action brought to recover the price of nine and one-half tons of fertilizer the defendant set up that the plaintiff agreed to sell and deliver to him twenty tons of fertilizer at a stipulated price, with

notice that it was intended for use on the defendant's cotton crop. The defendant was unable to buy the remaining quantity elsewhere, and the plaintiff refused to deliver it. The land upon which the fertilizer was designed to be used was cultivated in a farmer-like manner. Upon a portion the fertilizer delivered was used. This portion produced between three hundred and four hundred pounds of seed cotton per acre more than that adjoining, which was also planted in cotton—the quality and cultivation of each part being precisely the same. The court say: "The true rule seems to be that [the loss of] profits which have been sustained as the natural consequence of the breach or the wrongful act complained of are recoverable unless they are objectionable either on the ground of remoteness or of uncertainty. Those profits are usually considered too remote, among many others, which are not the immediate fruits of the principal contract, but are dependent upon collateral engagements and enterprises not brought to the notice of the contracting parties, and not therefore brought within their contemplation or that of the law. Those are considered uncertain which are purely speculative in their nature, and depend upon so many incalculable contingencies as to make it impracticable to determine them definitely by any trustworthy mode of computation. We would not be willing to say that the damages here claimed by the defendant by way of lost profits would have been recoverable if their ascertainment had been left to mere conjecture. The amount of cotton or other crops which land

Tayleur,⁶¹ the action was against a ship-builder to recover damages for nondelivery of an iron ship at the time appointed in the contract. The ship was intended by the plaintiffs and from the nature of her fittings the defendant must have known she was intended for a passenger ship in the Australian trade. The witnesses called on the part of the plaintiff stated that the vessel would, in all probability, have obtained, if completed by the time mentioned in the contract, at the then current rates, an outward freight of about 7,000*l.*, and a gross freight home of about 9,500*l.*, and that, allowing for the necessary outlay and expenses, the profits would in all probability have been a sum somewhat exceeding 7,000*l.* The amount of freight received by the plaintiffs when the ship sailed was 4,280*l.* The court submitted the case to the jury, to be decided by the rule laid down in *Hadley v. Baxendale*, and the jury returned a verdict in favor of the plaintiffs for 2,750*l.*, which was sustained. Under the particular circumstances it is to be inferred that the *data* for ascertaining what the ship would have earned if she had been finished at the proper time were not purely con-

produces is dependent upon so many varying contingencies as to render it very indeterminate. It will vary with the seasons, the adaptation of soil and climate, and its comparative exemption from the ravages of worms or other destructive insects. Speculative opinions of witnesses as to the probable influences of these operative causes would be a poor criterion for the measure of values. In this case, however, these difficulties are entirely removed. The character of the season is absolutely known. So is the precise effect of the fertilizer used during this particular season. No speculation is needed as to how much rain and how much sunshine were requisite to produce a given amount of crops to the acre, nor as to the probable

effect of the fertilizer upon the different kinds of soil, or even the proportion of it best suited to the land, and, therefore, what would necessarily have been produced on the remainder, which is shown to have been in precisely the same state of cultivation, and similar in quality of soil." *Bell v. Reynolds*, 73 Ala. 511. See *Goodsell v. Western U. Tel. Co.*, 53 N. Y. Super. 46, 58 id. 26.

One who has agreed to buy property from another, knowing that the latter intended to purchase it at a foreclosure sale, and who outbids such person at the sale must answer for the difference between the price bid and that he agreed to pay. *Patterson v. Meyerhofer*, 204 N. Y. 96.

⁶¹ 17 C. B. 21.

jectural, but were nearly as reliable as is the proof of market values.⁶²

But while this case on its facts is quite satisfactory and no doubtful principles are announced in it the damages were arrived at in a manner which the courts in this country have generally refused to adopt; that is, where there is any other and more certain method of ascertaining the damages they will not generally attempt to ascertain in what profits could be realized by conducting a business,⁶³ especially if the enterprise is a new one.⁶⁴ In actions for damages for not fulfilling in time contracts for particular works to be completed at a stipulated date the plaintiff cannot recover damages estimated on the value of profits which would have been realized by their use if the contract had been performed. The value of such use for general purposes to which they are adapted or some known use for which they were intended, during the delay, with any ex-

⁶² It is said in connection with the case cited that the rule of average profits made by the use of undelivered chattels has not been adopted as a separate rule, and is inapplicable to the breach of a contract to serve a mare with a particular stallion. *Sapwell v. Bass*, [1910] 2 K. B. 486. See § 61.

⁶³ *Smith v. Curran*, 138 Fed. 150; *Connorsville W. Co. v. McFarlan C. Co.*, 166 Ind. 123, 3 L.R.A.(N.S.) 709; *Gossage v. Philadelphia, etc. R. Co.*, 101 Md. 698; *Wade v. Belmont I. C. & W. P. Co.*, 87 Neb. 732; *Punteney-M. Mfg. Co. v. Northwall*, 70 Neb. 688; *Standard S. Co. v. Carter*, 81 S. C. 181, 19 L.R.A.(N.S.) 155; *Shropshire v. Adams*, 40 Tex. Civ. App. 339; *Hurxthal v. St. Lawrence B. & M. Co.*, 65 W. Va. 346; *Taylor v. Maguire*, 12 Mo. 313; *Blanchard v. Ely*, 21 Wend. 342; *Walker v. Ellis*, 1 Sneed, 515; *Porter v. Woods*, 3 Humph. 56, 39 Am. Dec. 153; *Singer v. Farnsworth*, 2 Ind. 597;

Glidden v. Pooler, 50 Ill. App. 36; *Lanahan v. Heaver*, 79 Md. 413; *Delp v. Edlis*, 190 Pa. 25; *Sharpe v. Southern R. Co.*, 130 N. C. 613; *Douglas v. Railroad Co.*, 51 W. Va. 523; *Central C. & C. Co. v. Hartman*, 111 Fed. 96, 49 C. C. A. 244; *Armistead v. Shreveport, etc. R. Co.*, 108 La. 171; *Asher v. Stacey*, 23 Ky. L. Rep. 1586; *Silurian M. S. Co. v. Kuhn*, 65 Neb. 646; *Garden City S. Co. v. Southern Fire B. & C. Co.*, 177 Ill. App. 280; *Thompson v. Corbin*, 41 Nova Scotia, 386.

⁶⁴ *Creamery P. Mfg. Co. v. Benton County C. Co.*, 120 Iowa 584; *Whitehead v. Cape Henry Syndicate*, 111 Va. 193; *Kellogg v. Mallick*, 125 Wis. 239; *Mitchell v. Cornell*, 44 N. Y. Super. 401. See *Owensboro-H. Tel. Co. v. Wisdom*, 23 Ky. L. Rep. 97, where a lesser degree of proof seems to have satisfied the court than has been required in many other cases.

penses which have to be incurred in the meantime, is usually the measure of damages.⁶⁵ Where the plaintiff took possession of a store under a contract of purchase and carried on a profitable business in it for several months and was then ejected by the defendant and kept out of possession the latter was liable for the value of the business lost, which was provable by evidence of the profits made.⁶⁶ On the breach of a contract for the loan of money to be used in erecting houses, none of which were built until three years after its breach, there cannot be a recovery for the loss of their rental value. The fact that the plaintiff was unable during that time to borrow the money from any other source on the same security offered the defendant, and which he did not impair, was taken as evidence of the uncertainty and speculative character of the anticipated profits.⁶⁷

In particular cases there may be losses in outlays made by the injured party in anticipation of the performance by the

⁶⁵ *Tompkins v. Monticello C. O. Co.*, 153 Fed. 817; *Curran v. Smith*, 149 Fed. 945, 81 C. C. A. 537; *Bliss v. Buffalo T. C. Co.*, 131 Fed. 51, 65 C. C. A. 289; *Dustin v. St. Petersburg I. Co.*, 126 Fed. 816; *Connersville W. Co. v. McFarlan C. Co.*, 166 Ind. 123, 3 L.R.A.(N.S.) 709; *First Nat. Bank v. Carroll*, 35 Mont. 302; *Callahan v. Chickasha C. O. Co.*, 17 Okla. 544; *Standard S. Co. v. Carter*, 81 S. C. 181, 19 L.R.A.(N.S.) 155; *Stark G. Co. v. Harry Bros. Co.*, 57 Tex. Civ. App. 529; *Ulrich v. Pateros*, 67 Wash. 328; *Griffin v. Colver*, 16 N. Y. 489; *Taylor v. Bradley*, 39 N. Y. 129; *McBoyle v. Reeder*, 1 Ired. 607; *Benton v. Fay*, 64 Ill. 417; *Green v. Mann*, 11 Ill. 614; *Priestly v. Northern I. & C. R. Co.*, 26 Ill. 207, 71 Am. Dec. 369; *Strawn v. Cogswell*, 28 Ill. 461; *Fleming v. Beck*, 48 Pa. 309; *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534; *Green v. Williams*, 45 Ill. 206; *Dean v. White*, 5 Iowa 266; *Rogers v. Beard*, 36 Barb. 31;

Snell v. Cottingham, 72 Ill. 161; *Cassidy v. Le Fevre*, 45 N. Y. 562; *Parker v. Gilliam*, 1 Ired. 545; *Lecroy v. Wiggins*, 31 Ala. 13; *Pettee v. Tennessee Mfg. Co.*, 1 Sneed 381; *Heard v. Holman*, 19 C. B. (N. S.) 1; *Davis v. Cincinnati, etc. R. Co.*, 1 Disney, 23; *Blair v. Kilpatrick*, 40 Ind. 312; *Thompson v. Shattuck*, 2 Mete. (Mass.) 615; *Corbet v. Johnson*, 10 Ont. App. 564; *Bridges v. Lanham*, 14 Neb. 369, 45 Am. Rep. 121; *Witherbee v. Meyer*, 155 N. Y. 446; *Rogers v. Bemis*, 69 Pa. 432; *Pennypacker v. Jones*, 106 Pa. 237; *Finnegan v. Allen*, 60 Ill. App. 354; *Paola G. Co. v. Paola G. Co.*, 56 Kan. 614, 54 Am. St. 598; *Williams v. Island City M. Co.*, 25 Ore. 573, citing the text; *Watson v. Kirby*, 112 Ala. 436; *Atlantic & D. R. Co. v. Delaware C. Co.*, 98 Va. 503; *Sharpe v. Southern R. Co.*, 130 N. C. 613.

⁶⁶ *Collins v. Lavelle*, 19 R. I. 45.

⁶⁷ *Levinisky v. Middlesex B. Co.*, 34 C. C. A. 452, 92 Fed. 449.

other party and actual loss of wages of men kept idle, and various other items which are easily proved; these, with the rental value of the agreed structure, enable the court to ascertain the damages with more certainty than by consideration of profits to be made in conducting a business where nearly all the factors in the calculation are suppositions.⁶⁸ But where there is not such a certain mode of estimating damages the court will not dismiss the injured party with nominal damages unless the case is such there is no certainty that he has suffered actual injury. In a suit by an agent against a life insurance company for damages resulting from his discharge during the term of his engagement his measure of damages is the amount he has lost in consequence; and testimony of actuaries as to the probable value of renewals for the remainder of his term on policies already obtained is competent to assist in arriving at the result.⁶⁹ But an estimate of the probable earnings thereafter, derived from proof of the amount of his collections and commissions before the breach, without other proof relating thereto, was too speculative to be admissible.⁷⁰ Where the personal element is a factor in realizing profits from a business the success of one person does not afford a basis for inferring that another would have succeeded in the same business on the same premises.⁷¹ But this principle may not apply where the chances of success are not affected by the employment of capital. Hence on the breach of a contract to return a fisherman who owned appliances to a place where employment at his occupation was certain it was competent to show the earnings of fishermen

⁶⁸ *Quay v. Duluth, etc. R. Co.*, 153 Mich. 567, 18 L.R.A. (N.S.) 250; *Brown v. East Carolina R. Co.*, 154 N. C. 300; *Kelley v. La Crosse C. Co.*, 120 Wis. 84, 102 Am. St. 971; *Standard O. Co. v. Weeks*, 6 Ala. App. 161; *Gates v. Northern Pac. R. Co.*, 64 Wis. 64; *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168; *Taylor Mfg. Co. v. Hatcher Mfg. Co.*, 39 Fed. 440, 3 L.R.A. 587; *Mandia v. McMahon*, 17 Ont. App. 34; cases cited in n. 59, *supra*.

The right to be reimbursed for outlay and expenses does not depend upon proof of the right to recover profits. *United States v. Behan*; *Taylor Mfg. Co. v. Hatcher Mfg. Co.*, *supra*.

⁶⁹ *Ætna L. Ins. Co. v. Nexsen*, 84 Ind. 347; *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534; *Tilles v. Mutual L. Ins. Co.*, 1 Mart. Ch. Dec. 313. See § 69.

⁷⁰ *Lewis v. Ins. Co.*, *supra*.

⁷¹ *Gross v. Heckert*, 120 Wis. 314.

situated as he would have been if the contract had not been broken.⁷² The value which land might have acquired if the operation of a street railroad over it had not been discontinued is so dependent on uncertain contingencies as to be unsafe as a ground for measuring damages;⁷³ and so of the loss of profits of a store and mill in consequence of the breach of an agreement to locate houses for employees near them.⁷⁴

In estimating the damages sustained by a company for the laying out of a highway across its railroad or for permitting another railroad to cross it at grade the jury have no right to take into consideration any supposed future damage to it from a probable increase in the expense of doing business in consequence of the establishment of the new highway or crossing; and evidence of payments of money on account of accidents at the several crossings, and of the comparative profit of travel over the railroad between different stations is inadmissible; it is too uncertain and contingent.⁷⁵ The conjectural or possible profits of a whaling or other voyage cannot be taken into consideration in estimating the damage against a master for running away with the vessel and abandoning the voyage.⁷⁶ Where there was a breach of a contract to give a theatrical performance on one occasion only proof of the leading actor's repute and popularity, that during the previous year he had played to a large house in the same place, the inhabitants of which largely patronized such performances, and the testimony of the plaintiff, based upon experience in the management of the theater in which the play was to have been rendered, of the cash receipts of similar plays given there, as to what the receipts might have

⁷² Johnson v. San Juan F. & P. Co., 31 Wash. 238.

⁷³ Eckington & S. H. R. Co. v. McDevitt, 191 U. S. 103, 48 L. ed. 112.

⁷⁴ Evans v. Cincinnati, etc. R. Co., 78 Ala. 341.

⁷⁵ Boston, etc. R. Co. v. Middlesex, 1 Allen 324; Portland & R. R. Co. v. Deering, 78 Me. 61, 57 Am. Rep. 784; Massachusetts, etc. R. Co. v. Boston, etc. R. Co., 121 Mass.

124; Chicago & A. R. Co. v. Joliet, etc. R. Co., 105 Ill. 388, 44 Am. Rep. 799; Boston & M. R. Co. v. County Com'rs, 79 Me. 386. See § 1077 *et seq.*

⁷⁶ Brown v. Smith, 12 Cush. 366; Schooner Lively, 1 Gall. 314; Boyd v. Brown, 17 Pick. 453; The Anna Maria, 2 Wheat. 327, 4 L. ed. 252; Del Col v. Arnold, 3 Dall. 333, 1 L. ed. 624. See § 1289.

been if the play had been given, was insufficient to sustain a judgment for substantial damages.⁷⁷ And where the breach was of a theatrical "sharing terms" agreement, which contemplated a considerable period for its execution, the loss of profits was not shown by the previous receipts of the plaintiff's theater and by proof of the success of the play, which was to have been given therein, in other cities.⁷⁸ The damages which will result from a contemplated advance in the price of real estate because of the proposed erection and operation of a factory on adjoining land cannot be recovered in an action for the breach of a contract for the erection and operation thereof.⁷⁹ But if lands are exchanged with an agreement as part of the consideration by one of the parties that he will make valuable improvements upon the tract conveyed by him, the damages resulting from his breach are not too uncertain if the complaint alleges the difference between the value of the tracts at the time the exchange was made.⁸⁰ In a Wisconsin case there was a breach of contract to purchase and work a stone quarry, of which the plaintiff was to have one-half of the net profits so long as it could be profitably worked. The defendant refused to perform before any profits were realized. It was proven that the quarry had been worked at a profit for three years preceding the trial and an estimate was made of profits based in part on earnings for another year. The court considered the loss of profits sufficiently established, and held that the time during which a recovery might be had therefor was for the jury.⁸¹

⁷⁷ Todd v. Keene, 167 Mass. 157.

In *Western U. Tel. Co. Auslet*, 53 Tex. Civ. App. 264, it is held that evidence of the number of tickets sold for a single performance, supplemented by evidence of the attendance upon similar performances in the same place, was not as to the latter altogether speculative; that the damages could not be estimated with accuracy is not ground for denying a recovery, there being some standard from which they may be approximately ascertained with a reasonable degree of certainty.

⁷⁸ *Moss v. Tompkins*, 69 Hun 288, affirmed without opinion, 144 N. Y. 659; approved in *Cutting v. Miner*, 30 App. Div. 457, see also *Alkahest Lyceum System v. Curry*, 6 Ga. App. 625.

⁷⁹ *Dullea v. Taylor*, 35 Up. Can. Q. B. 395; *Rockford, etc. R. Co. v. Beckemeier*, 72 Ill. 267; *Waterson v. Allegheny Valley R. Co.*, 74 Pa. 208; *St. Louis, etc. R. Co. v. Berry*, 86 Ark. 309.

⁸⁰ *Wilson v. Yocum*, 77 Iowa 569.

⁸¹ *Treat v. Hiles*, 81 Wis. 280, approved in *Hitchcock v. Supreme*

§ 61. Warranties of seeds and breeding quality of animals, etc. Where a vendor falsely warranted that seed sold would produce Bristol cabbages the damages recoverable were the value of a crop of Bristol cabbages such as would ordinarily have been produced that year, deducting the expense of raising it and the value of the crop actually raised.⁸² What would have been produced from other seed and of the kind warranted, of course, could not be proved directly, and it was not attempted; but the regularity of production under usual conditions is such that a judicial conclusion may be based upon it as sufficiently certain. Mere speculative profits, such as might be conjectured would be the probable result of an adventure defeated by the breach of contract, the gains from which are entirely conjectural and with respect to which no means exist of ascertaining even approximately the probable results, cannot under any circumstances be brought within the range of damages recoverable. In Georgia the rule is that for the breach of an implied warranty of the merchantable quality of seed for planting the damages are limited to the purchase-money with interest thereon and expenses incurred in planting and preparing for the planting of the seed.⁸³ In Tennessee only the difference in value between the seed purchased and that delivered can be recovered.⁸⁴ The cardinal rule in relation to the damages to be compensated on

Tent, 100 Mich. 40, and in *Schumaker v. Heinemann*, 99 Wis. 251.

Where it was sought to recover the loss of the profits of an established business in an action on an injunction bond it was said: It may not be possible to show by demonstration the precise extent of such damages, but profits for a reasonable period next preceding the time of the injury may be taken as the measure of such damages and as the basis of an estimate thereof, leaving the other party to show that, by depression in trade or otherwise, they would have been less. *Landis v. Wolf*, 206 Ill. 392.

⁸² *Passinger v. Thorburn*, 34 N. Y.

634, 90 Am. Dec. 753; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *White v. Miller*, 71 N. Y. 133; *Ferris v. Comstock*, 33 Conn. 513; *Page v. Pavey*, 8 C. & P. 769; *Randall v. Raper*, 96 Eng. C. L. 82; *Flick v. Weatherbee*, 20 Wis. 392; *Wagstaff v. Short Horn D. Co.*, 1 Cab. & E. 324; *Phelps v. Eyria M. Co.*, 12 Ohio Dec. 692, quoting the text. See *Reiger v. Worth*, 127 N. C. 230, 52 L.R.A. 362.

⁸³ *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508.

⁸⁴ *Hurley v. Buchi*, 10 Lea 346.

the breach of a contract is that the plaintiff must establish the *quantum* of his loss by evidence from which the jury will be able to estimate the extent of his injury; this will exclude all such elements of damage as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty.⁸⁵ Instances of such uncertain damages are profits expected from a whaling voyage and the gains which depend in a great measure upon chance; they are too purely conjectural to be capable of entering into compensation for non-performance of a contract⁸⁶ or for a tort.⁸⁷ For a similar reason the loss of the value of a crop for which seed had been sown, the yield of which would depend upon the contingencies of weather and season, have been excluded as incapable of estimation with the degree of certainty which the law exacts in the proof of damages;⁸⁸ but as to this the cases are not agreed if the probable ultimate value of an unmatured crop can be arrived at by evidence of the actual matured value of other like crops, cultivated during the same period as that in question, in the same locality and under substantially similar conditions.⁸⁹ The loss of profits following the

⁸⁵ Wolcott v. Mount, *supra*; Brigham v. Carlisle, 78 Ala. 243, 56 Am. Rep. 28, quoting the text; Hair v. Barnes, 26 Ill. App. 580; Morgan v. Sutlive, 148 Iowa 318.

⁸⁶ Favar v. Riverview Park, 144 Ill. App. 86, quoting the text; Wolcott v. Mount, *supra*.

⁸⁷ Lamond v. Seacoast C. Co., 108 Me. 155; Wright v. Mulvaney, 78 Wis. 89, 9 L.R.A. 807, 23 Am. St. 393. *Contra*, Pacific S. W. Co. v. Alaska P.'s Ass'n, 128 Cal. 632. See § 1289.

⁸⁸ Injuries to growing crops must be estimated with reference to their condition at the time they are inflicted. Their value cannot be proven by showing the worth of similar crops which matured. Drake v. Chicago, etc. R. Co., 63 Iowa 302, 50 Am. Rep. 746; Sabine, etc. R. Co. v. Joachim, 58 Tex. 456; Texas, etc. R. Co. v. Young, 60 id. 201;

G., C. & S. F. R. v. Holliday, 65 id. 512; Jones v. George, 61 id. 345, 48 Am. Rep. 280, 56 Tex. 149; Gresham v. Taylor, 51 Ala. 505.

And on account of the uncertainty involved in the maturing of crops the damage sustained by injuries done thereto cannot be reduced by efforts to show what might have been realized if another crop had been planted on the land on which that injured was growing. G. C. & S. F. R. v. Holliday, *supra*.

⁸⁹ Malone v. Hastings, 193 Fed. 1, 113 C. C. A. 329; Wolcott v. Mount, Passinger v. Thorburn, White v. Miller, 71 N. Y. 133; Colorado C. Co. v. McFarland (Tex. Civ. App.), 94 S. W. 400; Rice C. & M. Co. v. Wells, 33 Tex. Civ. App. 545; Tres Palacios R. & I. Co. v. Eidman, 41 id. 542; Payne v. Railroad, etc. Co., 38 La. Ann. 164, 58 Am. Rep. 174.

breach of a contract to publish an advertisement have been held to be incapable of being estimated;⁹⁰ a conclusion which has been denied.⁹¹ The damages resulting from the breach of a warranty of the breeding qualities of an animal are too contingent and uncertain to support a recovery when compensation for the services he renders is to be paid only when the animals served actually foal,⁹² as are the damages caused by the loss of profits because of the failure to serve a mare with a particular stallion, though there be proof of the profits the plaintiff had made from the sale of foals by the same stallion out of other mares.⁹³ The same is true of the reduction of the number of

⁹⁰ *Tribune Co. v. Bradshaw*, 20 Ill. App. 1.

The damages for the breach of an agreement to advertise certain remedies over the name of a druggist who gives an order for such remedies are too speculative to permit of a recovery. *Stevens v. Gale*, 113 Mich. 680.

⁹¹ The plaintiff, on beginning business as a ladies' tailor, made a contract with the defendant for the insertion of an advertisement in a special place in a newspaper. The publication was made for only a part of the stipulated time. The jury was instructed as to the measure of damages according to the rule of *Hadley v. Baxendale*, 2 Am. Neg. Rep. 400, and returned a verdict for substantial damages. *Kennedy, J.*, said: The defendant knew the object of the advertisement. If it be material, I think he ought to be taken to have known at the time that if he broke the contract the result would be, as a natural consequence, loss to the plaintiff in his business. The plaintiff said he suffered loss to the extent of £100, which he attributed to the loss of the advertisement. No suggestion was made by the defendant as to any other cause for the loss of busi-

ness. The defendant knew that the plaintiff could not get the advertisement inserted in a journal of such unique position in such a place as he had contracted to give him. I am of opinion that the evidence of loss of business was proper for the consideration of the jury in assessing the damages. *Marcus v. Myers*, 11 T. L. Rep. 327 (1895).

Where there was a breach of a contract to permit a party to put up signs at drinking stations on the grounds of an exposition advertising a water filter, testimony of qualified witnesses giving opinions as to the value of the right under that contract was admissible. *World's Columbian Exposition Co. v. Pasteur-C. F. Co.*, 82 Ill. App. 94.

⁹² *Connoble v. Clark*, 38 Mo. App. 476.

⁹³ *Sapwell v. Bass*, [1901] 2 K. B. 486. It is said: It will be observed that the expectation of profit arising from the contract at the time it was made was not and could not be based on any tangible market price of the expected progeny of the stallion and the undetermined mare, nor on the enhanced prospective price of such mare, but upon a succession of contingencies which could not be foretold more than a year before-

members in a given class in a mutual benefit society, the effect being that the amount realized by the beneficiary under a certificate is thereby lessened. What the result would have been if the change which brought about such reduction had not been made is a matter of speculation.⁹⁴ But if a vessel is under charter or engaged in a trade the earnings of which can be ascertained by reference to the usual schedule of freights in the market, or if a crop has been sown and the ground prepared for cultivation and the complaint is that because of the inferior quality of the seed a crop of less value is produced, by these circumstances the means would be furnished to enable the jury to make a proper estimate of the injury resulting from the loss of profits of this character.⁹⁵

§ 62. **Prospective growth of orchard and of animals.** An instructive case arose in Ohio involving this question of uncertainty.⁹⁶ The action was on a contract by which the defendant

hand, such as the following: (1) That the stallion would be alive and well at the time of the intended service. (2) That the mare sent would be a well-bred one, and that the plaintiff would for his own sake and without any obligation towards the defendant make a good and suitable selection of such mare. (3) That the mare would not prove barren, which had happened to another mare sent by the plaintiff to the same stallion. (4) That the mare sent would not slip her foal, and that such foal would be born alive and would be strong and healthy. (5) The chance whether it would be a colt or filley, the former being more valuable. (6) That the foal would be all right when offered for sale. (7) That the relative reputations of the stallion and other sires and their respective foals would be the same in 1909 as in 1908. (8) That no substitute for the stallion available in 1909 would equal or exceed him in public estimation or in results. (9) That the

offspring of a substituted stallion would not command as good a price as that of the stallion in question. See § 71.

⁹⁴ *Supreme Lodge v. Knight*, 117 Ind. 489, 500, 3 L.R.A. 409.

⁹⁵ *Wolcott v. Mount*, 36 N. J. L. 271, 13 Am. Rep. 438; *Owners of The Gracie v. Owners of The Argentino*, 14 App. Cas. 519, affirming *The Argentino*, 13 Prob. Div. 191; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52, quoted from in note to preceding section.

⁹⁶ *Rhodes v. Baird*, 16 Ohio, 573. It is said of this case that if it goes so far as to hold that deprivation of future profits cannot be ground for damages, it is not in accord with the current of authority. See § 107. The case in which this observation was made ruled that evidence of the value of an orchard at the time of trial, in the prospective profits of which the plaintiff was interested, was admissible, and it was not to be presumed in favor of a wrongdoer that such value will

agreed to make a lease to the plaintiff for the term of ten years of certain lands on which to plant and cultivate a peach orchard. The breach consisted in the failure to make a lease and in defendant causing the plaintiff, within two years from his taking possession and after the peach trees were planted, to be evicted from the premises. On the trial the plaintiff was permitted to give evidence of the probable profits that might be realized from the orchard, judging from the number of crops and the prices of peaches in the county for the last ten or fifteen years. This testimony was incompetent, because too uncertain and speculative. The court said: To the extent that the damages depended upon the loss of the use of the property, its market value at the time of the eviction, subject to the performance of the contract on the part of the plaintiff, was the standard for awarding compensation; if it had no general market value its value should have been ascertained from witnesses whose skill and experience enabled them to testify directly to such value in view of the hazards and chances of the business to which the land was to be devoted.⁹⁷ Where the plaintiff sought to recover the value of his stock in a green-house, which was damaged or destroyed by a defective heating apparatus, he was permitted to show the value of the plants by testifying as to the number of flowers cut from them the year previous, he having had long experience in cultivating plants by artificial heat and knowing how many flowers could be produced from a plant.⁹⁸ The damages resulting from the failure to furnish an agreed number of steers to be cared for and sold at a profit, the plaintiff to be compensated for his services by a share of the profits resulting from their improvement in condition, are not too uncertain. In the absence of any agreement as to the weight or age of the steers it was assumed that they were such as were ordinarily purchased for feeding purposes in the community.⁹⁹ The decrease in the

become less. *Shoemaker v. Acker*, 116 Cal. 239. See *Kellogg v. Mallowick*, 125 Wis. 239.

⁹⁷ *Griffin v. Colver*, 16 N. Y. 489; *Giles v. O'Toole*, 4 Barb. 261; *Newbrough v. Walker*, 8 Gratt. 16, 56 Am. Dec. 127; *Jenkins v. Womach*,

143 Mo. App. 410; *Wade v. Belmont I. C. & W. P. Co.*, 87 Neb. 732, 31 L.R.A. (N.S.) 743.

⁹⁸ *Laufer v. Boynton F. Co.*, 84 Hun, 311. See *Black v. Minneapolis, etc. R. Co.*, 122 Iowa 32.

⁹⁹ *Rule v. McGregor*, 117 Iowa

growth of cattle because of the use of improper food or wrongful treatment is not too uncertain to be recovered for.¹

§ 63. **Profits of special contracts.** The liability for the profits which would have resulted from the performance of a contract is co-extensive with the power to contract; and the government is liable therefor to the same extent as an individual.² The right of a party to recover the profits he would have made in fulfilling a contract depends solely upon the fault of the other party to it and the plaintiff's ability to show that the profits claimed were reasonably certain to have been realized but for the wrongful act complained of.³ It is not an insuperable objection to their recovery that they cannot be directly and absolutely proved. The general uncertainty attending human life and the special contingencies as to its duration on account of the physical condition of an individual whose rights are involved do not prevent the recovery of damages for causing his death or injuring his person. An agreement by one person to support another during life is an entire, continuing contract upon the total breach of which the obligor is liable for full and final damages estimated to the time the person who was to be

419; *Schrandt v. Young*, 2 Neb. (Unof.) 546.

In an action for negligence in caring for cattle the testimony as to their condition when received by the defendant, as to the number of calves which probably would have been dropped if the cows had been properly bred and cared for, and as to the value of such calves was given by farmers, and was sufficient to fix the probable loss of profits. *Mattern v. McCarthy*, 73 Neb. 228.

¹ *Swift v. Redhead*, 147 Iowa, 94; *Riehner v. Plateau L. S. Co.*, 44 Colo. 302.

² *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277.

³ *Bixby-T. L. Co. v. Evans*, 167 Ala. 431, 29 L.R.A.(N.S.) 194; *McConnell v. Crown City W. Co.*, 149 Cal. 60, 8 L.R.A.(N.S.) 1171, citing

the text; *Schiffman v. Peerless M. C. Co.*, 13 Cal. App. 600; *Barnette S. Co. v. Ft. Harrison L. Co.*, 126 La. 75; *Crowley v. Burns B. & Mfg. Co.*, 100 Minn. 178; *Wilkinson v. Dunbar*, 149 N. C. 20; *Pittsburg Steel F. v. Pittsburg S. Co.*, 223 Pa. 430; *Hagan v. Nashville T. Co.*, 124 Tenn. 93; *Church v. Wilkerson-T. Co.*, 58 Wash. 262, 137 Am. St. 1059; *Smith v. Atlas-P. C. Co.*, 66 W. Va. 599; *Schumaker v. Heinemann*, 99 Wis. 251; *Treat v. Hiles*, 81 Wis. 280; *American C. Co. v. Bullen B. Co.*, 29 Ore. 549, 561, citing the text; *Rule v. McGregor*, 117 Iowa, 419; *Schrandt v. Young*, 2 Neb. (Unof.) 546; *Farmers' L. & T. Co. v. Eaton*, 114 Fed. 14, 51 C. C. A. 640; *Maguire v. Kiesel*, 86 Conn. 453, citing the text; *Howard v. Brown*, — Iowa —, 148 N. W. 987.

supported would probably die.⁴ It is the constant practice to so assess damages in actions to recover for personal injuries. In the nature of things where performance has been prevented the proof of profits cannot be direct and absolute. The injured party must, however, introduce evidence legally tending to establish damage and sufficient to warrant a jury in coming to the conclusion that the damages they find have been sustained; but no greater degree of certainty in this proof is required than of any other fact which is essential to be established in a civil action. If there is no more certain method of arriving at the amount the injured party is entitled to submit to the jury the particular facts which have transpired and to show the whole situation which is the foundation of the claim and expectation of profit, so far as any detail offered has a legal tendency to support such claim.⁵ The law does not require that the party

⁴ Schell v. Plumb, 55 N. Y. 592; First Nat. Bank v. St. Cloud, 73 Minn. 219; Ironton L. Co. v. Butchart, 73 Minn. 39; Morrison v. McAttee, 23 Ore. 530; Freeman v. Fogg, 82 Me. 408.

⁵ Lum Ah Lee v. Ah Soong, 16 Hawaii 163, quoting the text; Iowa M. L. Co. v. Conner, 136 Iowa 674; Long v. Kaufman, 128 La. 767; Hendrix v. Wabash R. Co., 107 Mo. App. 127; Smith v. Hicks, 14 N. M. 560, 19 L.R.A.(N.S.) 938; El Paso, etc. R. Co. v. Eichel (Tex. Civ. App.), 130 S. W. 922; Wilson v. Wernwag, 217 Pa. 82; Griffin v. Colver, 16 N. Y. 489; Giles v. O'Toole, 4 Barb. 261; Newbrough v. Walker, 8 Gratt. 16, 56 Am. Dec. 127; Taylor Mfg. Co. v. Hatcher Co., 39 Fed. 440, 446, 3 L.R.A. 587, quoting the text; Brewing Co. v. McCann, 118 Pa. 314; Dart v. Laimbeer, 107 N. Y. 664; Wakeman v. Wheeler & W. Mfg. Co., 101 N. Y. 205, 217, 54 Am. Rep. 676; quoting the text; Shoemaker v. Acker, 116 Cal. 239; Lavens v. Lieb, 12 App. Div. 487; Dickinson v. Hart, 142 N. Y. 183; United States T. Co.

v. O'Brien, 143 N. Y. 284; Skinner v. Shew, [1894] 2 Ch. 581.

The difficulty of fairly estimating the injury done an unknown author by the breach of a contract to publish his first book is not necessarily insuperable. Gale v. Leckie, 2 Stark. 107; Bean v. Carleton, 51 Hun 318, Compare Bean v. Carleton, 12 N. Y. Supp. 519. Nor the net proceeds which might have been derived from the sale of tickets to hear a noted lecturer. Savery v. Ingersoll, 46 Hun 176. This is a very doubtful proposition in the absence of proof of an advance sale of tickets. See Bernstein v. Meech, 130 N. Y. 354, and § 60. Nor the damages resulting to a hotel from the violation of a contract to maintain a depot at a certain point. Houston, etc. R. v. Molloy, 64 Tex. 607. But it is otherwise with the breach of a contract to furnish a mule for the cultivation of land: in such case the damage resulting to crops is too uncertain. Harper v. Weeks, 89 Ala. 577; Luce v. Hoisington, 56 Vt. 436.

The damages following the breach

seeking to recover for gains prevented shall furnish *data* from which they can be mathematically computed. "When one breaks a contract which the other party has partly performed and the violator then performs the work himself, from which he reaps the profits which the other party might have made, he cannot escape liability for damages if such other party can show the profits made while he was executing it and the benefits received from its subsequent completion.⁶

The profits which would have been made from a farm which was to be operated by a corporation are too uncertain to be a

of a contract to issue an annual railway pass during the life of a party are not too uncertain. *Curry v. Kansas, etc. R. Co.*, 58 Kan. 6.

⁶ *Hitchcock v. Supreme Tent*, 100 Mich. 40; *Schiffman v. Peerless M. C. Co.*, 13 Cal. App. 600.

Where the plaintiff was permitted to sink but one of five wells which he had contracted to sink not less than two hundred feet in depth and five hundred feet if practicable and possible in the defendant's judgment, it was sufficient to show as a basis for damages what profit was made in sinking other wells in the vicinity of an average depth of four hundred feet. *Sanford v. East Riverside Dist.*, 101 Cal. 275.

If the trial does not occur until long after the cause of action arose and the contract contemplated a long period for its performance the plaintiff may show the facts as they then exist. *Shoemaker v. Acker*, 116 Cal. 239. See § 107.

There is noticeable a lack of harmony in the cases as to the recovery of profits as damages, some requiring a higher degree of proof than others, and some courts manifesting a marked hesitancy as to permitting their recovery. This seems to be the case in Michigan, where the recovery of lost profits has been denied under circumstances similar to those which

have justified their recovery in other jurisdictions. See *McKinnon v. McEwan*, 48 Mich. 106; *Allis v. McLean*, id. 428 (citing approvingly in *Williams v. Island City M. Co.*, 25 Ore. 573, 590); *Talcott v. Crippen*, 52 Mich. 633; *Petrie v. Lane*, 67 Mich. 454. *Talcott v. Crippen, supra*, is limited in *Leonard v. Beaudry*, 68 Mich. 318; *Fell v. Newberry*, 106 Mich. 542, and *Barrett v. Grand Rapids V. Works*, 110 Mich. 6. See *First Nat. Bank v. Thurman*, 69 Iowa 693. *Allis v. McLean, supra*, is approved in *Moulthrop v. Hyett*, 105 Ala. 493, and followed in *Hutchinson Co. v. Pinch*, 91 Mich. 156, and the rule there laid down has been applied in *Quay v. Duluth, etc. R. Co.*, 153 Mich. 567, 18 L.R.A.(N.S.) 250. See also, *Heron v. Raupp*, 156 Mich. 162; *Oliver v. Perkins*, 92 id. 304; *Burrell v. New York, etc. S. Co.*, 14 id. 39; *Allison v. Chandler*, 11 id. 558; *Mueller v. Bethesda S. Co.*, 88 id. 390, recognize the right to recover lost profits, as do others of the cases cited *supra*.

The profits lost to a mill owner because of the nondelivery of logs as contracted for, to be manufactured into lumber at a fixed price, are not too speculative. *Barrett v. Grand Rapids V. Works*, 110 Mich. 6.

measure of damages for the breach of a contract to work it. The recovery is measurable by the difference between the market value of the lease and the price paid for it.⁷ The profits made under the contract prior to the trial may be shown for the double purpose of ascertaining what the award should be on account of them and to aid in forming a conclusion, in connection with other facts, as to the profits to be reasonably expected in the ordinary course of events.⁸

§ 64. **Same subject; Masterton v. Mayor.** In the leading case in New York,⁹ which has been extensively cited and approved, the plaintiffs agreed to furnish and deliver marble wrought in a particular manner from a designated quarry for a public building. The quantity necessary to fill their contract was eighty-eight thousand eight hundred and nineteen feet, for which they were to be paid a specified price. They afterwards contracted with the proprietors of that quarry for the marble. When the plaintiffs had delivered fourteen thousand seven hundred and seventy-nine feet and had on hand at the quarry three thousand three hundred and eight feet ready for delivery the defendants suspended the performance of the contract without fault of the plaintiffs. They sought to recover the profits of the contract and also the damages to which they were subjected for the consequent violation of their subcontract for the marble at the quarry. Nelson, C. J., said: "It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature and too dependent upon the fluctuation of the markets and chances of business to enter into a safe or reasonable estimate of damages. Thus any supposed successful operation the party might have made if he had not been prevented from realizing the proceeds of the contract at the time stipulated is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation

⁷ *Augusta N. S. Co. v. Forlaw*, 133 Ga. 138.

⁸ *Maguire v. Kiesel*, 86 Conn. 453, citing this section.

⁹ *Masterton v. Mayor*, 7 Hill 61. See *Jones v. Judd*, 4 N. Y. 411; *Dan-*

olds v. State, 89 id. 36, 42 Am. Rep. 277; *Taft v. Tiede*, 55 Iowa 370; *Bernstein v. Meech*, 130 N. Y. 354; *Rice v. Penn P. G. Co.*, 88 Ill. App. 407.

in itself considered it has no legal or necessary connection with the stipulations between the parties and cannot, therefore, be presumed to have entered into their consideration at the time of contracting. It has accordingly been held that the loss of any speculation or enterprise in which a party may have embarked, relying on the proceeds to be derived from the fulfillment of an existing contract, constitutes no part of the damages to be recovered in case of breach.¹⁰ So, a good bargain made by a vendor, in anticipation of the price of the article sold; or an advantageous contract of resale made by a vendee confiding in the vendor's promise to deliver the article are considerations excluded as too remote and contingent to affect the question of damages. . . . When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into account in ascertaining the true measure of damages they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. The performance or non-performance of the latter may, and doubtless often does, exert a material influence upon the collateral enterprises of the party; and the same may be said as to his general affairs and business transactions. But the influence is altogether too remote and subtle to be reached by legal proof or judicial investigation. And besides, the consequences, when injurious, are as often, perhaps, attributable to the indiscretion and fault of the party himself as to the conduct of the delinquent contractor. His condition, in respect to the measure of damages, ought not to be worse for having failed in his engagement to a person whose affairs are embarrassed than if it had been made with one in prosperous or affluent circumstances.¹¹ But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and

¹⁰ *Shoemaker v. Acker*, 116 Cal. 239, 245. See § 47.

¹¹ Dom., B. 3, tit. 5, § 2, art. 4.

plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made and formed, perhaps, the only inducement to the arrangement.¹² The parties may have entertained different opinions concerning the advantages of the bargain, each supposing and believing that he had the best of it; but this is mere matter of judgment, going to the formation of the contract, for which each has shown himself willing to take the responsibility, and must, therefore, abide the hazard." Applying these principles the judge said: "The plaintiffs' claim is substantially one for not accepting goods bargained and sold; as much so as if the subject-matter of the contract had been bricks, rough stones or other article of commerce used in the process of building. The only difficulty or embarrassment in applying the general rule grows out of the fact that the article in question does not appear to have any well-ascertained market value. But this cannot change the principle which must govern, but only the mode of ascertaining the actual value, or rather the cost to the party producing it. Where the article has no market value an investigation into the constituent elements of the cost to the party who has to furnish it becomes necessary, and that, compared with the contract price, will afford the measure of damages. The jury will be able to settle this upon evidence of the outlays, trouble, risk, etc., which enter into and make up the cost of the article in the condition required by the contract at the place of delivery. . . . It has been argued that, inasmuch as the furnishing of the marble would have run through a period of five years—of which about one year and a half only had expired at the time of the suspension—the benefits which the party might have realized from the execution of the contract must necessarily be speculative and conjectural; the

¹² Shoemaker v. Acker. *supra*, quoting the text; Goldhammer v. Dyer, 7 Colo. App. 29; Paola G. Co. v. Paola G. Co., 56 Kan. 614, 622, 54 Am. St. 598; Hirschhorn v. Bradley, 117 Iowa, 130; Treat v. Hiles, 81 Wis. 280; Anvil M. Co. v. Humble, 153 U. S. 540, 38 L. ed. 814;

Farmers' L. & T. Co. v. Eaton, 114 Fed. 14, 51 C. C. A. 640; Owensboro-H. Tel. Co. v. Wisdom, 23 Ky. L. Rep. 97, 62 S. W. 529; Ford H. L. Co. v. Clement, 97 Ark. 522; George v. Lane, 80 Kan. 94; Wilkinson v. Dunbar, 149 N. C. 20.

court and jury having no certain *data* upon which to make the estimate. If it were necessary to make the estimate upon any such basis the argument would be decisive of the present claim. But in my judgment no such necessity exists. When the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose and not at the time fixed for full performance. * * * It will be seen that we have laid altogether out of view the subcontract * * * and all others that may have been entered into by the plaintiffs as preparatory and subsidiary to the fulfillment of the principal one with the defendants. Indeed, I am unable to comprehend how these can be taken into the account, or become the subject-matter of consideration at all in settling the amount of damages to be recovered for a breach of the principal contract. The defendants had no control over or participation in the making of the subcontracts, and are certainly not to be compelled to assume them if improvidently entered into. On the other hand, if they were made so as to secure great advantages to the plaintiffs, surely the defendants are not entitled to the gains which might be realized from them. In any aspect, therefore, these subcontracts present a most unfit as well as unsatisfactory basis upon which to estimate the real damages and loss occasioned by the default of the defendants. . . . And yet, the fact that these subcontracts must ordinarily be entered into preparatory to the fulfillment of the principal one shows the injustice of restricting the damages in cases like the present to compensation for the work actually done, and the item of the materials on hand. We should thus throw the whole loss and damage that would or might arise out of contracts for further materials, etc., entirely upon the party not in default. If there was a market value of the article in this case, the question would be a simple one. As there is none, however, the parties will be obliged to go into an inquiry as to the actual cost of furnishing the article at the place of delivery; and the

court and jury should see that in estimating this amount it be made upon a substantial basis, and not left to rest upon loose and speculative opinions of witnesses. The constituent elements of the cost should be ascertained from sound and reliable sources; from practical men, having experience in the particular department of labor to which the contract relates. It is a very easy matter to figure out large profits upon paper; but it will be found that these, in a great majority of the cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with care and watchfulness any speculative or conjectured account of the cost of furnishing the article that would result in a very unequal bargain between the parties, by which the gains and benefits, or, in other words, the measure of damages against the defendants, are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseparable from the execution of contracts like the one in question, and which increase the expense independently of the outlay in labor and capital."

§ 65. **Violation of contract to lease.** The plaintiff agreed with the defendant to take a lease of premises belonging to the latter for the purpose, as he knew, of carrying on a trade which the plaintiff was about to commence. The defendant wilfully refused to carry out his agreement, and plaintiff was unable for fifteen weeks to commence business. Specific performance of the agreement was decreed and damages were awarded for loss of profit.¹³ The damages resulting from the failure to perform a contract to rent premises is the difference between what they were worth and the rent agreed upon.¹⁴ Where the lease of a farm which was to be worked on shares for several years stipulated that if the owner exercised his reserved right to sell the farm during the term he should pay any damages which the lessee sustained by giving up possession, the latter's rights are

¹³ *Jaques v. Millar*, 6 Ch. Div. 153; *Alexander v. Bishop*, 59 Iowa 572; *Brockway v. Thomas*, 36 Ark. 518; *Beidler v. Fish*, 14 Ill. App. 623; *Jarrait v. Peters*, 145 Mich. 29, are

not in accord with the English case. See *Benyaker v. Scherz*, 103 App. Div. 192; § 867 and note.

¹⁴ *Eastman v. Mayor*, 152 N. Y. 468.

the same as they would have been if the sale had been made wrongfully; he was entitled to recover the value of his contract—what the privilege of occupying and working the farm was worth, subject to the terms of the contract and under all the contingencies liable to affect the result.¹⁵ But time spent by the person who was to be the lessee in securing other premises is not an element of the damages.¹⁶ If the lessee of business premises is evicted and his business broken up he may recover the prospective profits thereof for the remainder of the term.¹⁷ It is otherwise as to profits which might have been made on a farm by a person who was without experience.¹⁸ If the lessor of business property fails to keep it in repair as he agreed to do the lessee may recoup for the loss of custom and the profits he might have made but for the breach; and it will be enough for him to show facts which enable the jury to approximate his losses.¹⁹ A lessee who violates covenants in the lease as to posting a notice “to let” and allowing the premises to be shown will be liable for the loss of rent resulting.²⁰

§ 66. **Profits of labor.** Where a party has contracted to perform labor from which a profit is to spring as a direct result of the work done at the contract price and is prevented from earning this profit by the wrongful act of another party its loss is a direct and natural result which the law will presume

¹⁵ *Depew v. Ketchum*, 75 Hun, 227; *Taylor v. Bradley*, 39 N. Y. 129; *Shoemaker v. Crawford*, 82 Mo. App. 487; *Cilley v. Hawkins*, 48 Ill. 308; *North Chicago S. R. Co. v. Le Grand Co.*, 95 Ill. App. 435; *Kjelsberg v. Chilberg*, 177 Fed. 109, 100 C. C. A. 529.

The measure of damages for the breach of a contract to lease a farm for a period of years is not what the plaintiff as lessee, “might have made out of it under the most favorable conditions not within human power to command, but the value of the privilege of occupying and cultivating the farm subject to the conditions of the lease, and all the contingencies that were liable to affect

the result.” *Cornelius v. Lytle*, 246 Pa. 205.

¹⁶ *Schultz v. Brenner*, 24 N. Y. Misc. 522.

¹⁷ *Snow v. Pulitzer*, 142 N. Y. 263; *Farmers' L. & T. Co. v. Eaton*, 114 Fed. 14, 51 C. C. A. 640, applying the rule to the termination of the lease of a railroad executed by a receiver; *Owensboro-II. Tel. Co. v. Wisdom*, 23 Ky. L. Rep. 97, 62 S. W. 529 (violation of lease for use of telephone); *Neal v. Jefferson*, 212 Mass. 517.

¹⁸ *Kellogg v. Maliek*, 125 Wis. 239.

¹⁹ *Stewart v. Lanier House Co.*, 75 Ga. 582.

²⁰ *United States T. Co. v. O'Brien*, 143 N. Y. 284. See ch. XX.

to follow the breach of the contract; and he is entitled to recover it without special allegations in his declaration. The amount of damage may be established by showing how much less than the contract price it will cost to do the work or perform the contract.²¹ Actual damages clearly include the direct and actual loss which a plaintiff sustains *propter rem ipsam non habitam*. And in case of such contracts the loss of profits, among other things, is the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital and assumes the risks which attend the enterprise. Where profits are advisedly spoken of as not a subject of damages it will be found that something contingent upon future bargains, or speculations, or state of the market is referred to, and not the difference between an agreed price of something contracted for and its ascertainable value or cost.²²

²¹ Leonard v. Beaudry, 68 Mich. 310, 13 Am. St. 344; Mississippi & Rum River B. Co. v. Prince, 34 Mich. 71; Oldham v. Kerchner, 79 N. C. 106; Jolly v. Single, 16 Wis. 280; Kinney v. Crocker, 18 id. 74; Hinckley v. Beckwith, 13 id. 31; McAndrews v. Tippet, 39 N. J. L. 105; United States v. Speed, 8 Wall. 77, 19 L. ed. 449; Doolittle v. McCullough, 12 Ohio St. 360; Middekauff v. Smith, 1 Md. 343; Clark v. Mayor, 4 N. Y. 338, 53 Am. Dec. 379; Cook v. Commissioners, 6 McLean 612; Frye v. Maine, etc. R. Co., 67 Me. 414; Lentz v. Choteau, 42 Pa. 435; James v. Adams, 8 W. Va. 568; Cramer v. Metz, 57 N. Y. 659; Devlin v. Mayor, 63 N. Y. 8; Hoy v. Gronoble, 34 Pa. 9, 75 Am. Dec. 628; Thompson v. Jackson, 14 B. Mon. 114; Fox v. Harding, 7 Cush. 516; Milburn v. Belloni, 39 N. Y. 53, 100 Am. Dec. 403; Elizabethtown, etc. R. Co. v. Pottinger, 10 Bush 185; Wallace v. Tumlin, 42

Ga. 462; United States v. Smith, 94 U. S. 214, 24 L. ed. 115; Somers v. Wright, 115 Mass. 292; Richmond v. D. & S. C. R. Co., 40 Iowa 264; Fail v. McRee, 36 Ala. 61; Goldman v. Wolff, 6 Mo. App. 490; Dennis v. Maxfield, 10 Allen 138; Skagit R. & L. Co. v. Cole, 2 Wash. 57; Fell v. Newberry, 106 Mich. 542; O'Connor v. Smith, 84 Tex. 232; Barrett v. Grand Rapids V. Works, 110 Mich. 6; Ramsey v. Holmes E. P. Co., 85 Wis. 174; Equitable M. Co. v. Weddington, 2 Tex. Civ. App. 373; McConnell v. Corona City W. Co., 149 Cal. 60, 8 L.R.A.(N.S.) 1171, quoting the text; Stumm v. Western U. Tel. Co., 140 Wis. 528. See § 713.

²² Philadelphia, etc. R. Co. v. Howard, 13 How. 344, 14 L. ed. 173; O'Connor v. Smith, 84 Tex. 232; Hirschhorn v. Bradley, 117 Iowa 130; Carrico v. Stevenson (Tex. Civ. App.), 135 S. W. 260; El Paso, etc. R. Co. v. Eichel (Tex. Civ. App.), 130 S. W. 922; Smith v. Curry,

Tips are too indefinite and uncertain in amount to afford a basis for estimating profits or income.²³

§ 67. **Profits from commercial ventures.** The success of business ventures is not antecedently certain in an absolute sense; they are generally undertaken in reliance upon probabilities based upon the law of demand and supply. Though speculative in their inception, by anticipating future values, they are generally retrospectively examined when they become subjects of judicial investigation, and then such values are capable of proof. If the business, the profits from which are in question, is a trading business they must depend on a succession of purchases of stock for sale, or the employment of labor or material to be purchased for its production, and a succession of sales. Where the injury complained of is an interruption or prevention of such a business or causes a diminution of it it is scarcely possible to establish damages to a very high degree of certainty.²⁴ In many cases the best conclusion will be merely a probable one. The rule of law is the same in all cases, that the damages be proved with reasonable certainty; but a greater degree of certainty being attainable in some cases than is possible when the result sought depends on the chances of future bargains the law will not permit the proof which is certain to be neglected and resort be made to that which is less satisfactory; though the latter in other cases, is the best the nature of the case admits of and must be received as the only guide to the proper amount of compensation, and is then available.²⁵ The damages result-

(Ky.) 146 S. W. 434 (a music teacher who has not been supplied with a piano as agreed may recover the profits that would have been made if it was impracticable to procure another piano); *Beckwith v. Talbot*, 2 Colo. 639; *Dockstader v. Young Men's C. Ass'n*, — Iowa —, 109 N. W. 906.

²³ *Torgeson v. Hanford*, 79 Wash. 56.

²⁴ See *Carsey v. Farmer*, 117 Ky. 826; *Winslow E. & M. Co. v. Hoffman*, 107 Md. 621, 17 L.R.A. (N.S.) 1130; *Morrow v. Missouri Pac. R.*

Co., 140 Mo. App. 200; *Patten v. Lynett*, 133 App. Div. (N. Y.) 746; *American P. F. Co. v. Elliott*, 151 N. C. 393; *Paola G. Co. v. Paola G. Co.*, 56 Kan. 614, 622, 54 Am. St. 598.

The loss of property because of the negligence of a bailee is not accompanied with liability for the profits lost because the bailor was unable to immediately supply himself with like property. *Weick v. Dougherty*, 139 Ky. 528, 3 L.R.A. (N.S.) 348.

²⁵ *Fairchild v. Rogers*, 32 Minn.

ing from the breach of an agreement to furnish the plaintiff facilities for carrying on his business in a store during a fixed term were sufficiently shown by proof of the gross receipts made during the two years business was done there, the net profits, the income obtained elsewhere during the succeeding year, and what plaintiff was able to earn after his business in the store was broken up.²⁶ A proposed contract cannot be a basis for the recovery of profits.²⁷ Anticipated profits from a business to be established are too uncertain to form a basis of damages.²⁸

§ 68. Profits on dissolution of partnership. One partner may maintain an action at law against another for a breach of the copartnership articles in dissolving before the time limited therefor, and may do so before the expiration of the period for which the partnership was to continue. The damages are the profits which would have accrued to the plaintiff from the continuation of the partnership business and which are lost by its unau-

269: *Alexander v. Breeden*, 14 B. Mon. 154; *Houston, etc. R. Co. v. Hill*, 70 Tex. 51; *Same v. Molloy*, 64 Tex. 607; *Kelly v. Miles*, 58 N. Y. Super. 495; *Oliver v. Perkins*, 92 Mich. 304; *Treat v. Hiles*, 81 Wis. 280; *World's Columbian Exp. Co. v. Pasteur-C. F. Co.*, 82 Ill. App. 94; *Fraser v. Echo M. & S. Co.*, 9 Tex. Civ. App. 210; *Dr. Harter M. Co. v. Hopkins*, 83 Wis. 309; *American C. Co. v. Caswell* (Tex. Civ. App.), 141 S. W. 1013; *Harper F. Co. v. Southern Exp. Co.*, 148 N. C. 87, 30 L.R.A. (N.S.) 483. See § 913 and note, and *Achison, etc. R. Co. v. Thomas*, 70 Kan. 409.

In an action to recover for misrepresentations concerning his business the plaintiff alleged injury to his credit, whereby he was unable to obtain goods to sell and therefore lost profits. The damage claimed under the latter head was too remote. *Bradstreet Co. v. Oswald*, 96 Ga. 396.

One cannot recover the prospective profits of a business which is illegal

and which he discontinued because of threats. *Prude v. Sebastian*, 107 La. 64.

²⁶ *Dickinson v. Hart*, 142 N. Y. 183; *Gagnon v. Sperry*, 206 Mass. 547; *Standard S. Co. v. Carter*, 81 S. C. 181, 19 L.R.A. (N.S.) 155.

The loss of the profits caused by the partial breach of a license for the exclusive privilege of selling goods on a fleet of steamers for a series of seasons is well shown by proof of the sums realized in previous years, including the time the contract was in effect, the ability of the plaintiff to do business, the nature of the business and the opportunities for prosecuting it. *Nash v. Thousand Islands S. Co.*, 123 App. Div. 148.

²⁷ *Western U. Tel. Co. v. Adams Mach. Co.*, 92 Miss. 849.

²⁸ *Webster v. Beau*, 77 Wash. 444, 51 L.R.A. (N.S.) 81; *C. W. Kettering Mercantile Co. v. Sheppard*, — N. M. —, 142 Pac. 1128, citing authorities. See also § 704.

thorized dissolution.²⁹ The only legitimate beneficial consequence of continuing a partnership is the making of profits. The most direct and legitimate injurious consequence which can follow upon an unauthorized dissolution of a partnership is the loss thereof. Unless that loss can be made up to the injured party it is idle to say that any obligation is imposed by a contract to continue a partnership for a fixed period.³⁰ It is safe to say that such profits cannot be proved except to a reasonable certainty, which is sufficient.³¹ The profits immediately before the dissolution may be shown for the consideration of the jury. In *Bagley v. Smith*³² Judge Johnson said: "It seems to me quite obvious that outside of a court of justice no man would undertake to form an opinion as to prospective profits of a business without in the first place informing himself as to its past profits, if that fact were accessible. As it is a fact in its nature entirely capable of accurate ascertainment and proof, I can see no more reason why it should be excluded from the con-

²⁹ *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756; *Treat v. Hiles*, 81 Wis. 280; *Ramsay v. Meade*, 37 Colo. 465; *Tygart v. Albritton*, 5 Ga. App. 412.

³⁰ *Bagley v. Smith*, *supra*; *McNeill v. Reid*, 9 Bing. 68; *Gale v. Leekie*, 2 Stark. 107; *Mitchell v. Read*, 84 N. Y. 556; *Burekhardt v. Burekhardt*, 42 Ohio St. 474, 498, 58 Am. Rep. 842, citing the text and applying the principle to the breach of a contract for the sale of the good will of a business; *Zimmerman v. Harding*, 227 U. S. 489, 57 L. ed. 608; *Karrick v. Hannaman*, 168 U. S. 328, 42 L. ed. 484; *Dennis v. Maxfield*, 10 Allen, 138.

In *Reiter v. Morton*, 96 Pa. 229, 242, the measure of damages for the wrongful dissolution of a manufacturing partnership was held to be the actual money value of the plaintiff's interest in the firm at the time of the breach. "What would the interest sell for to a person willing to

buy and having the means to buy? As illustrating this question the actual state and condition of the property, business and assets of the firm at the time, together with proof of actual results accomplished, whether of profit or loss or both, in the past, would be competent evidence. Beyond this, at least so far as conjectural profits in the future are concerned, it would not be safe to go."

Where one partner rendered services and the other furnished the capital, there being no time fixed for the duration of the partnership, the damages recoverable by the former for its wrongful dissolution were the value of his services, skill, etc., in conducting the partnership business, and not his share of profits for any specific time. *Ball v. Britton*, 58 Tex. 57.

³¹ *Ramsay v. Meade*, 37 Colo. 465.

³² 10 N. Y. 489, 61 Am. Dec. 756.

sideration of the tribunal called upon to determine conjecturally the amount of prospective profits than proof of the nature of the business, or any other circumstances connected with its transaction. It is very true that there is great difficulty in making an accurate estimate of future profits, even with the aid of knowing the amount of past profits. This difficulty is inherent in the nature of the inquiry. We shall not lessen it by shutting our eyes to the light which the previous transactions of the partnership throw upon it. Nor are we more inclined to refuse to make the inquiry, by reason of its difficulty, when we remember that it is the misconduct of the defendants which has rendered it necessary." In a subsequent case, where the business in the past had been a losing one, it was held error to charge, as the plaintiff requested, that the jury were not confined in estimating damages to the rate of profits at the time of dissolution, but might consider and give damages for profits that would probably have been made by the higher prices; and might consider the present and probable future rate during the balance of the partnership, though the court added: "It requires some care. You are not to guess about this matter. If you can rationally see through this that the profits would have been greater in the future, and are greater at the present time than at the time of the dissolution, and you believe that the present increased profits, if such there would be, are likely to continue and increase, and you can satisfy yourself of this in your own mind, then you have the right to look through the remainder of the time of the partnership, making a very careful estimate in regard to what the profits might probably be." The supreme court regarded the instruction to give damages for profits that would *probably* have been made by the *higher prices*, and authorizing the jury to consider the present and probable future rate, as going beyond any previous case in favor of speculative and contingent profits; the former case was referred to as adhering to the rule of certainty. The court say, also, "The case at bar differs from that case, and the cases cited therein, inasmuch as in those cases where the court was submitting the question of damages to the jury they were no longer prospective; but at the time of the trial in those cases respectively, the time had

expired up to which the profits in question were to be estimated. In such cases all the *data* for ascertaining what profits might have been obtained from the business could be furnished by witnesses and there was no need of resorting to conjecture.”³³ This case insists on a more rigid rule than the former one. It was, however, a case in which there was very little *data* for finding even a probable profit.³⁴ Evidence of the profits previously made may be supplemented by evidence of the prosperity and growth of the local community during the time the partnership had continued and also of the ability and skill of the plaintiff.³⁵ If one partner fails to pay in a portion of his share of the capital and the copartner continues in the firm until it is dissolved by mutual consent there cannot be a recovery of profits which might have been made if such share had been fully paid; the payment of interest will adjust the parties’ rights.³⁶ Where a copartner to whom a premium has been paid wrongfully brings an action to dissolve the partnership the premium may be apportioned and an equitable part of it be adjudged in such action to be returned.³⁷

§ 69. Commercial and insurance agencies; proof of damages.

The contracts between commercial agents and their principals embody as many elements of uncertainty as are usually found in combination; among others (at least where the compensation is based upon commissions) the state of trade, quality and price of the goods offered, the skill, energy and industry with which the business is prosecuted, the credit of the parties to whom sales are made, and the acceptance of the agent’s orders by his principal are all considerations which tend to make the damages sustained by an agent by reason of the wrongful revocation of his agency so uncertain as to be difficult, if not impossible, of ascer-

³³ Van Ness v. Fisher, 5 Lans. 236

³⁴ See Dobbins v. Duquid, 66 Ill. 464; Park v. C. & S. W. R. Co., 43 Iowa 636; Smith v. Wunderlich, 70 Ill. 426; Sewall’s Falls Bridge v. Fisk, 23 N. H. 171; Shafer v. Wilson, 44 Md. 268; Lacour v. Mayor, 3 Duer 406; St. John v. Mayor, 13 How. Pr. 527; Richmond v. Dnhu-Suth. Dam. Vol. I.—17.

que, etc. R. Co., 33 Iowa 423; Satchwell v. Williams, 40 Conn. 371; Schile v. Brokhahns, 80 N. Y. 614; Treat v. Hiles, 81 Wis. 280; Burdall v. Johnson, 122 Mo. App. 119.

³⁵ Ramsay v. Meade, 37 Colo. 465.

³⁶ Delp v. Edlis, 190 Pa. 25.

³⁷ Corcoran v. Sumption, 79 Minn. 108.

tainment.³⁸ Past sales, it has been said, do not afford a safe basis for estimating future profits because conditions may not remain as they were,³⁹ and also because the time and service of the salesman, which have been given to the making of them, will be his, on the termination of the employment, to use otherwise.⁴⁰ The damages in cases of this class are not speculative or remote, and the difficulty in ascertaining them does not deter courts from awarding such compensation for their breach as the evidence shows with reasonable certainty the wronged party is entitled to. It would be a reproach to the law if he could not recover all the damages sustained.⁴¹ Where an agent selling on commission was discharged three months before the expiration of his contract the court said it could see no great difficulty in proving facts that would enable a jury to determine approximately the amount of goods he would have sold during that time. He had been a traveling salesman for the defendant during the two preceding years, and his sales during the corresponding months of those years could have been shown, as might the state of the markets, the number of his regular customers, etc.⁴² If the agent, at the time of the revocation of his

³⁸ *Union Ref. Co. v. Barton*, 77 Ala. 148; *Brigham v. Carlisle*, 78 id. 243, 56 Am. Rep. 28; *Stern v. Rosenheim*, 67 Md. 503. See *Noble v. Hand*, 163 Mass. 289.

It has been said that, where the employer discontinues his business and his agent thereby loses the profits of sales upon commission there can be no recovery because it was within the contemplation of the parties that "the employe took the chances of his employer finding his business profitable and carrying it on." *In re Scottish Marine Ins. Co.*, 5 Ch. App. 737. See § 694.

³⁹ *Washburn v. Hubbard*, 6 Laus. 11; *Hair v. Barnes*, 26 Ill. App. 580; *Roth v. Spero*, 48 N. Y. Misc. 506.

⁴⁰ *Ray v. Lewis*, 67 Minn. 365.

⁴¹ *Baldwin v. Marqueze*, 91 Ga.

404; *Spencer M. Co. v. Hall*, 78 Ark. 336. It is said: When, as in this case, there is a breach of a contract in which the parties expressly contracted for the earning of profits by way of commission on sales of goods to be made by the agent, they must necessarily have had in contemplation the loss of such profits as an element of damages upon the breach of the contract. They cannot, therefore, be said to be either too uncertain of ascertainment or too remote to be considered as the proximate result of the breach of the contract. See *Fortaine v. Baxley*, 90 Ga. 416.

⁴² *Cranmer v. Kohn*, 7 S. D. 247; *Laishley v. Goold B. Co.*, 6 Ont. L. R. 319 (court of appeal). See *Ogdens v. Nelson*, [1903] 2 K. B. 287.

authority, had agreements for sales which he could have consummated but for the wrongful act of his principal he is entitled to his commissions on them, if it is clear they would have been made. Mere expectations, doubtful offers or other vague or indefinite assurances of intention to purchase are speculative.⁴³ The loss of employment is an element of damage, but no standard can be fixed for ascertaining the extent of it.⁴⁴ If the principal has accepted orders from his agent and refused to fill them the commission thereon may be recovered;⁴⁵ but not damages which resulted to the business of the agent otherwise.⁴⁶ A more liberal rule has been held in a case which has been often cited.⁴⁷ The contract sued upon provided that if the plaintiff should sell fifty of the defendant's machines to one firm in Mexico for every such sale he should have the exclusive agency of the machines in that locality, they to be furnished by the defendant at the lowest price, and the plaintiff to receive a com-

⁴³ *Kenney v. Knight*, 127 Fed. 403; *Sterling O. Co. v. House*, 25 W. Va. 64. See *La Favorite R. Mfg. Co. v. Channon Co.*, 113 Ill. App. 491; *Dowagiac Mfg. Co. v. Corbit*, 127 Mich. 473.

⁴⁴ *Beck v. West*, 87 Ala. 213. See *Taylor v. Spencer*, 75 Kan. 152.

⁴⁵ *Taylor Mfg. Co. v. Hatcher Mfg. Co.*, 39 Fed. 440, 3 L.R.A. 587.

⁴⁶ *Id.* In accord: *Bennett L. Co. v. Walnut Lake C. Co.*, 105 Ark. 421.

⁴⁷ *Wakeman v. Wheeler & W. Mfg. Co.*, 101 N. Y. 205, 54 Am. Rep. 671; *Bannatyne v. Florence M. & M. Co.*, 77 Hun, 289, applying the rule in the *Wakeman* case, *supra*; *Crittenden v. Johnston*, 7 App. Div. 258; *More v. Knox*, 52 N. Y. Supp. 145; *Wells v. National L. Ass'n*, 39 C. C. A. 476, 99 Fed. 222, 53 L.R.A. 33, approving the *Wakeman* case, *supra*; *Hitchcock v. Supreme Tent*, 100 Mich. 40, 43 Am. St. 423; *Hirschhorn v. Bradley*, 117 Iowa 130;

Emerson v. Pacific Coast & N. P. Co., 96 Minn. 11, 113 Am. St. 603; *Nash v. Thousand Islands S. Co.*, 123 App. Div. (N. Y.) 148; *Roth v. Spero*, 48 N. Y. Misc. 506; *Dunham v. Hastings P. Co.*, 95 App. Div. 360; *Federal I. & B. B. Co. v. Hoek*, 42 Wash. 668; *American Agricultural C. Co. v. Rhodes*, 139 Ga. 495. See *Independent B. Ass'n v. Burt*, 109 Minn. 323; *Wilson v. Wernwag*, 217 Pa. 82; *Meylert v. Gas Consumers' B. Co.*, 26 Abb. N. C. 262, § 62, and *Mechanics' & T's. Ins. Co. v. McLain*, 48 La. Ann. 109; *Hollweg v. Schaefer B. Co.*, 197 Fed. 689, 117 C. C. A. 83, is an important case on this question.

The profits made in a business formerly pursued by the plaintiff and abandoned in reliance on the performance of the contract in question may be shown to establish the lost profits. *Meylert v. Gas Co.*, *supra*; *Arkansas Valley T. & L. Co. v. Lincoln*, 56 Kan. 145.

mission. Two such sales were made, the order for one of which was filled; the other order was not filled, and the contract was repudiated. Agencies were established by the plaintiff at the places these sales were made. The court observed that these agencies were to be exclusive and to have some permanency. They were valuable to the plaintiff, and though there was difficulty in ascertaining the damages he sustained it was not greater than existed in other cases where profits had been recovered. There were some facts upon which a jury could base a judgment, not certain nor strictly accurate, but sufficiently so for the administration of justice; such as the fact that sales had been made before the breach and afterwards; the qualifications of the agent and those who operated under him to make sales; the facilities for carrying on business, and like facts would have warranted a verdict which would have approached as near the proper measure of justice as the nature of the case and the infirmity which attaches to the administration of the law will allow.⁴⁸ In another case there was an unauthorized revocation of the sole agency for the sale of an article. The agent's re-

⁴⁸ *Stevens v. Ansinck*, 149 App. Div. (N. Y.) 220. See *Wiley v. California H. Co.*, 97 Cal. 18.

In *Howe Mach. Co. v. Bryson*, 44 Iowa 159, 24 Am. Rep. 735, a majority of the court held that an agent could not recover as damages for the breach of a contract to furnish him machines to sell on commission the profits which might have been realized if the contract had been performed. The New York court in the case considered in the text concurs with the two Iowa judges who dissented. It is said in *Hirschhorn v. Bradley*, *supra*: If the question considered in *Howe Machine Co. v. Bryson*, *supra*, were now before us for the first time, we might, in view of the later authorities, incline to the view expressed in the dissenting opinion. As supporting that view, see *Wells v. National L.*

Ass'n, 39 C. C. A. 476, 95 Fed. 222, 53 L.R.A. 33. See also, *Klingman v. Racine Sattley Co.*, 143 Iowa 435.

A jobber who has been granted the sole and exclusive sale of an article not obtainable in the general market and who has bound himself to use all good methods to promote its sale during the life of the contract may, for the refusal to supply him with the article, recover the profits he would have made on all orders taken during such time though some of them were not to be filled until after its expiration. The parties must have contemplated that the usual methods of doing business would be pursued and orders for future delivery be taken. *Portable E. Mfg. Co. v. Bradley*, 158 Iowa 19.

covery was measured by the profits he might have realized if there had been no breach of the principal's contract. In order to determine what they would have been proof of the actual sales of the article made by the agent's successor during the term the former was entitled to the agency was admissible.⁴⁹ On the revocation of such an agency in prescribed territory evidence of the sales made by the agent after the breach and up to the time of the trial is competent to establish his claim for the loss of profits,⁵⁰ and so are sales made in the agent's exclusive territory by the principal; he will not be heard to allege that the agent would not have made them.⁵¹ Where an agent made sales for two years of the three the agency was to continue the result of his efforts was a basis on which damages might be assessed in his favor, though a diminished demand for the goods during the third year was shown.⁵² The profits on articles the plaintiff had a fair expectation of making within a reasonable time may be considered on the basis of his efforts to make a market for them.⁵³ The rights of an agent under a contract limited as to time and territory do not require that the principal shall supply goods beyond the reasonable need

⁴⁹ *Corbin v. Taussig*, 137 Fed. 151; *Mueller v. Bethesda M. S. Co.*, 88 Mich. 390, approved in *Cranmer v. Kohn*, 7 S. D. 247; *Hirschhorn v. Bradley*, 117 Iowa 130; *Schumaker v. Heinemann*, 99 Wis. 251, is in harmony with the cases sustaining the right to recover profits, as is *Carlson v. Stone-O. W. Co.*, 40 Mont. 434; *Independent B. Ass'n v. Burt*, 109 Minn. 323; and *Bredemeier v. Pacific S. Co.*, 64 Ore. 576, 131 Pac. 312.

⁵⁰ *Hirschhorn v. Bradley*, *Carlson v. Stone-O. W. Co.*, *supra*; *Herman v. Pierce*, 105 App. Div. (N. Y.) 16.

In *White S. M. Co. v. Shaddock*, 79 Ark. 220, a contract allotting an agent exclusive territory provided for its termination upon giving notice; and it was so terminated. The

defendant was liable for the loss of profits on sales made within the stipulated territory by other salesmen prior thereto and on machines bought by the agent and not sold by him in so far as the latter profits were lost by putting other salesmen in the territory after the termination of the contract; but was not liable for the loss of profits on other sales made thereafter.

⁵¹ *Schiffman v. Peerless M. C. Co.*, 13 Cal. App. 600; *Caffe v. Newark A. Mfg. Co.*, 78 N. Y. Misc. 152. See *Cincinnati, etc. G. I. Co. v. Western S.-L. Co.*, 152 U. S. 200, 38 L. ed. 411.

⁵² *Laishley v. Gould B. Co.*, 6 Ont. L. R. 319.

⁵³ *Kenney v. Knight*, 127 Fed. 403.

of the agent's business during such time. If a claim is made for the loss of profits because of the failure to furnish goods beyond the extent to which sales made in anticipation of additional goods being supplied it must be shown with reasonable certainty that other sales were prevented within the contract period.⁵⁴

As is disclosed by what has been said in the text and notes the range of evidence in cases of this class is wide. It may be shown what sales were made of the article in question previous to the establishment of the agency, and also to what extent sales were made of other like articles, the public demand for them as evidenced by the sales made by others in the locality in which the plaintiff was doing business, his acquaintance with the business, the good reputation of the article, and other evidence in connection with the expense the plaintiff incurred in doing business. Such evidence shows the damages caused by the revocation of the agency with the certainty necessary to support a recovery.⁵⁵

In the absence of an agreement for a commission on sales made within his exclusive territory an agent may recover only nominal damages because of sales made therein by his principal unless he shows a custom or usage upon which to predicate the recovery of substantial damages, or that he could have made them if the principal had not.⁵⁶ In fixing the profits the agent would have made on sales made by the principal the price at which the latter sold is the basis upon which they are to be arrived at.⁵⁷ The liability of the principal for the revocation of an agency is not affected by the profits made by the agent from the sale of other and competing articles if his whole time was not required to be given to the sale of the principal's goods. The latter may show in mitigation that the agent was financially unable to carry out his contract obligations.⁵⁸

The breach of a contract giving the plaintiff a general agency

⁵⁴ *Rawlings v. Nash*, 117 Md. 393.

⁵⁵ *Randall v. Peerless M. C. Co.*, 212 Mass. 352.

⁵⁶ *Illsley v. Peerless M. C. Co.*, 177 Ill. App. 459; *Roberts v. Minneapolis T. M. Co.*, 8 S. D. 579;

Curry v. E. M. F. Co., 28 Ont. L. R. 427.

⁵⁷ *Koehring M. Co. v. Chicago Builders' S. Co.*, 177 Ill. App. 100.

⁵⁸ *Randall v. Peerless M. C. Co.*, *supra*.

for a term of years, within a specified territory, of a life insurance company, he to have sole charge of such territory, establish sub-agencies and receive as compensation commissions on the first and subsequent premiums paid gives a cause of action for loss of commissions on premiums to become due afterward. It was said: "It is evident that all the schemes of insurance referred to in the contract to be offered to the public contemplated the keeping of the policies alive by payments made from time to time subsequent to the first year's premium. Between the parties to the contract the presumption is that the policies would be kept alive, and these subsequent payments—renewal premiums as they are called—would be received by the defendant company. The conduct of that company in breaking the contract entitles the plaintiff to this presumption and puts upon the defendant the burden of showing the contrary, if it exists, and the extent to which it does exist. So all uncertainty is eliminated from this branch of the plaintiff's claim for loss of profits. As to the other branch, assuming, as we must for the present do, that the defendant breached the contract as alleged in the petition, entered the territory allotted to the plaintiff, and has through other agents and agencies, since the date of the breach, written a large amount of other insurance, such as the contract between the parties contemplated would be obtained by and through the action of the plaintiff and his sub-agents, the amount of such insurance so taken and carried by the defendant up to the time of the trial may be exactly shown by the testimony of the managing agents of the defendant, or by its books, or by both. * * * There can be, therefore, no substantial difficulty in arriving at this amount, at least with substantial accuracy. * * * Whether he could, and with reasonable probability would, have done all or a definite portion of this work, had the defendant not breached the contract, is a proper subject for the finding of a jury on the proof that may be offered as to the means which the plaintiff had organized and s using for the efficient prosecution of this work, compared with the means and effort which the defendant has used in its accomplishment of the work so done by it in the territory allotted to the plaintiff. He is not necessarily or even probably entitled

to receive the full specified rate of per cent. on the first year's and subsequent premiums paid and to be paid on policies so issued by defendant through its other agents and agencies, for some deduction must necessarily be made on account of the fact that he would incur no current expenses, nor render any personal services in the procurement of this insurance thus obtained by the defendant through its other agents and agencies. The condition of the business" in the territory assigned to the plaintiff "at the time of the breach; the means that had been used and were being used by the plaintiff to work the territory allotted to him; the machinery which he had organized for the purpose of that work; the reasonable cost of its continued operation; the extent of the territory allotted to him; the number of persons therein who were fit subjects for such insurance as the defendant proposed to write; the reasonable relative proportion of cost for the first year of organizing the business and putting it in operation to the cost of continuing its conduct during the subsequent years; the machinery actually used by the defendant after it entered the territory allotted to the plaintiff, and its success, through the use of this machinery, and the agencies it established, in obtaining applicants for insurance and holders for its policies, should all be given to the jury."⁵⁹ A manufacturer of a particular style of hats who gives a local dealer the exclusive agency for their sale cannot, upon withdrawing the agency, refuse to fill orders sent by the agent and accepted prior to the termination of the agency; and where such agency is transferred to another dealer in the same city, so that it was

⁵⁹ Wells v. National L. Ass'n, 39 C. C. A. 476, 489, 99 Fed. 222, 53 L.R.A. 33; Hitchcock v. Supreme Tent, 100 Mich. 40, 43 Am. St. 423; Power v. Brown, 2 Ohio C. C. (N. S.) 320; Michigan Mut. L. Ins. Co. v. Coleman, 118 Tenn. 215. See Lewis v. Atlas Mut. L. Ins. Co., 61 Mo. 534; Pellett v. Manufacturers' & M's. Ins. Co., 43 C. C. A. 669, 104 Fed. 502; Oklahoma Fire Ins. Co. v. Ross, — Tex. Civ. App. —, 170 S. W. 1062.

In Richey v. Union Cent. L. Ins. Co., 140 Wis. 486, evidence showing the amount of business done during the two years the agency existed, what had been done in organizing it with a view to conducting it, the success of the plaintiff and his prospects was considered ample to support the recovery of damages for the termination of the contract. See Press Pub. Co. v. Reading News Agency, 44 Pa. Super. 428.

impossible for the deposed agent to buy the hats at wholesale, he may prove the retail price charged by the new agent as tending to show the market value of the hats called for by such orders and as establishing the measure of recovery for the profits lost. The plaintiff's right to such profits was not affected because he sold other hats as valuable as those made by the defendant, nor though he sold as many of such as he would formerly have sold of those furnished by the defendant.⁶⁰ In ascertaining the value of such agency no account is to be taken of the stock in the hands of the agent which he has paid for, the principal not having bound himself to take it from the agent.⁶¹ In equity an agent whose exclusive territory is invaded by a stranger to his contract may recover only to the extent that the latter derived advantages or benefits from the sales made. These are ascertained on the same principles as govern in patent infringement cases.⁶² The period during which profits may be recovered is measured by the life of the contract, and not by an unexercised option for its extension.⁶³

§ 70. Tortious interference with business. In actions for torts injurious to business the extent of the loss is provable by the same testimony as in actions to recover for the loss of profits caused by the breach of contracts, and recovery may be had for such as is proved with reasonable certainty; it is enough to show what the profits would probably have been.⁶⁴ Certainty

⁶⁰ *More v. Knox*, 52 App. Div. (N. Y.) 145.

Where a person has the exclusive right to buy from another and resell the goods so bought within a certain territory, in which the vendor has a monopoly, and he, violating his contract, sells goods to other persons within such territory, he is liable to the first person for the profits he may show with reasonable certainty would have been his if there had not been a breach of the contract. *Russell v. Horn, etc. Mfg. Co.*, 41 Neb. 567.

⁶¹ *Vosburg v. Mallory*, 70 App. Div. 247.

⁶² *Corbin v. Taussig*, 137 Fed. 151; §§ 1190, 1191.

⁶³ *Ramsey v. Holmes E. P. Co.*, 85 Wis. 174.

⁶⁴ *Allison v. Chandler*, 11 Mich. 542; *Dennery v. Bisa*, 6 La. Ann. 365; *Shepard v. Milwaukee G. L. Co.*, 15 Wis. 318, 82 Am. Dec. 679; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; *Schile v. Brokhahus*, 80 N. Y. 614; *Oliver v. Perkins*, 92 Mich. 304; *Jackson v. Stanfield*, 137 Ind. 592, 23 L.R.A. 588; *White v. Moseley*, 8 Pick. 356; *French v. Connecticut River L. Co.*, 145 Mass. 261; *Terre Haute v. Hudnut*, 112 Ind. 542; *National Fibre Board Co.*

is very desirable in estimating damages in all cases; and where from the nature and circumstances of the case a rule can be discovered by which adequate compensation can be accurately measured it should be applied to actions of tort as well as to those upon contract. The law, however, does not require impossibilities; and cannot, therefore, demand a higher degree of certainty than the nature of the case admits. If a regular and established business is wrongfully interrupted the damage thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of.⁶⁵ But it is otherwise where the business is subject to the contingencies of weather, breakages, delays, etc.⁶⁶ There is no good reason for requiring any higher degree of certainty in respect to the amount

v. Lewiston & A. E. L. Co., 95 Me. 318; Wolff S. Co. v. Frankenthal, 96 Mo. App. 307; Pacific S. W. Co. v. Alaska P.'s Ass'n, 128 Cal. 632; Yates v. Whyel Coke Co., 137 C. C. A. 327, 221 Fed. 603; Hillsdale C. & C. Co. v. Pennsylvania R. Co., 229 Pa. 61; International, etc. R. Co. v. Capers, 33 Tex. Civ. App. 283.

⁶⁵ Barnes v. Midland R. R. Terminal Co., 161 App. Div. (N. Y.) 621; Sparks v. McCreary, 156 Ala. 382, 22 L.R.A.(N.S.) 1224; Barnes v. Berendes, 139 Cal. 32; Sacchi v. Bayside L. Co., 13 Cal. App. 72; Keegan v. Harlan, 134 Ill. App. 363; Manning v. Grinstead, 121 Ky. 802; McCausey v. Hoek, 159 Mich. 570; Morrow v. Missouri Pac. R. Co., 140 Mo. App. 200; West v. Martin, 51 Wash. 85, 21 L.R.A. (N.S.) 324; Mensing v. Wright, 86 Kan. 98; Willis v. Perry, 92 Iowa 297, 306, 26 L.R.A. 124; Kyd v. Cook, 56 Neb. 71, 71 Am. St. 661; Schriver v. Johnstown, 71 Hun 232, affirmed without opinion, 148 N. Y. 758; Langan v. Potter, 8 N. Y. Misc. 541; Williams v. Island City M. Co., 25 Ore. 573, 589, citing the text; Paul v. Cragnaz, 25 Nev. 293,

320, 47 L.R.A. 540; Exchange Tel. Co. v. Gregory, [1896] 1 Q. B. 147; Hartman v. Pittsburgh I. Co., 159 Pa. 442; Leach v. New York, etc. R. Co., 89 Hun 377; Butler v. Manhattan R. Co., 143 N. Y. 417, 5 Am. Neg. Cas. 364, 42 Am. St. 738, 26 L.R.A. 46; Goebel v. Hough, 26 Minn. 252; Terre Haute v. Hudnut, National Fibre Board Co. v. Lewiston & A. E. L. Co., *supra*; Gunter v. Astor, 4 Moore 12.

⁶⁶ The Bodlewell, [1907] Prob. Div. 286; Cushing v. Seymour, 30 Minn. 301. In this case plaintiff had entered into contracts for threshing grain before the conversion of the machine which he was to use in executing them.

In Jones v. Call, 96 N. C. 337, 60 Am. Rep. 416, a manufacturer of machines, unlawfully prevented from carrying on his business, recovered damages to the extent that the machines then contracted for would have yielded him a profit. The estimated profits beyond that point were too speculative and remote. See Clements v. State, 77 N. C. 142, doubted in the preceding case,

of damages than in respect to any other branch of a cause. Juries are allowed to act upon probable and inferential as well as direct and positive proof. And when from the nature of the case the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, no objection is perceived to placing before the jury all the facts and circumstances of the case having any tendency to show damages or their probable amount, so as to enable them to make the most intelligible and accurate estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances may require and as may tend to prevent the allowance of such damages as may be merely possible, or too remote or fanciful in their character to be safely considered as the result of the injury.⁶⁷ If the business interfered with was conducted under

⁶⁷ *People v. Schwartz*, 151 Ill. App. 190; *Hoover v. New Holland W. Co.*, 43 Pa. Super. 262; *Asia v. Pool*, 47 Wash. 515; *Bigbee F. Co. v. Scott*, 3 Ala. App. 385; *Allison v. Chandler*, 11 Mich. 542. In this case *Christianey, J.*, said: "Since, from the nature of the case (one of injury to business), the damages cannot be estimated with certainty and there is risk of giving by one course of trial less, and by the other more, than a fair compensation—to say nothing of justice—does not sound policy require that the risk should be thrown upon the wrong-doer instead of the injured party? However this question may be answered, we cannot resist the conclusion that it is better to run a slight risk of giving somewhat more than actual compensation than to adopt a rule which, under the circumstances of the case, will, in all reasonable probability, preclude the injured party from the recovery of a large proportion of the damages he has actually sustained from the injury, though the amount thus excluded cannot be

estimated with accuracy by a fixed and certain rule." *Gilbert v. Kennedy*, 22 Mich. 129. See *Jenkins v. Pennsylvania R. Co.*, 67 N. J. L. 331, 11 Am. Neg. Rep. 464, 57 L.R.A. 309, stated in § 1059, where other cases to the same purport are cited; *Chalupa v. Tri-State L. Co.*, 92 Neb. 477; *Cosgriff v. Miller*, 10 Wyo. 190; *Thayer-M. B. Co. v. Campbell*, 164 Mo. App. 8; *Virtue v. Creamery P. Mfg. Co.*, 123 Minn. 17; *Richmond v. Dubuque, etc. R. Co.*, 33 Iowa 422. See *Howe Mach. Co. v. Bryson*, 44 Iowa 159, 24 Am. Rep. 735; *Fultz v. Wycoff*, 25 Ind. 321; *Flick v. Wetherbee*, 20 Wis. 392; *Heard v. Holman*, 19 C. B. (N. S.) 1; *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66; *McKnight v. Ratcliff*, 44 Pa. 156; *The Narragansett, Olcott*, 388; *Douty v. Bird*, 60 Pa. 48; *Hanover R. Co. v. Coyle*, 55 Pa. 396; *Chapman v. Kirby*, 49 Ill. 211; *Ludlow v. Vonkers*, 43 Barb. 493; *Todd v. Minneapolis, etc. R. Co.*, 39 Minn. 186; *Swain v. Schieffelin*, 134 N. Y. 471, 18 L.R.A. 385; *Dickinson v. Hart*, 142 N. Y.

a license granted by public officers and the issue of a new license depends upon their discretion profits which might have been realized for a time beyond the existence of the license in force when the wrong was done cannot be recovered.⁶⁸ A person who has been forcibly prevented from fishing in public waters may show the quantity of fish he might have caught, the value of the same and the probable profits he would have made. As an aid in determining these questions he may prove the quantity of fish caught in the waters from which he was excluded by the defendant.⁶⁹

§ 71. **Chances for prizes and promotions.** In an action against a carrier for negligently delaying the transportation of models made to compete for a prize until the award was made the judges differed as to the measure of damages, and it was left undecided whether they should be given for the labor and materials used in making the models or whether the chance for the prize might be taken into consideration. Patteson, J., favored the latter: "The goods were made for a specific purpose, which had been defeated by the negligence of the defendant, and they have become useless." Erle, J., said: "I have great doubts whether that chance was not too remote and contingent to be the subject of damages."⁷⁰ A like view has been held in Texas.⁷¹ The unsatisfactory condition in which the English law was left by the case referred to has been materially lessened by a recent case in the Court of Appeal, in the decision of which the judges were agreed. The plaintiff sued upon a contract giving her the opportunity of appearing in a competition in which considerable prizes were offered. It was held that the damages were not too remote, neither were they of such a nature as to be impossible of ascertainment. It was

183; *Malone v. Weill*, 67 App. Div. (N. Y.) 169; *Ingram v. Lawson*, 6 Bing. N. C. 212; *Savery v. Ingersoll*, 46 Hun 176; *Wood v. Monteleone*, 118 La. 1005; *Holden v. Lake Co.*, 53 N. H. 552.

⁶⁸ *Porter v. Johnson*, 96 Ga. 154.

⁶⁹ *Pacific S. W. Co. v. Alaska P.'s*

Ass'n, 138 Cal. 632; *Smalling v. Jackson*, 133 App. Div. (N. Y.) 382. See § 1289.

⁷⁰ *Watson v. Ambergate R. Co.*, 15 Jur. 448.

⁷¹ *Ft. Worth, etc. R. Co. v. Ikard* (Tex. Civ. App.), 140 S. W. 502, citing the text.

for the jury to fix them according to their good sense.⁷² In a Pennsylvania case the plaintiff had delivered to the defendants, who were carriers, a box containing plans and specifications to be forwarded to a committee at a distant place, who had offered a premium to the successful competitor for the best plans for a building. In consequence of the defendants' negligence they were not delivered at their destination until after the premium had been awarded. There was no evidence on the part of the plaintiff to show that there was any probability that his plans would have been adopted, and there was some evidence to the contrary. On this ground it was held the plaintiff was entitled to only nominal damages. But it was held that such proof was admissible to show the value of his opportunity to compete, and that the loss of this was the direct and immediate effect of the negligence complained of.⁷³

Damages cannot be recovered against a telegraph company because the inaccurate transmission of a message prevented a horse from being entered in competition for a purse,⁷⁴ but it is otherwise as to the loss of profits from a prospective contract for

⁷² *Chaplin v. Hicks*, [1911] 2 K. B. 786. It was said by one of the judges: Where by a contract a man has a right to belong to a limited class of competitors, he is possessed of something of value, and it is the duty of the jury to estimate the pecuniary value of that advantage if it is taken from him. The present case is a typical one. From a body of 6000, who sent in their photographs, a smaller body of 50 was formed, of which the plaintiff was one, and among that smaller body twelve prizes were allotted for distribution; by reason of the defendant's breach of contract she lost all the advantage of being in the limited competition, and she is entitled to have her loss estimated. I cannot lay down any rule as to the measure of damages in such a case; this must be left to the good sense of the jury. They must, of course,

give effect to the consideration that the plaintiff's chance is only one out of four and that they cannot tell whether she would have ultimately proved to be the winner. But having considered all this they may well think that it is of considerable pecuniary value to have got into so small a class, and they must assess the damages accordingly. Two of the judges distinguished *Sapwell v. Bass*, [1910] 2 K. B. 486, stated in § 61.

⁷³ *Adams Exp. Co. v. Egbert*, 36 Pa. 360, 72 Am. Dec. 382.

⁷⁴ *Larsen v. Postal Tel.-C. Co.*, 150 Iowa 748; *Cain v. Vollmer*, 19 Idaho 163, 32 L.R.A.(N.S.) 38; *Western U. Tel. Co. v. Crall*, 39 Kan. 580; *Hessee v. Columbus, etc. R. Co.*, 58 Ohio St. 167; *Bonnet v. Galveston, etc. R. Co.*, 89 Tex. 72. *Contra*, *Gulf, etc. R. Co. v. John*, 9 Tex. Civ. App. 342.

services.⁷⁵ The fact that an injured person was in the line of promotion from the position of fireman to engineer cannot be considered in awarding him damages,⁷⁶ but promotion under civil service rules, though conditioned upon showing qualifications, is not too remote.⁷⁷ A person who, in connection with others, has arranged for the capture of one accused of crime and for whose arrest a reward has been offered may recover the amount of the reward from a telegraph company which negligently failed to deliver a message relating to the capture if the jury find that the arrest would have been made but for the negligence.⁷⁸ The defendant failed to deliver to the plaintiff a message sent him by the comptroller of the currency: "Would you accept receivership of a bank named? Bond \$35,000; compensation \$200 per month, subject to future modification." Because there would have been no binding obligation if the message had been received and an affirmative answer sent to make the appointment there could not be a recovery.⁷⁹ The defeat of a candidate of office because of a slander is a damage too remote, uncertain and speculative to justify a recovery.⁸⁰

§ 72. *Contingent advantage.* The fact that the value of a contract or the advantage to be derived from it is contingent—that is, that the expected advantage depends on the concurrence of circumstances subsequently to transpire and which may by possibility not happen—is not an insuperable objection to recovering damages for its loss. The chance, so to

⁷⁵ *Stumm v. Western U. Tel. Co.*, 140 Wis. 528.

⁷⁶ *Brown v. Chicago, etc. R. Co.*, 64 Iowa 652, 14 Am. Neg. Cas. 654. But see ch. 36.

"Testimony by an injured servant that by his experience in holding positions of lower grades in a particular line of work he is capable of doing the work of a higher position than he ever held, carrying more pay than he was receiving when injured, standing alone, is too problematical and uncertain to

have any probative force on the question of damages." *Marshall v. Dalton P. Mills*, 82 Vt. 489, 24 L.R.A. (N.S.) 128.

⁷⁷ *Williams v. Spokane Falls & N. R. Co.*, 42 Wash. 597.

⁷⁸ *McPeck v. Western U. Tel. Co.*, 107 Iowa 356, 5 Am. Neg. Rep. 314, 20 Ky. L. Rep. 171, 70 Am. St. 205, 43 L.R.A. 214. But compare *Smitha v. Gentry*, 42 L.R.A. 302.

⁷⁹ *Walser v. Western U. Tel. Co.*, 114 N. C. 440.

⁸⁰ *Field v. Colson*, 93 Ky. 347.

speak, of obtaining that advantage by performance of the contract and the conjunction of the necessary subsequent facts may be valuable. The nature of the contingency must be considered. If it is purely conjectural and cannot be reasonably anticipated to happen in the usual course of things it is too uncertain. There must be proof legally tending to show and sufficient to satisfy the jury that it would happen.⁸¹ The chance that a father would pay a son's debt to procure his release from custody has been held capable of estimation.⁸² The advantages resulting from the use of trading stamps as a means of increasing trade are so contingent that they cannot form a basis on which to rest a recovery for the breach of a contract to supply them. In lieu of compensation based thereon the court directed the recovery of the sum expended in preparation for carrying on business in connection with the use of the stamps.⁸³ It is to be assumed where contracts are required to be let to the lowest bidder that the discretionary power vested in a public officer to refuse to do so will not be exercised; hence a person who has made the lowest bid may recover from a surety company, for its failure to file his bond or to notify him of its decision not to do so, for the loss of the contract he might have secured.⁸⁴

§ 73. Uncertain mitigation of breach of marriage promise. In assessing damages for the breach of a promise of marriage it would not be a legitimate subject for the jury to consider the consequences to the plaintiff, in mitigation of damages, of marrying the defendant and thereby forming an unhappy alliance by reason of a want of that love and affection a husband should bear his wife.⁸⁵

§ 74. Failure to provide sinking fund. The damages to a creditor for the failure of a municipal corporation to fulfill its contract to provide a sinking fund as security for the debt are not capable of legal computation; there is no legal standard by

⁸¹ *Occidental C. M. Co. v. Comstock T. Co.*, 125 Fed. 244, quoting the text; *Maclay v. United States*, 43 Ct. of Cls. 90. See § 61.

⁸² *Maerae v. Clarke*, L. R. 1 C. P. 403. See § 71.

⁸³ *Sperry v. O'Neill*, 185 Fed. 231, 107 C. C. A. 337.

⁸⁴ *Hicks v. National S. Co.*, 169 Mo. App. 479.

⁸⁵ *Piper v. Kingsbury*, 48 Vt. 480.

which they can be fixed; they are shadowy, uncertain and speculative.⁸⁶

SECTION 6.

THE CONSTITUENTS OF COMPENSATION, OR ELEMENTS OF DAMAGE.

§ 75. **Elementary limitation of damages.** The elementary limitation of recovery to a just indemnity for actual injury, estimated upon the natural and proximate consequences of the injurious act, fixes a logical boundary of redress in the form of compensation and furnishes a general test by which any particulars may be included or rejected. Recovery beyond nominal damages requires that actual injury be shown except in those cases where there are no pecuniary elements or measure and the amount of the recovery is necessarily left to the discretion of the jury, as in cases of personal injury or defamation of character.⁸⁷ What are the elements of injury which may be compensated? This inquiry is a legal one and must be determined by the court; where the details are capable of pecuniary valuation the law affords some standard for measuring compensation for them. The elements of damage are always correlative to the right violated by the act complained of; and the amount of compensation, whether measured by legal rules or referred to the discretion of the jury, must depend on the nature of the right and the mode, incidents and consequences of the violative act.⁸⁸ Each party to a contract has a legal right

⁸⁶ *Memphis v. Brown*, 20 Wall 289, 22 L. ed. 264.

⁸⁷ In *Scott v. Williams*, 1 Dev. 376, an action for assault and battery and false imprisonment, its object being to determine whether the plaintiff who was held as a slave was not a freeman, more than nominal damages were given though there seems to have been no proof of the actual damages.

In *Creech v. Creech*, 98 N. C. 155, an action upon an apprentice bond, evidence was given to show that the

health of the apprentice had suffered by the master's improper treatment; but it did not appear to what extent it had been injured. It was ruled not to be error to instruct the jury that they might determine if there was damage from that cause and fix the amount.

⁸⁸ If land is injured by a wrongful act or taken under the power of eminent domain the owner may have his damages fixed with regard to its adaptability to any use to which it may be applied; he is not

to performance by the other according to its legal import and effect. Any default is a violation of that right. The injured party is entitled to a measure of compensation which will place him in as good condition as if the contract had been fulfilled. In other words, all the natural and proximate results of the act complained of will be considered with a view to giving him compensation for all gains prevented and all losses sustained.⁸⁹ The particular stipulations of the contract and the alleged breach will circumscribe the inquiry, and the facts establishing the breach and its consequences will constitute its subjects.

§ 76. Damages for nonpayment of or failure to loan money.

On a contract for the mere payment of money the unpaid principal, together with the stipulated or, after maturity, the lawful rate of interest is the measure of damages. It is the invariable measure of recovery in a creditor's action against his debtor.⁹⁰ The failure to pay a debt when due may disappoint the creditor and embarrass him in his affairs and collateral undertakings; he may consequentially suffer losses for which interest is a

restricted to such damages as it sustained for the purpose it was used when the injury was done or it was taken. *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Ft. Worth, etc. R. Co. v. Wallace*, 74 Tex. 581; *Same v. Hogsett*, 67 Tex. 685. See ch. 26.

The damages for the loss of a grove wholly situated upon a part of a farm which is separated from the larger tract included in it by a railroad are to be awarded with regard to its usefulness to the whole farm. *Brooks v. Chicago, etc. R. Co.*, 73 Iowa 179.

⁸⁹ *Hurxthal v. Boom Co.*, 53 W. Va. 87, 97 Am. St. 954, citing the text.

⁹⁰ *Board of Directors v. Roach*, 174 Fed. 949, 99 C. C. A. 453; *Baumgarten v. Alliance Assur. Co.*, 159 Fed. 275; *Bixby-T. L. Co. v. Evans*, 167 Ala. 431, citing the text;

Suth. Dam. Vol. I.—18.

Lightfoot v. Murphy, 47 Tex. Civ. App. 112; *Malin v. McCutcheon*, 33 Id. 387; *Fletcher v. Tayleur*, 17 C. B. 21; *Short v. Skipwith*, 1 Brock. 103; *Bender v. Fromberger*, 4 Dall. 436, 1 L. ed. 898; *Loudon v. Taxing Dist.*, 104 U. S. 771, 26 L. ed. 923; *Hoblitt v. Bloomington*, 71 Ill. App. 204; *Greene v. Goddard*, 9 Metc. (Mass.) 212, 232; *Ladies' B. Ass'n v. Robbins*, 1 Mart. Ch. 134, 152; *Western W. & P. Co. v. West*, [1892] 1 Ch. 271, 277; *South African Territories v. Wallington*, [1898] App. Cas. 309; *Henderson v. Bank*, 25 Ont. 641; *Bethel v. Salem I. Co.*, 93 Va. 354, 33 L.R.A. 602; *Arnott v. Spokane*, 6 Wash. 442; *Blue v. Capital Nat. Bank*, 145 Ind. 518; *Morrill v. Weeks*, 70 N. H. 178.

The plaintiff may not recover for lost time in attending to litigation. *Mutual Ins. Co. v. Chambliss*, 131 Ga. 60.

very inadequate compensation; but they are remote and do not result alone from the default of his debtor. Money, like the staples of commerce, is, in legal contemplation, always in market and procurable at the lawful rate of interest; and the same principle which limits a disappointed vendee's recovery against his defaulting vendor to the market value of the commodity which is the subject of his contract restricts the creditor to the principal and interest. The practical difficulty to a creditor of borrowing the money, where the debtor is withholding the sum he owes and which is wanted, and that of a vendee in making a new purchase, after he has paid the defaulting vendor for the goods needed, is the same. No party's condition in respect to the measure of damages should be worse for having failed in his engagement to a person whose affairs are embarrassed than if the same result had occurred with one in prosperous or affluent circumstances.⁹¹ The utmost liability of a person who breaches his contract to loan money, in the absence of notice of special circumstances, is for the increased interest the other person was obliged to pay.⁹²

§ 77. Greater damages than interest for failure to pay or loan money. Where the obligation to pay money is special and has reference to other objects than the mere discharge of a debt, as where it is agreed to be done to facilitate trade and to maintain the credit of the promisee in a foreign country, to take up commercial paper, pay taxes, discharge liens, relieve sureties, or for any other supposable ulterior object, damages beyond interest for delay of payment, according to the actual injury, may be recovered.⁹³ The contract implied between a

⁹¹ *Masterton v. Mayor*, 7 Hill 61; *Lowe v. Turpie*, 147 Ind. 652, 677, 37 L.R.A. 233, quoting the text; *Smith v. Parker*, 148 Ind. 127; *Fox v. Poor Ridge etc. T. R. Co.*, 8 Ky. L. Rep. 427 (Ky. Super. Ct.); *Hoblit v. Bloomington*, 71 Ill. App. 204; *McGee v. Wineholt*, 23 Wash. 748; *Western U. Tel. Co. v. Westmoreland*, 151 Ala. 319; *Chicago v. Duffy*, 117 Ill. App. 261, quoting the entire section, and holding that

the nonliability of the defaulting party for interest does not affect the rule. See *Dody v. State Bank*, 82 Kan. 406.

⁹² *New York L. Ins. Co. v. Pope*, 139 Ky. 567; *Gooden v. Moses*, 99 Ala. 230; *Thorp v. Bradley*, 75 Iowa 50; *Luce v. Hoisington*, 56 Vt. 436; *Coles v. Standard L. Co.*, 150 N. C. 183.

⁹³ *Bixby-T. L. Co. v. Evans*, 167 Ala. 431, 29 L.R.A. (N.S.) 194, cit-

bank and its depositors is that the former will hold the funds and pay them out on the order of the latter; for failing so to do the bank is liable either in tort or upon contract.⁹⁴ If the action be brought on the contract and the failure to pay was

ing the text; *O'Grady v. Stotts City Bank*, 106 Mo. App. 366, citing the text; *Scheele v. Lafayette Bank*, 120 Id. 611 (loss of insurance); *Holt v. United Security L. Ins. Co.*, 76 N. J. L. 585, 21 L.R.A.(N.S.) 691; *Bohemian-Am. Workingmen's G. Ass'n v. Northern Bank* (N. Y. Misc.), 120 Supp. 134; *Pardee v. Douglas*, 122 App. Div. (N. Y.) 395 (increased cost of doing the work for which the loan was to be made); *Hanna v. Chicago, etc. R. Co.*, 89 Kan. 503.

In *Treanor v. New York B's. Co.*, 51 N. Y. Misc. 607, in reliance on a promise to loan money to furnish a place to do business in, the plaintiff secured a lease, paid two months' rent, secured the good will of the business, and at the expiration of two months bought a release from his landlord. He recovered the sums paid for the good will and for the release, but was denied a recovery for the rent paid on the theory that the premises were worth that sum.

In *Donshkess v. Burger B. Co.*, 20 App. Div. (N. Y.) 375, one consequence of the failure to loan money payable on demand to remove a lien on property was the foreclosure of the lien. The damages were measured by the difference between the value of the property and the amount of the lien, and the liability of the owner to the holder of the lien for the stipulated expense of the foreclosure proceedings.

In *Banwur v. Levenson*, 171 Mass. 1, the breach of a contract to apply the defendant's money in such a

way as to release the plaintiff's property from attachment and him from liability for debts of three times the amount of money to be used was attended with liability for the difference between the whole amount of the debts which the defendant was to discharge and the sum he was to pay the creditors, and which the plaintiff was to pay him to redeem the property. The defendant was also liable for any of the plaintiff's property received under the contract.

A mortgagee who breaches his contract to pay prior mortgages given by the mortgagor to others and the taxes on the mortgaged property by procuring the assignment of one of these mortgages to himself and permitting the foreclosure of the other, causing the loss of the equity of redemption, is chargeable with the difference between the value of that equity and the amount due on the mortgage, and a decree may pass ordering him to discharge both mortgages. *Page v. Franklin*, 214 Mass. 552.

Loss of business is too remote to be a ground of damage for the breach of an agreement to extend an existing credit. *LefRovits v. First Nat. Bank*, 152 Ala. 521.

⁹⁴ *Columbia Nat. Bank v. MacKnight*, 29 App. D. C. 580; *Callahan v. Bank*, 69 S. C. 374; *Citizens' Nat. Bank v. Importers' & T.'s Bank*, 119 N. Y. 195; *Burroughs v. Tradesmen's Nat. Bank*, 87 Hun 6, affirmed without opinion, 156 N. Y. 663.

not wilful and no special damages are proved and the check has been paid only nominal damages can be recovered,⁹⁵ unless the depositor was a trader, in which case injury to his credit may be inferred and substantial compensation allowed without further proof.⁹⁶ If the depositor is not a trader on the wrongful refusal to pay him in person he can recover only interest on the amount.⁹⁷ He cannot recover for injury to his credit because no publicity is given to the refusal to pay.⁹⁸ Though payment is refused with knowledge of the use to be made of the money there cannot be a recovery for mental suffering, the action being for breach of the contract.⁹⁹ In the absence of proof of special damage a farmer whose check is not honored can recover only a nominal sum,¹ in addition to the protest fees.² But a depositor who proves special damage to himself as a stock and share-broker and stock-jobber may recover very substantial damages, though he is not a trader.³

Under various circumstances an enlarged liability results from the failure to pay checks of customers who have provided

⁹⁵ *Burroughs v. Bank, supra.*

⁹⁶ *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495.

⁹⁷ *Henderson v. Bank*, 25 Ont. 641.

⁹⁸ *Hanna v. Drovers' Nat. Bank*, 92 Ill. App. 611; *Carsey v. Farmer*, 117 Ky. 826.

⁹⁹ *Smith v. Sanborn State Bank*, 147 Iowa 640, 30 L.R.A.(N.S.) 517. Compare § 95.

¹ *Bank of New South Wales v. Milvain*, 10 Vict. L. R. (law) 3. But more than nominal damages have been recovered for the refusal to pay the check of a depositor who was not a trader, though no special damages were shown. *Columbia Nat. Bank v. MacKnight*, 29 App. D. C. 580.

² *Third Nat. Bank v. Ober*, 178 Fed. 678, 102 C. C. A. 178.

³ *Dean v. Melbourne Stock Exchange A. & B. Co.*, 16 Vict. L. R. 403. In this case the plaintiff was

rendered unable to meet his business engagements and was suspended by a stock exchange of which he was a member, and suffered damage to his reputation. A judgment for 2,900*l.* was sustained.

In *Spearing v. Whitney-Cent. Nat. Bank*, 129 La. 607, the court, in view of the facts that the dishonor of the plaintiff's checks was made known to bankers and other business men in several cities and in the town in which he resided, fixed his damages at \$300, after making allowance for the defendant's efforts to repair the injury done.

A trader originally meant a shop-keeper, a tradesman; but now it includes all business men. Any man engaged in business may recover temperate damages for the dishonor of his check without proving special damages. *Peabody v. Citizens' State Bank*, 98 Minn. 302.

funds to meet them, or to loan money as agreed;⁴ in such cases the business standing and especially the credit of the parties may be impaired.⁵ In one such case for refusal to pay a check of 48*l.* the jury gave a verdict of 500*l.* damages, and there was no evidence that special damage had been sustained. This was deemed excessive and was reduced by consent to 200*l.*⁶

⁴ A bank agreed to advance money to a customer with knowledge of the use he designed to make of it, and subsequently refused to do so. He was unable to procure the money elsewhere and was obliged to abandon his enterprise. There was a recovery of the actual damages sustained. *Manchester & O. Bank v. Cook*, 49 L. T. Rep. 674.

⁵ *Metropolitan S. Co. v. Garden City B. & F. Co.*, 114 Ill. App. 318; *Third Nat. Bank v. Ober*, 178 Fed. 678, 102 C. C. A. 178; *Lorick v. Palmetto Bank & T. Co.*, 74 S. C. 185 (temperate damages); *Siminoff v. Goodman Bank*, 18 Cal. App. 5 (the rule of damages is not prescribed by the code); *Svensden v. State Bank*, 64 Minn. 40, 58 Am. St. 522, 31 L.R.A. 552, citing the text; *Bank v. Goos*, 39 Neb. 437, 23 L.R.A. 90; *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 17 Am. St. 779; *First Nat. Bank v. Railsback*, 58 Neb. 248; *Marzetti v. Williams*, 1 B. & Ad. 415; *Birchall v. Third Nat. Bank*, 17 Phila. 139; *James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 51 L.R.A. 255; *Fleming v. Bank of New Zealand*, [1900] App. Cas. 577; *Winkler v. Citizens' S. Bank*, 89 Kan. 279.

⁶ *Rolin v. Steward*, 14 C. B. 595; *Boyd v. Fitt*, 14 Ir. C. L. (N. S.) 43; *Larios v. Gurety*, L. R. 5 P. C. 346; *Prehn v. Royal Bank*, L. R. 5 Ex. 92; *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 17 Am. St. 779. In *Schaffner v. Ehrman*, 139 Ill.

109, a verdict for \$400 was sustained for a mistaken refusal to cash checks amounting to \$900.

In the absence of proof of special damage a bank which failed to pay a check sent it by mail, solely through the negligent mistake of an employee, was liable for "temperate damages;" judgment for \$200 was affirmed. *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 51 Am. St. 139.

On the dishonor of a note because of the breach of an agreement to renew it, although pecuniary loss was not shown, a judgment for the plaintiff's expenses and 150*l.* for general damages was sustained; but a recovery of 10*l.* for attorney's expenses was disallowed. *Dowling v. Jones*, 2 New South Wales, 359.

In *Commercial Nat. Bank v. Latham*, 29 Okla. 88, the bank acted oppressively and caused the funds to be impounded as those of another; the plaintiff incurred expense to the extent of \$69, and obtained a judgment for \$1000 in addition, as compensatory damages. The deposit amounted to \$670.

An award of \$1000 was sustained where a trader's check for a small sum was refused payment one day and paid on the day following, no special damage being shown. *Bailey v. Bank*, 6 New South Wales St. Rep. 686.

The state of the plaintiff's credit when his check was dishonored is a material consideration in determining whether or not his recovery

The rule of *Hadley v. Baxendale* is applied to such cases.⁷ Bankers at Liverpool by letter of credit delivered to a customer undertook to accept drafts drawn abroad to be paid with his money deposited for that purpose. Before maturity they gave notice that they would be unable to pay the drafts at maturity and the customer was put to the expense of a commission to another party to take up the bills, of protesting them and of telegrams. These were proper elements of damage.⁸ In another case the defendant's failure to meet the plaintiff's drafts caused a suspension of the latter's business at one place, injured it at another and caused the loss of a valuable agency; all resulting losses were recoverable.⁹ The breach of an agreement to secure the extension of time for the payment of a mortgage involves the expense incurred in obtaining another loan.¹⁰ The elements of damage for the non-payment of a check include time lost, expense incurred and loss of business sustained.¹¹ The fact that the drawer of an unpaid check had a nervous chill in consequence of its non-payment is too remote.¹² The arrest and

was excessive. *Miles v. Commercial B. Co.*, 4 New South Wales St. Rep. 223.

⁷ *Coles v. Standard L. Co.*, 150 N. C. 183; *Parker v. Cunningham*, 5 Vict. L. R. (law) 202, and cases cited *supra*, except *Boyd v. Fitt*, 14 Ir. C. L. (N. S.) 43, in which it is suggested that it is for the jury to find whether the damages are the natural and proximate consequence of the breach of contract.

⁸ *Prehn v. Royal Bank*, L. R. 5 Ex. 92; *Urquhart v. McIver*, 4 Johns. 103; *Riggs v. Lindsay*, 7 Cranch 500.

⁹ *Boyd v. Fitt*, 14 Ir. C. L. (N. S.) 43.

It is not according to the usual course of events that the refusal of a bank to pay a note for \$517 which was payable there out of a deposit of \$611 should result in the entry of judgment for over \$8,000, and the seizure of the business of the

maker of the note. *Brooke v. Tradesmen's Nat. Bank*, 69 Hun, 202.

Where a check has been dishonored the plaintiff may show as evidence of damage to his business reputation the loss of a partnership; but such loss is too remote to be regarded as special damage. *Dyson v. Union Bank*, 8 Vict. L. R. (law) 106.

¹⁰ *Hoch v. Braxmar*, 109 App. Div. (N. Y.) 209.

¹¹ *American Nat. Bank v. Morey*, *infra*.

The expenses recoverable do not include attorney's fees or other expenses in connection with looking after the matter prior to the commencement of suit. *Winkler v. Citizens' S. Bank*, 89 Kan. 279.

¹² *American Nat. Bank v. Morey*, 69 S. W. 759, 58 L.R.A. 956. As to the liability of telegraph companies, see § 97.

imprisonment of the drawer of a check is not a result which may be considered in awarding him compensation for its non-payment.¹³ If the plaintiff pleads and proves he is a trader he may show a general impairment of credit as the result of dishonoring his checks without alleging special damage;¹⁴ but if loss of custom and credit from particular persons is relied upon it must be specially pleaded.¹⁵ If special damages are not claimed there may be a recovery of temperate (which are more than nominal) damages, to be ascertained by proof of the plaintiff's financial standing and credit.¹⁶

Where a depositor's checks had been refused payment four times in close succession, with knowledge that his deposit was sufficient to pay them, the plaintiff recovered damages for his actual money loss because of the notice of protest and expenditures made in arranging matters after he knew of the dishonor of his checks, substantial damages for the impairment of his credit, notwithstanding he was not a trader. On this feature of the recovery it was said that plaintiff was engaged in actual business, and that it was in the course of that business that the checks had been drawn. Ordinarily, an honest man draws checks only on a bank where he has an account, and though sometimes by mistake he may draw checks when he has overdrawn his account, yet, if he does that repeatedly, any one knowing it would be sure to conceive an unfavorable opinion, not only as to his honesty, but also as to his credit; so

¹³ *Bank v. Goos*, 39 Neb. 437, 23 L.R.A. 90; *Western Nat. Bank v. White* (Tex. Civ. App.), 131 S. W. 828.

¹⁴ *James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 51 L.R.A. 255.

"While it may be true that a corporation has no individual personal character to be affected by a libel, independent of its trade or business, its credit may be impaired and its business injured in the same way and to the same extent by the dishonor of its checks as in the case of an individual trader. No reason is apparent why the law will not

in the case of a corporation, as well as of an individual, presume without proof of special damages that by the dishonor of its check it has sustained special or substantial damages. While the wrong was unintentional, the refusal to pay was intentional and without just excuse, and the presumption of legal malice follows." *Metropolitan S. Co. v. Garden City B. & T. Co.*, 114 Ill. App. 318.

¹⁵ *Fleming v. Bank*, [1900] App. Cas. 577.

¹⁶ *Hilton v. Jesup B. Co.*, 128 Ga. 30, 11 L.R.A. (N.S.) 224.

that the act of a bank in refusing to pay its customer's checks is something more than a mere nominal breach of the contract to be paid for by requiring the bank to make good the money which its act has cost him. From these repeated refusals the jury might infer that the credit of the plaintiff was impaired thereby. A further recovery was sustained for injured feelings and mental anxiety over the matter; so far as these resulted directly and proximately from the defendant's acts if these were committed maliciously through wrongful and improper motives. As to this head the court said: As we have seen, when the *animus* is a question for the jury they are at liberty, when they find that damages are suffered because of the tort, not only to award the actual money damages sustained, but damages for the mental suffering and anxiety which accompany the material damages resulting from the wrongful act. * * *

If it can be fairly inferred that, as the result of the act, the plaintiff, who was a prosperous business man in good standing, has suffered damage to his credit, so that his *status* in that regard has been changed, and that has taken place because of the wrongful and intentional act of the defendant, it is not too much to infer that, as a result of that act and the damages caused by it, the plaintiff has suffered anxiety and the feeling of humiliation which would necessarily follow the consciousness of a loss of one's business reputation. The case is quite analogous to an action of slander. It is quite true that in such a case as this the bank says nothing which can be laid hold of as the basis of the action, but by its act it affirms that the person who has drawn checks upon it has made an effort to obtain money from the bank and to impose his checks upon his neighbors with whom he deals, knowing that they would not be honored when presented; and that is substantially saying that in respect to that matter his dealing is dishonest, and necessarily impairs his credit as an honest man. The jury were, therefore, justified in considering that an act of the bank which raised an inference that the plaintiff was not an honest man, necessarily inflicted upon him that humiliation and mental anxiety which follows upon the knowledge by a man that he has been accused of the dishonest act, which the action of the

bank has given rise to.¹⁷ The rule which supports a recovery for the loss of credit where a bank refuses to pay a depositor's check has no application in the case of unintentional delay in the delivery of money by a telegraph company whereby the plaintiff's note was protested unless he shows a pecuniary loss because of the protest.¹⁸ Where the plaintiff gave up certain claims against the defendant as a consideration for the supply of funds by the latter for specified purposes and for a fixed time, and at the expiration of three-fourths of that time the defendant broke his contract, the plaintiff was not entitled to recover the value of such claims, the failure of consideration not being total; he did recover the expenses directly entailed upon him by the breach, a liberal sum in respect to loss and embarrassment, to avoid which he surrendered those claims, which loss and embarrassment were in the contemplation of the parties when they contracted. The first head of damage consisted of the expense of transferring the loan, and it was allowed notwithstanding the transfer would necessarily have been made three months later.¹⁹

In order that the liability for the breach of a contract to loan money to pay an incumbrance shall exceed a nominal sum it must appear that the contract was made with knowledge of the purpose for which the money was to be used, the necessity for its use, and also that the land was lost to the owner because of the incumbrance, and without his knowledge and solely through the fault of him who was to make the loan; or, if the other person had notice of the neglect or refusal to make the loan, it came at a time when he was deprived of the opportunity to procure the money elsewhere and pay the incumbrance or redeem the land if it had been sold.²⁰ Under such circum-

¹⁷ *Davis v. Standard Nat. Bank*, 50 App. Div. (N. Y.) 210.

¹⁸ *Smith v. Western U. Tel. Co.*, 150 Pa. 561.

¹⁹ *Parker v. Cunningham*, 5 Vict. L. R. (law) 202.

On the breach of a contract to extend a loan the only damages recoverable are those represented by the difference in the rate of interest

to be paid, unless the plaintiff shows his inability to obtain the money from other sources to discharge the debt which, by his default in the payment of interest, has matured. *Western U. Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67.

²⁰ *Lowe v. Turpie*, 147 Ind. 652, 675, 37 L.R.A. 233. See *Savings Bank v. Asbury*, 117 Cal. 96.

stances as are indicated there may be a recovery of the amount lost by reason of the breach of the contract.²¹ The breach of a contract to advance money and supplies to carry on a logging business, the contract having been made with knowledge that the obligee could not procure these elsewhere, renders the party guilty thereof liable for the profits which could have been made by putting logs in the market.²² If the facts leave the proof of profits remote and uncertain the plaintiff may recover the rental value of the mill he was to reconstruct with the money which was to have been supplied during the time required to make the change, if that period was of such length as to give it such value, otherwise the recovery may be of interest on its value, and, in addition, the cost incurred and labor used preparatory to its reconstruction in reliance on the money being supplied, and the cost of restoring it to its former condition, and its rental value until it was restored.²³

The general rule that a person can recover only nominal damages because of the refusal of another to advance money of which he may immediately demand the repayment,²⁴ does not apply where the circumstances indicate that the parties did not intend the transaction to be a demand loan though it was such in terms; in such a case the plaintiff may prove the damages he has sustained because of the breach of contract.²⁵ The purchaser of a stock of goods who has failed to pay the claim of the vendor's creditors as agreed is liable therefor and for such other damages as the vendor has sustained.²⁶

²¹ Hedden v. Schneblin, 126 Mo. App. 478, citing this section.

²² Graham v. McCoy, 17 Wash. 63; Holt v. United Security L. Ins. Co., 76 N. J. L. 585, 21 L.R.A. (N.S.) 691. *Contra*, Towles v. Cincinnati T. W. Co., 146 Ky. 301, also denying a recovery of expenses incurred in reliance on the loan being made. But it is otherwise in New Jersey as to expenses. Holt v. Ins. Co., *supra*. See Pugh v. Jackson, 154 Ky. 649.

²³ Bixby-T. Co. v. Evans, 174 Ala. 571.

²⁴ Bradford, etc. R. Co. v. New York, etc. R. Co., 123 N. Y. 316, 11 L.R.A. 116.

²⁵ Alderton v. Williams, 139 Mich. 296; Doushness v. Burger B. Co., *supra*; Bohemian-Am. W. G. Ass'n v. Northern Bank, 120 N. Y. Supp. 134; Goldsmith v. Holland T. Co., 5 App. Div. (N. Y.) 104. See Bank v. Bright, 23 C. C. A. 586, 77 Fed. 949.

²⁶ Doolittle v. Murray, 134 Iowa 536.

Where one person furnishes money to another to discharge an incumbrance upon the land of the person furnishing the money and the person undertaking to discharge it neglects to do so and the land is lost to the owner by reason of the neglect, the measure of damages may be the money furnished with interest, or the value of the land lost, according to circumstances.²⁷ If the land-owner has knowledge of the agent's failure in time to redeem the land himself his damages will be the money furnished with interest; but if he justly relies upon his agent to whom he has furnished money to discharge the incumbrance and the land is lost without his knowledge and solely through the fault of the agent, the latter will be liable for the value of the land at the time it is lost.²⁸

§ 78. **Liability for gains and losses.** For the breach of other contracts than to pay money the injured party is entitled to compensation for gains prevented²⁹ and losses sustained. The gains prevented are those which would accrue to the contracting parties from the mutual performance of the contract. The damages for the total breach of a contract should include the value of it to the injured party. This is generally the measure. There are some exceptions, as in case of contracts for the sale of land where title unexpectedly cannot be made, and generally on covenants for title in conveyances of real estate.³⁰

²⁷ In actions upon covenants against incumbrances or covenants to pay off specific incumbrances the damages are the diminution in value of the estate by reason of the incumbrances, and where the contract broken was to pay off a specific lien the owner may recover the whole amount of it although no damage has been proved. *Lethbridge v. Mytton*, 2 B. & Ad. 772; *Carr v. Roberts*, 5 id. 78; *Loosemore v. Radford*, 9 M. & W. 657; *Hodgson v. Wood*, 2 H. & C. 649. See *Paro v. St. Martin*, 180 Mass. 29; *Boyd v. Hill*, 198 Mass. 477.

²⁸ *Blood v. Wilkins*, 43 Iowa 565; *Gallup v. Miller*, 25 Hun 298.

The rule stated in the text does

not apply where an individual accepts a deed for the land of another and agrees with him to advance money to pay his debts, and to sell the land to raise money with which to repay himself the amount thus advanced, where, after receiving the deed, he refuses to make the advancements. The liability of such person is not for the value of the land nor the sum which was to be advanced, but for the actual damages sustained. *Turpie v. Lowe*, 114 Ind. 37, 54; *Stanley v. Nye*, 51 Mich. 232. See *Duckworth v. Ewart*, 2 Hurl. & C. 129.

²⁹ See § 59 *et seq.*

³⁰ *Flureau v. Thornhill*, 2 W. Bl. 1078; *Worthington v. Warrington*,

By this general rule the party thus injured by a total breach is entitled to recover the profits of the particular contract which he shows, with sufficient certainty, would have accrued if the other party had performed. He is entitled to recover proportionately for a partial breach. And to ascertain these profits the nature and the special purpose of the contract, a subcontract, or other subsidiary and dependent arrangement, within the contemplation of the parties at the time of contracting, may be taken into consideration.³¹ The objection

8 C. B. 134; Buckley v. Dawson, 4 Ir. C. L. (N.S.) 211; Sikes v. Wild, 1 B. & S. 594; Bain v. Fothergill, L. R. 6 Ex. 59, L. R. 7 Eng. & Irish App. 158; Baldwin v. Munn, 2 Wend. 399, 20 Am. Dec. 627; Conger v. Weaver, 20 N. Y. 140; Pumpelly v. Phelps, 40 id. 60; Sweem v. Steele, 5 Iowa 352; Drake v. Baker, 34 N. J. L. 358; Violet v. Rose, 39 Neb. 661. See ch. 13.

³¹ South Memphis L. Co. v. McLean H. L. Co., 179 Fed. 417, 102 C. C. A. 563; Hardaway-W. Co. v. Bradley, 163 Ala. 596; Prestwood v. Carlton, 162 Ala. 327; Schiffman v. Peerless M. C. Co., 13 Cal. App. 600; Silver Springs, etc. R. Co. v. Van Ness, 45 Fla. 559; Elzy v. Adams Exp. Co., 141 Iowa 407; Thorn v. Morgan, 135 Mich. 51; Kitchen Bros. H. Co. v. Philbin, 2 Neb. (Unof.) 340; Meyer D. Co. v. McKinney, 137 App. Div. (N. Y.) 541; Lande v. Hyde, 66 N. Y. Misc. 259; Bowie v. Western U. Tel. Co., 78 S. C. 424; Peden v. Platte Valley F. & C. Co., 93 Neb. 141; Frankfort & C. R. Co. v. Jackson, 153 Ky. 534; Pugh v. Jackson, 154 Ky. 649; American S. & W. Co. v. Copeland, 159 N. C. 556; Mason v. Alabama I. Co., 73 Ala. 270; Jones v. Foster, 67 Wis. 296; Cameron v. White, 74 Wis. 425, 5 L.R.A. 493; Treat v. Hiles, 81 Wis. 280; Oliver v. Per-

kins, 92 Mich. 304; Morgan v. Hefler, 68 Me. 131; Hadley v. Baxendale, 9 Ex. 341, 2 Am. Neg. Rep. 400; McHose v. Fulmer, 73 Pa. 365; Van Arsdale v. Rundel, 82 Ill. 63; True v. International Tel. Co., 60 Me. 9; Booth v. Spuyten Duyvil R. M. Co., 60 N. Y. 487; Cassidy v. Le Fevre, 45 id. 562; Hexter v. Knox, 63 id. 561; Frye v. Main Cent. R. Co., 67 Me. 414; Fultz v. Wycoff, 25 Ind. 321; Holden v. Lake Co., 53 N. H. 552; Coweta Falls Mfg. Co. v. Rogers, 19 Ga. 416, 65 Am. Dec. 602; Fox v. Harding, 7 Cush. 516; Fletcher v. Tayleur, 17 C. B. 21; Masterton v. Mayor, 7 Hill 61; Wolcott v. Mount, 36 N. J. L. 262, 13 Am. Rep. 438; Passinger v. Thorburn, 34 N. Y. 634; Smith v. Chicago, etc. R. Co., 38 Iowa 518; Van Wyck v. Allen, 69 N. Y. 61, 25 Am. Rep. 136; Ferris v. Comstock, 33 Conn. 513; France v. Gaudet, L. R. 6 Q. B. 199; Richmond v. D. & S. C. R. Co., 40 Iowa 264; Sisson v. Cleveland, etc. R. Co., 14 Mich. 489; Burrell v. New York, etc. Co., 14 Mich. 34; Maynard v. Pease, 99 Mass. 555; Bell v. Cunningham, 3 Pet. 69; Farwell v. Price, 30 Mo. 587; Rice Co. v. Penn. P. G. Co., 88 Ill. App. 407, citing the text; Smith v. Los Angeles & P. R. Co., 98 Cal. 210; Post v. Davis, 7 Kan. App. 217; McNeill v. Richards,

that the nature of the business to which the contract has reference and in which profits might have been earned furnishes no reasonable basis upon which to make an estimate of loss is not controlling where the contract sued upon, or the collateral contract, if, in the latter case, the defendant is responsible for its breach, consists of an undertaking to do specific work for a specified price, although in the performance of that work machinery as well as labor may be employed and the weather may affect the profits by interfering with the work.³² The infringement of an exclusive franchise is attended with liability for the losses resulting.³³ Members of a partnership who use the property of a co-partner must account for the profits made thereby.³⁴ A judgment creditor of a corporation who has

[1899] 1 Irish 79; Consolidated C. Co. v. Schneider, 93 Ill. App. 88, citing the text; Curry v. Kansas, etc. R. Co., 58 Kan. 6, 61 Kan. 541; Watson v. Needham, 161 Mass. 404, 24 L.R.A. 287; Knowles v. Steele, 59 Minn. 452; Farr v. Griffith, 9 Utah, 416, citing the text; Kendall Bank Note Co. v. Commissioners, 79 Va. 563; Bratt v. Swift, 99 Wis. 579; Crosby L. Co. v. Smith, 2 C. C. A. 97, 51 Fed. 63; Tinsley v. Jemison, 20 C. C. A. 371, 74 Fed. 177; Lindsay v. Stevenson, 17 Vict. L. R. 112; Marcus v. Myers, 11 T. L. Rep. 327.

In *Pell v. Shearman*, 10 Ex. 766, the defendant covenanted with the plaintiff that if he would surrender to his lessor a certain lease they would, within two years or such period as should be agreed in a new lease, which the lessor had agreed to grant them, sink upon the demised premises a pit to the depth of one hundred and thirty yards for the purpose of finding coal, and, in case a marketable vein of coal should be reached, pay the plaintiff 2,500*l*. There was a breach of the contract, and evidence showing a

reasonable probability that if the pit had been sunk such coal would have been discovered. Plaintiff's measure of damage was the amount of his loss by being deprived of the opportunity to find coal.

Machinery put into a mill failed to possess the capacity as to the quantity and quality of flour it was warranted to produce. The damages were measured by the amount paid upon it, the loss by reason of its defects and the cost incurred in repairing the mill and putting it in condition to produce the quantity and quality of flour stipulated for. *Pennypacker v. Jones*, 106 Pa. 237.

³² *Industrial Works v. Mitchell*, 114 Mich. 29; *South Memphis L. Co. v. McLean H. L. Co.*, 179 Fed. 417, 102 C. C. A. 563; *Fredonia G. Co. v. Bailey*, 77 Kan. 296; *Candler v. Washoe Lake R. etc. Co.*, 28 Nev. 151.

³³ *Hatten v. Turman*, 123 Ky. 844.

³⁴ *Dunlap v. Watson*, 124 Mass. 305; *Freeman v. Freeman*, 136 Mass. 260; *Moore v. Rawson*, 185 Mass. 264.

agreed to receive bonds in satisfaction of his demand may recover for the breach of a contract to issue bonds and put the proceeds into the improvement of the corporation's plant the difference between market value his bonds would have had if the contract had been performed and their value without performance, but not to exceed their face value.³⁵ The breach of a contract by stockholders not to sell their stock except in connection with that of other holders is cause for the recovery of damages to the extent of the depreciation in the fair cash market value of the stock held by the plaintiff in so far as it was the result of such breach.³⁶

§ 79. **What losses elements of damage.** Losses, aside from gains prevented, may be sustained in various ways in consequence of the breach of a contract or duty. First, a loss may consist of money, property or valuable rights which may be directly taken from the injured party by the breach.³⁷ A servant improperly discharged before the period of his engagement has expired and unable to find any other employment, or one equally remunerative, is thereby deprived of the right to earn the stipulated wages. By that breach of contract he loses the

³⁵ *South Texas Tel. Co. v. Huntington* (Tex. Civ. App.), 138 S. W. 381.

³⁶ *Havemeyer v. Havemeyer*, 43 N. Y. Super. 506.

³⁷ *Smith v. Los Angeles & P. R. Co.*, 98 Cal. 210; *Occidental C. M. Co. v. Comstock T. Co.*, 125 Fed. 244; *Bixby-T. L. Co. v. Evans*, 167 Ala. 431, 29 L.R.A.(N.S.) 194; *St. Louis, etc. R. Co. v. Berry*, 86 Ark. 369; *O'Driscoll v. Doyle*, 31 Colo. 193 (damages recoverable by one who has bought an interest in a pending suit which is compromised in violation of the original plaintiff's contract are measured by the price paid for the interest); *Pope v. Graniteville Mfg. Co.*, 1 Ga. App. 176; *Pittsburgh, etc. R. Co. v. Wilson*, 34 Ind. App. 324; *Wallace v. Knoxville W. Mills*, 117 Ky. 450; *Laughren v. Barnard*, 115 Minn.

276; *Ramsey v. Maberry*, 135 Mo. App. 569; *Clague v. Tri-State L. Co.*, 84 Neb. 499, 133 Am. St. 637; *Dunsford v. Webster*, 14 Manitoba, 529 (depreciation in the value of land through neglect to cultivate it); *Agincourt S. S. Co. v. Eastern Extension, etc. Tel. Co.*, [1907] 2 K. B. 305 (under a contract providing that the sacrifice of an anchor shall be compensated for there cannot be a recovery for all the consequences of such sacrifice, though, it seems, the cost of replacing the anchor is not necessarily the measure of recovery); *Green v. Gregory* (Tex. Civ. App.), 142 S. W. 999; *Connally v. Saunders* (Tex. Civ. App.), 142 S. W. 975; *Carter v. Cairo, etc. R. Co.*, 240 Ill. 152; *Eastman v. Dunn*, 34 R. I. 416.

whole or a part of what he was entitled to earn during the term he was engaged for and is entitled to recover accordingly.³⁸ And that measure of relief will be accorded him against a third party who is the means of securing his dismissal from employment.³⁹

An agent or bailee who, by breach of duty, converts his principal's property, or by neglect or otherwise suffers it to be lost or destroyed, or by failure to assert his rights or by doing it in a careless or inefficient manner subjects him to loss, must respond in damages according to the injury thus occasioned.⁴⁰ The directors and officers of a corporation who deplete its treasury and render it insolvent in order that its property may be sold upon foreclosure must answer for the full value of it and of the franchise as it existed prior to their acts, less the sum realized upon the sale.⁴¹ In some cases such losses are the measure of recovery, as where there is a breach of contract by

³⁸ Paola G. Co. v. Paola G. Co., 56 Kan. 614, 54 Am. St. 598; Hughes v. Robinson, 60 Mo. App. 194; Athletic B. Ass'n v. St. Louis S.'s P. & C. Ass'n, 67 Mo. App. 653; Hutt v. Hickey, 67 N. H. 411; Friedland v. Myers, 139 N. Y. 432; Cutting v. Miner, 30 App. Div. (N. Y.) 457; Wells v. National L. Ass'n, 53 L.R.A. 33, 39 C. C. A. 476, 99 Fed. 222; Sutherland v. Wyer, 67 Me. 64; Gifford v. Waters, 67 N. Y. 80; Gillis v. Space, 63 Barb. 177; Emerson v. Howland, 1 Mason 45; Howe Mach. Co. v. Bryson, 44 Iowa 159, 24 Am. Rep. 735; Williams v. Anderson, 9 Minn. 50; Williams v. Chicago C. Co., 60 Ill. 149; Smith v. Thompson, 8 C. B. 44.

The damages recoverable from the usurper of an office are the salary or emoluments received. Palmer v. Darby, 64 Ohio St. 520.

³⁹ Lopes v. Connolly, 210 Mass. 487, 38 L.R.A. (N.S.) 986; Carter v. Oster, 134 Mo. App. 146. See Hanson v. Innis, 211 Mass. 301.

A member of a union illegally expelled therefrom may recover for the loss of opportunity to obtain employment. Schouten v. Alpine, 77 N. Y. Misc. 19.

⁴⁰ McGaw v. Acker, 111 Md. 153, 134 Am. St. 592; Whitney v. Abbott, 191 Mass. 59; Carl v. Goldberg, 59 N. Y. Misc. 172; White v. Smith, 54 N. Y. 522; Dodge v. Perkins, 9 Pick. 368; Clark v. Moody, 17 Mass. 145; Frothingham v. Everton, 12 N. H. 239; Webster v. De Tastet, 7 T. R. 157; Blot v. Boiceau, 3 N. Y. 78; Maynard v. Pease, 99 Mass. 555; Stearine etc. Co. v. Heintzmann, 17 C. B. (N. S.) 56; Allen v. Suydam, 20 Wend. 321, 32 Am. Dec. 555; Mallough v. Barber, 4 Camp. 150; Nickerson v. Soesman, 98 Mass. 364; Trinidad Nat. Bank v. Denver Nat. Bank, 4 Dill. 290; De Tastet v. Crousillat, 2 Wash. C. C. 132; Lilley v. Doubleday, 7 Q. B. Div. 510.

⁴¹ Niles v. New York Cent. etc. R. Co., 176 N. Y. 119.

one person to adopt another and make him his heir. The value of the services rendered or outlay incurred on the faith of the promise, and not the value of the promised share of the estate, measures the recovery.⁴² On the breach of a contract to supply water a consumer may recover the value of the labor required to obtain it from another source.⁴³ When a lessee occupies premises for the entire term, but is compelled to pay more rent than was stipulated for, he may recover the excess.⁴⁴ The same rule applies in tort actions, as where egress and ingress is cut off from adjacent lands or water is caused to run or stand on them; the recovery is measured by the expense of remedying the wrong.⁴⁵ One who breaches his contract to permit the owner of mortgaged lands to redeem them after foreclosure and sale by selling the same to innocent purchasers is liable for the value of the lands in excess of the mortgage debt, including foreclosure costs; if but a small part of the lands were sold at the time suit was begun, the remainder not being thereby depreciated in value, he is liable for the value of those sold and the plaintiff may recover those unsold upon payment of the mortgage debt and charges; if the defendant continued to sell the remaining lands after suit was begun he is responsible for their value unless the plaintiff elected to proceed against the purchasers, who were not entitled to the rights of innocent holders.⁴⁶

The wrongful expulsion of a member of a society is attended with liability for the value of an insurance policy thereby lost and the value of a traveling card forfeited.⁴⁷ A vendee who, because of the negligence of an abstractor, secures a less estate than he paid for may recover the difference between the sum paid and the value of that received.⁴⁸ The loss resulting from

⁴² *McDaniel v. Hutcherson*, 136 Ky. 412; *Sandham v. Grounds*, 36 C. C. A. 103, 94 Fed. 83; *Graham v. Graham*, 34 Pa. 475, overruling *Jack v. McKee*, 9 Pa. 240; *Kauss v. Rohner*, 172 Pa. 481, 51 Am. St. 762; *Murtha v. Donohoo*, 149 Wis. 491.

⁴³ *Whitehouse v. Staten Island W. S. Co.*, 101 App. Div. (N. Y.) 112.

⁴⁴ *Myers T. Co. v. Keeley*, 58 Mo. App. 491.

⁴⁵ *Louisville & N. R. Co. v. Finley*, 7 Ky. L. Rep. 129 (Ky. Super. Ct.).

⁴⁶ *Silliman v. Gano*, 90 Tex. 637.

⁴⁷ *St. Louis S. R. Co. v. Thompson*, 102 Tex. 89.

⁴⁸ *Keuthan v. St. Louis T. Co.*, 101 Mo. App. 1.

the sale of goods in other than the stipulated manner is measurable by the difference in the price realized for them in the way in which they were sold and what would have been obtained if they had been sold under the contract.⁴⁹ On the breach of a contract to treat sheep as soon as they became diseased, the disease being one responsive to treatment, there may be a recovery of the difference in their value when they were treated and what that value would have been if they had been treated without delay.⁵⁰ The breach of a contract to extend the time for the payment of a mortgage is followed by liability for the value of the equity of redemption in the property.⁵¹ A mortgagee who breaches his contract not to exercise his power of sale for a stated time by selling the property at an insufficiently-advertised sale and disclosing the reserved price before the sale, is liable to the mortgagor for the difference between the value of the property and the price at which it was sold.⁵² The increased price paid for property because a party procured the breach of a contract between others is an element of damage.⁵³ The refusal to register shares of stock makes the wrongdoer liable for the difference between their value at the time their owner contracted to sell them and their value when they were subsequently registered, he having gone into the market and bought to fill his contract.⁵⁴ The damages for the infringement of a ferry franchise are equal to the amount of tolls lost to the owner by the diminution of the patronage of his ferry.⁵⁵ The breach of a contract to forbear bringing suit or not to issue an execution is to be compensated for to the extent of the amount of the judgment upon which execution issued, with interest on the sum paid, and the costs paid or due in satisfaction thereof, including those incurred in obtaining a discharge from arrest.⁵⁶

⁴⁹ Paxton v. Vadbonker, 1 Neb. (Unof.) 776.

⁵⁰ Burnham v. Meredith, 3 Neb. (Unof.) 287.

⁵¹ Missouri R. E. Syndicate v. Sims, 121 Mo. App. 156.

⁵² Barns v. Queensland Nat. Bank, 3 Aust. Com. L. R. 925.

⁵³ Knickerbocker I. Co. v. Gardiner D. Co., 107 Md. 556, 16 L.R.A. Suth. Dam. Vol. 1.—19.

(N.S.) 746.

⁵⁴ Boulbee v. Wills, 15 Ont. L. R. 227; Balkis C. Co. v. Tomkinson, [1893] App. Cas. 396; Tomkinson v. Balkis C. Co., [1891] 2 Q. B. 614.

⁵⁵ Blackwood v. Tanner, 112 Ky. 672.

⁵⁶ Smith v. Way, 6 Allen, 212.

Inconvenience and loss occasioned by being obliged to quit business and raise money to pay the note upon which it was agreed suit should not be brought are not elements of the damages;⁵⁷ the consequences of a forced sale are also too remote.⁵⁸ But where a contract stipulating for the discontinuance of an action and the vacation of an attachment was broken and the property sold for less than its value a recovery was allowed for the difference between such value and the amount obtained for the property at the sale.⁵⁹

A lessor may recover in tort against a water company which breaches its contract to supply water, which he had bound himself to furnish his lessee, the rent lost between the time of the discontinuance and resumption of the service.⁶⁰ The depreciation in the value of adjoining property measures the liability for the breach of a contract to leave parts of lots vacant.⁶¹ Wrongfully interfering with the performance of a contract between third parties is ground for imposing liability for the resulting loss.⁶²

§ 80. **Same subject; labor and expenditures.** Second, losses sustained may consist of labor or expenditures prudently incurred in preparation to perform or in part performance of the contract on the part of the plaintiff.⁶³ Where a contract is partly performed by one party and, without his being in any default, the other stops him and prevents further performance such part performance, in addition to the profits which could be made by completing the contract, will enter into the estimate of damages for such breach. Should a vendor who had received part payment for goods bargained and sold refuse to go on with the contract the vendee would be entitled to recover, in addition to the profits—the excess of the value of the goods above the contract price—the amount which he had

⁵⁷ *Deyo v. Waggoner*, 19 Johns. 241.

⁵⁸ *Indiana, etc. R. Co. v. Scearce*, 23 Ind. App. 223.

⁵⁹ *Cole v. Stearns*, 23 App. Div. (N. Y.) 446.

⁶⁰ *Phelps v. Cape Girardeau W.*

W. & E. L. Co., 165 Mo. App. 454.

⁶¹ *Knoch v. Haizlip*, 163 Cal. 146.

⁶² *Mealey v. Bemidji L. Co.*, 118 Minn. 427.

⁶³ *Sperry v. O'Neill*, 185 Fed. 231,

107 C. C. A. 337.

paid towards the latter, for the same reason which supports his claim where he has paid the whole purchase price for the value of the property.⁶⁴ If a contract for particular work is partly performed and the employer then puts an end to the undertaking, recovery may be had against him, not only for the profits the contractor could have made by performing the contract, but compensation also for so much as he has done towards performance.⁶⁵ Preparations for performance, which were a necessary preliminary to performance or within the contemplation of the parties as necessary in the particular case, rest upon the same principle.⁶⁶ Maintaining a shop and waiting

⁶⁴ *Copper Co. v. Copper M. Co.*, 33 Vt. 92; *Woodbury v. Jones*, 44 N. H. 206; *Owen v. Routh*, 14 C. B. 327; *Bush v. Canfield*, 2 Conn. 485; *Loder v. Kekule*, 3 C. B. (N. S.) 128; *Smith v. Berry*, 18 Me. 122; *Berry v. Dwinel*, 44 Me. 255; *Wyman v. American P. Co.*, 8 Cush. 168; *Pinkerton v. Manchester & L. R.*, 42 N. H. 424.

⁶⁵ *McCullough v. Baker*, 47 Mo. 401; *Jones v. Woodbury*, 11 B. Mon. 167; *Derby v. Johnson*, 21 Vt. 17; *Chamberlin v. Scott*, 33 Vt. 80; *Friedlander v. Pugh*, 43 Miss. 111; *Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613; *Danforth v. Walker*, 37 Vt. 239; §§ 713, 714.

⁶⁶ *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168; *Hale v. Hess*, 30 Neb. 42, 58 (quoting the two preceding propositions); *Bernstein v. Meech*, 130 N. Y. 354; *Friedland v. Myers*, 139 N. Y. 433; *Nelson v. Hatch*, 70 App. Div. (N. Y.) 206; *Griffin v. Sprague E. Co.*, 116 Fed. 749; *Masterton v. Mayor*, 7 Hill 61 (the marble at the quarry was taken into account in the estimate of damages); *Bryant v. Barton*, 32 Neb. 613; *McDaniel v. Hutcheson*, 136 Ky. 412; *Hardaway-W. Co. v. Bradley*, 163 Ala. 596; *McKenzie v. Mitchell*, 123 Ga. 72; *Mitchell v.*

Vogt Mach Co., 3 Ga. App. 542; *Enyart v. Inman-P. L. Co.*, 54 Wash. 38. See § 649; *Taylor Mfg. Co. v. Hatcher Mfg. Co.*, 3 L.R.A. 587, 39 Fed. 440.

The loss resulting to a contractor where the employer has acted in good faith has been apportioned between them. *Harris v. Faris-K. C. Co.*, 13 Idaho 211.

In *Nurse v. Barnes*, T. Raym. 77, the defendant, in consideration of 10*l.*, promised to demise a mill to the plaintiff, who laid in a large stock to employ it, which he lost because the defendant refused to give him possession. A verdict of 500*l.* was approved. The stock so procured may more properly be classed as an expenditure on the faith of performance by the other party. See § 81. But the allowance of a loss for such expenditures rests on a similar principle.

In *Skinner v. Tinker*, 34 Barb. 333, an action was brought to recover damages for the breach of a contract for a partnership. The plaintiff, a dentist of Brooklyn, and the defendant, a dentist of Havana, Cuba, entered into an agreement in writing at the latter place, in March, 1853, by which they were to do a joint business as dentists at

for orders which are due under a contract is the equivalent of an expenditure under this principle.⁶⁷ If, by partial performance of the contract a contractor has enjoyed a part of the benefits of his expenditure for full performance the damages

Havana, to begin in October or November following, if the plaintiff should present himself. The agreement was silent as to the duration of the partnership. Thereupon the plaintiff sold his business at Brooklyn and entered into bonds not to resume practice there, and made all preparations for carrying out his agreement. In May he received a letter from the defendant declining to carry out the agreement on his part. On the trial the plaintiff proved these facts and his readiness and an offer to fulfill, and recovered a verdict for \$4,000. On appeal Ingraham, J., said: "Performance on the part of the plaintiff by appearing in Havana, in October or November, as stated in the contract, was unnecessary because the defendant had given notice of his determination not to form a partnership. The plaintiff was then entitled to damages, if any were sustained, up to that time, but not to prospective damages."

Johnson v. Arnold, 2 Cush. 46, was an action to recover damages for the breach of a special contract by which, upon certain terms, the defendant agreed to furnish and keep the plaintiff supplied with a stock of goods for carrying on business in the defendant's store in another state, and the plaintiff undertook to carry it on for a share of the profits for a given term. It was held that in estimating the damages it was competent to allow the plaintiff compensation for the loss of his time and for the expenses of removing his family to and from

the place where the business was to be carried on.

Noble v. Ames Mfg. Co., 112 Mass. 492, is apparently not consistent with the principle stated. The defendant, doing business in Massachusetts, wrote the plaintiff in the Sandwich Islands: "I am ready to offer you a foreman's situation at these works as soon as you may get here; pay, \$1,500 a year." The plaintiff accepted the proposition and came, but the defendant refused to employ him. The court rejected the claim of compensation for the time and expenses in coming from the Sandwich Islands on the ground that those items preceded the taking effect of the contract, and were not in part performance. Morton, J., said: "All the plaintiff can claim is that he should be placed in as good condition as he would have been in if the contract had been performed. But the ruling (allowing these items) puts him in a better condition." On the trial those were the only items claimed. It was stated by the plaintiff's counsel that no claim was made for business sacrifices in leaving the Islands and coming to the defendant to perform the contract, and none for any loss of time or other loss or damage after the refusal of the defendant to employ him.

The contrary view is expressed in Moore v. Mountcastle, 72 Mo. 605, where plaintiff was allowed to recover for loss of time and expense in going to perform a contract. The expense incurred in taking another person with him to assist in the

he is entitled to are proportionately lessened.⁶⁸ To be recoverable expenses must be incurred in pursuance of the contract.⁶⁹

§ 81. Same subject; damages by relying on performance. Third, such losses may consist of expenditures made by one party to a contract and damages from his own acts done on the faith of its being performed by the other, in furtherance of the object for which the contract purports to be made, or the object which was in the contemplation of the parties at the time of contracting,⁷⁰ as the price paid for a ticket to a place of amusement and expenses incurred preparatory to attending

work he was to do was disallowed. His personal expenses and the loss of his time were "such damages as may be presumed necessarily to have resulted from the breach of the contract," and hence did not need to be specially pleaded.

In *Smith v. Sherman*, 4 Cush. 408, it was held that loss of time and expenses incurred in preparation for marriage are directly incidental to the breach of the marriage promise.

In *Durkee v. Mott*, 8 Barb. 423, on a contract to pay a certain price for rafting logs which the defendant put an end to before the labor began, the plaintiff recovered the immediate loss in preparing to perform the contract by providing men for that purpose.

Woodbury v. Jones, 44 N. H. 206, affirms the same doctrine. There the defendant proposed to the plaintiff, who was then living in Minnesota, that if he would come back to N. B. he might move into the defendant's house, and he would give the plaintiff and his wife a year's board, and he might carry on the defendant's farm on any terms he might elect. He accepted, and came back; defendant failed to make his offer good; it was competent for the jury to take into consideration the expenses of removing to N. B.

In an action against the proprietor of a school for the breach of a contract to employ the plaintiff as a teacher, made for her by her father during her absence in Europe, the plaintiff was held not entitled to recover as part of her damages the expenses of her journey home, it not appearing that they were incurred in consequence of the contract, or were in the contemplation of the parties when it was made. *Benziger v. Miller*, 50 Ala. 206. See *Williams v. Oliphant*, 3 Ind. 271; *Bulkley v. United States*, 19 Wall. 37, 22 L. ed. 62; *Dillon v. Anderson*, 43 N. Y. 231; *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 416.

⁶⁷ *Speirs v. Union D. F. Co.*, 180 Mass. 87, 90; *Sterling O. Co. v. House*, 25 W. Va. 64.

⁶⁸ *O'Connell v. Rosso*, 56 Ark. 603; *May v. Brenig* (N. Y. Misc.), 120 Supp. 98; *May v. Polnhoff*, 65 N. Y. Misc. 546; § 713; *McKenzie v. Mitchell*, *supra*.

⁶⁹ *Curran v. Smith*, 149 Fed. 945, 81 C. C. A. 537; *Ramsey v. Maberry*, 135 Mo. App. 569; *Tucker v. Deering S. R. Co.*, 133 id. 122; *Kenerson v. Colgan*, 164 Mass. 166.

⁷⁰ *Curran v. Smith*, 149 Fed. 945, 81 C. C. A. 537; *Owen v. United States*, 44 Ct. of Cls. 440; *Choctaw, etc. R. Co. v. Rolfe*, 76 Ark. 220;

the performance which was prevented by the defendant.⁷¹ It is not cause for denying a recovery that the contract pursuant to which the expenditures were made was void under the statute of frauds.⁷² Such losses cannot be recovered if incurred after notice of the refusal of the other party to perform the contract,⁷³

Ranson v. Ranson, 233 Ill. 369; Sanitary Dist. v. McMahon, 110 Ill. App. 519; King v. Perfection B. Mach. Co., 81 Kan. 809; Taylor v. Spencer, 75 Kan. 152; Illinois Cent. R. Co. v. Doss, 137 Ky. 659; McDaniel v. Hutcherson, 136 Ky. 412; Pennebaker v. Bell City Mfg. Co., 130 Ky. 592; Seretto v. Rockland, etc. R. Co., 101 Me. 149; Denton v. Gill, 102 Md. 386, 3 L.R.A.(N.S.) 465; Garfield & P. C. Co. v. Pennsylvania C. & C. Co., 199 Mass. 22; Boyden v. Hill, 198 Mass. 477; Alderton v. Williams, 139 Mich. 296; Thorn v. Morgan, 135 Mich. 51; Crowley v. Burns B. & Mfg. Co., 100 Minn. 178; Ragland v. Conqueror Z. Co., 136 Mo. App. 631; Holt v. United Security L. Ins. Co., 76 N. J. L. 585, 21 L.R.A.(N.S.) 691, citing the text; Fuldner v. Fieb (N. Y. Misc.), 127 Supp. 339; American-H. Pub. Co. v. Miles, 68 N. Y. Misc. 334; Ideal W. Co. v. Garvin Mach. Co., 92 App. Div. (N. Y.) 187; Brown v. East Carolina R. Co., 154 N. C. 309; Pittsburg S. Foundry v. Pittsburg S. Co., 223 Pa. 430; Singer Mfg. Co. Christian, 211 Pa. 534; McMeekin v. Southern R. Co., 82 S. C. 468; Martin v. Seaboard A. L. R., 70 S. C. 8; Gross v. Heckert, 129 Wis. 314; Hanes v. Idaho I. Co., 21 Idaho 512; Sommerville v. Same, 21 Idaho 546, 123 Pac. 302; Murphy v. Pitt C. Co., 52 Pa. Super. 316; Battiesburg Lumber Co. v. Herrick, 129 O. C. A. 288, 212 Fed. 834; Wolters v. Schultz, 1 N. Y. Misc. 196; Gordon v. Constantine H. Co., 117 Mich.

620; People's B. L. & S. Ass'n v. Pickerell, 21 Ky. L. Rep. 1386, 55 S. W. 194; Kelly v. Davis, 9 Ky. L. Rep. 647 (Ky. Super. Ct.); Dean v. White, 5 Iowa, 266; Grand Tower Co. v. Phillips, 23 Wall. 471, 23 L. ed. 71; Driggs v. Dwight, 17 Wend. 71, 31 Am. Dec. 283; Bunney v. Hopkinson, 1 L. T. (N. S.) 53; Smith v. Green, 1 C. P. Div. 92; Randall v. Newson, 2 Q. B. Div. 102; Leffingwell v. Elliott, 10 Pick. 204; Milburn v. Belloni, 39 N. Y. 53, 100 Am. Dec. 403; Thomas v. Dingley, 70 Me. 109, 35 Am. Rep. 310; Randall v. Raper, E. B. & E. 84; Borradaile v. Brunton, 8 Taunt. 535; Brown v. Edgington, 2 M. & G. 279; French v. Vining, 102 Mass. 132, 3 Am. Rep. 449; Johnson v. Meyer, 34 Mo. 255; Rowland v. Shelton, 25 Ala. 217; Ferris v. Comstock, 33 Conn. 513; Zuller v. Rogers, 7 Hun. 540; Fisk v. Tank, 12 Wis. 276, 78 Am. Dec. 737; Reggio v. Braggiotti, 7 Cush. 166; Jeter v. Glenn, 9 Rich. 374; Skagit R. & L. Co. v. Cole, 2 Wash. 57; Bernstein v. Meech, 130 N. Y. 354. See Mason v. Alabama I. Co., 73 Ala. 279.

⁷¹ People v. Flynn, 189 N. Y. 180.

⁷² Baldrige v. Centgraf, 82 Kan. 240.

⁷³ Thorn v. Morgan, 135 Mich. 51; Durham v. Hastings P. Co., 95 App. Div. (N. Y.) 835; Mendell v. Willyoung, 42 N. Y. Misc. 210; Kellogg v. Malick, 125 Wis. 239; Allington & C. Mfg. Co. v. Detroit Red. Co., 133 Mich. 427; Rice Co. v. Penn P. Co., 88 Ill. App. 407.

nor unless they were within the contemplation of such party.⁷⁴ They must have been actually incurred.⁷⁵ If the profits which would have resulted from performance are recovered there cannot be a recovery of expenses.⁷⁶

§ 82. **Same subject; liability to third persons; covenants of indemnity.** Fourth, such losses may consist of sums necessarily paid to third persons, or of sums recovered and expenses incurred in actions brought by third persons in consequence of the defendant's breach of contract. They are those losses which may result from suretyship or the breach of any duty or obligation of indemnity.⁷⁷ In such cases the practical question will always be what the plaintiff was obliged or authorized to

⁷⁴ Bixby-T. L. Co. v. Evans, 167 Ala. 431, 29 L.R.A. (N.S.) 194.

⁷⁵ Winston C. Mach. Co. v. Wells-W. T. Co., 144 N. C. 421.

⁷⁶ American-H. Pub. Co. v. Miles, 68 N. Y. Misc. 334.

⁷⁷ Rogers v. Riverside L. & I. Co., 132 Cal. 9; Mowbray v. Merryweather, [1895] 1 Q. B. 57, [1895] 2 id. 640; French v. Parish, 14 N. H. 496; Newburgh v. Galatian, 4 Cow. 340; Holdgate v. Clark, 10 Wend. 215; Lincoln v. Blanchard, 17 Vt. 464; Chamberlain v. Godfrey, 36 Vt. 380, 84 Am. Dec. 690; Westervelt v. Smith, 2 Duer, 449; Illies v. Fitzgerald, 11 Tex. 417; Brame v. Dowse, 12 Cush. 227; Spear v. Stacy, 26 Vt. 61; Howard v. Lovegrove, L. R., 6 Ex. 43; Finekh v. Evers, 25 Ohio St. 82; Webb v. Pond, 19 Wend. 423; Rockfeller v. Donnelly, 8 Cow. 623; Warwick v. Richardson, 10 M. & W. 284; Gerrish v. Smyth, 10 Allen, 303; Ray v. Clemens, 6 Leigh, 600; Kip v. Brigham, 6 Johns. 158; Colter v. Morgan, 12 B. Mon. 278; Lowell v. Boston, etc. R. Co., 23 Pick. 24; Baynard v. Harritty, 1 Houst. 200; Robbins v. Chicago, 4 Wall. 657, 18 L. ed. 427, 16 Am. Neg. Rep. 601; Crawford v. Turk, 24 Gratt. 176; Duxbury v.

Vermont, etc. R. Co., 26 Vt. 751; Annett v. Terry, 35 N. Y. 256; Spalding v. Oakes, 42 Vt. 343; Chamberlain v. Beller, 18 N. Y. 115; Bridgeport Ins. Co. v. Wilson, 34 N. Y. 275; Proprietors of L. & C. v. Lowell Horse R. Co., 109 Mass. 221; Briggs v. Boyd, 37 Vt. 534; Colburn v. Pomeroy, 44 N. H. 19; Thomas v. Beckman, 1 B. Mon. 31; Robertson v. Morgan, 3 id. 309; Littleton v. Richardson, 32 N. H. 59; Gibson v. Love, 2 Fla. 598; Trego v. Rubovits, 178 Ill. App. 127; Southern R. Co. v. Lewis, 165 Ala. 451; McArthur v. Ogletree, 4 Ga. App. 429; Evans v. Howell, 211 Ill. 85; Seufft v. Vanek, 209 Ill. 361; Cousins v. Paxton, 122 Iowa 465; Bourke v. Spaight, 80 Kan. 387; Samson v. Zimmerman, 73 Kan. 654; Wellington Nat. Bank v. Robbins, 71 Kan. 748, 114 Am. St. 523; Louisville & N. R. Co. v. Schmidt, 128 Ky. 229; Pittsburg, etc. R. Co. v. Dodd, 115 Ky. 176; Stewart v. American B. Co., 108 Md. 200; Chesapeake S. S. Co. v. Merchants' Nat. Bank, 102 Md. 589; Hetherington & Sons v. Firth, 210 Mass. 8; Schenk v. Forrester, 102 Mo. App. 124; Brown v. Cowles, 72 Neb. 896; Hubbard v. Gould, 74 N. H. 25; Fairfield v. Day, 71 N. H.

pay both in respect to the principal and incidental costs or expenses. If there has been a voluntary payment by the indemnified party or a compulsory payment resulting from a suit by which the indemnitor is not bound by his contract or in consequence of the lack of notice to defend, the question of the liability of the indemnified party to make such payment is, according to some authorities, open in his action for indemnity.⁷⁸

In a recent case⁷⁹ a contractor for machinery supplied an article made for him by the defendant. It was defectively constructed and in consequence the plaintiff was subjected to a judgment for damages resulting from the breaking of that article, such judgment being rendered in Canada. No offer of the defense of the action on which such judgment was rendered was made to the plaintiff. The conclusion of the court was that where a subvendee or a subcontractor has a legal claim for indemnification and has, under fear of the consequences, made an adjustment or been compelled to yield to a judgment under circumstances indicating good faith and a reasonable amount of resistance, the amount thus determined, either by the adjustment or by the litigation, becomes evidence of the amount of damages to be awarded against the principal contractor.⁸⁰ This conclusion was aside from the question whether the judgment should stand as of conclusive effect or only *prima facie* evidence as to the measure of damages. If there is an express indemnity against the result of a particular suit, whether the indemnitor is a party or not, the judgment binds him for the purposes of that contract.⁸¹ But under a general

63; *Olmstead v. Rawson*, 188 N. Y. 517; *Gallo v. Brooklyn Sav. Bank*, 129 App. Div. (N. Y.) 698; *Browning v. Stillwell*, 42 N. Y. Misc. 346; *Hughes v. Crooker*, 148 N. C. 318; *Mangold v. Isabelle F. Co.*, 31 Pa. Super. 275. See *Berlin I. B. Co. v. American B. Co.*, 76 Conn. 1.

⁷⁸ *Seaboard A. L. R. Co. v. Main*, 132 N. C. 445; *Douglas v. Howland*, 24 Wend. 35; *Lee v. Clark*, 1 Hill, 56; *Duffield v. Scott*, 3 T. R. 374; *Aberdeen v. Blackmar*, 6 Hill, 324;

Rapelye v. Prince, 4 Hill, 119, 40 Am. Dec. 267.

⁷⁹ *Nashua I. & S. Co. v. Brush*, 33 C. C. A. 456, 91 Fed. 213.

⁸⁰ Citing *Smith v. Compton*, 3 B. & Ad. 407, and the text.

⁸¹ *Patton v. Caldwell*, 1 Dall. 419, 1 L. ed. 204; *Rapelye v. Prince*, *supra*; *Thomas v. Hubbell*, 15 N. Y. 405, 69 Am. Dec. 619; *Chamberlain v. Godfrey*, 36 Vt. 380, 84 Am. Dec. 690.

covenant of indemnity against suits the covenantor has a right to defend either in the action against the indemnified party or in the latter's action upon the covenant of indemnity. There is a marked distinction between covenants which stipulate against the consequences of a suit and those which contain no such undertaking. In the latter class the judgment is *res inter alios acta*, and proves nothing except *rem ipsam* against the indemnitor unless he had notice and an opportunity to defend. The want of notice does not go to the cause of action; the judgment is *prima facie* evidence only against the indemnitor and he is at liberty to defend against the demand on which it is founded.⁸² If notice is expressly stipulated for the want of it will defeat the action.⁸³

As to the right to costs and expenses of defending a former suit brought to enforce a liability, against which there is an agreement or duty to indemnify, there is some conflict of decision. If a surety for a liquidated debt is sued upon it he is not bound to pay it to save costs; and he may recover of the principal the costs he is compelled to pay as incident to a default judgment and, in addition, the sum he is obliged to pay of the debt.⁸⁴ And where the action is founded on a disputable liability or an unliquidated demand the rule in England, and generally in this country, allows the surety or indemnified party to give notice of the suit to the party ultimately liable and abide his directions; if he gives none, to make no defense;

⁸² Henry v. Heldmaier, 226 Ill. 152; Grant v. Maslen, 151 Mich. 466, 16 L.R.A.(N.S.) 910; Clark v. Clune, 172 Mich. 323; Bridgeport Ins. Co. v. Wilson, 34 N. Y. 275; Smith v. Compton, 2 B. & Ad. 407; Reggio v. Braggiotti, 7 Cush. 166; Marlatt v. Clary, 20 Ark. 251; Boyd v. Whitfield, 19 Ark. 447; Collingwood v. Irwin, 3 Watts, 306; Paul v. Witman, 3 W. & S. 407; Pitkin v. Leavitt, 13 Vt. 379; Train v. Gold, 5 Pick. 380; Baynard v. Har- rity, 1 Houst. 200.

⁸³ Bridgeport Ins. Co. v. Wilson, 34 N. Y. 275.

⁸⁴ Hulett v. Soullard, 26 Vt. 295; Kemp v. Finden, 12 M. & W. 421; Ex parte Marshall, 1 Atk. 262; Baker v. Martin, 3 Barb. 634; Elwood v. Deifendorf, 5 Barb. 412; Bleaden v. Charles, 7 Bing. 246; Holmes v. Weed, 24 Barb. 546; Wynn v. Brooke, 5 Rawle 106; McKee v. Campbell, 27 Mich. 497; Wright v. Whiting, 40 Barb. 240; Wallace v. Gilchrist, 24 Up. Can. C. P. 40; Craig v. Craig, 5 Rawle, 91; Robertson v. Morgan, 3 B. Mon. 307; Colter v. Same, 12 id. 278. See Pierce v. Williams, 23 L. J. (Ex.) 322.

or if the facts are such as to render some defense reasonable and judicious and there is a probability of success he is at liberty to defend; and such costs and expenses as are reasonable and incurred in good faith he will be entitled to recover as part of his indemnity. He may recover not only the costs taxed against him by the prevailing adverse party, but the costs of his defense.⁸⁵ A man has no right, merely because he has an indemnity, to defend a hopeless action and put the person guarantying to useless expense.⁸⁶ The rule formerly laid down was that if the defendant in the first action placed the facts before the person whom he sought ultimately to charge and that person declined to intervene and left him to take his own course, it would be a question for the jury whether it was reasonable to defend or whether the defense was conducted in a fair manner; in deciding that question the jury would have to consider whether it was more prudent to settle the matter by compromise, pay the money into court or let judgment go by default.⁸⁷ And this is still probably the law. An agent, surety, or one expressly indemnified in respect to the liability sought by action to be fixed on him, who relies on the indemnity for security against loss, has no personal interest to defend where he can connect the indemnitor with that action so as to conclude him. But where notice cannot be given or for any reason is omitted the defendant who depends on another for indemnity must neces-

⁸⁵ *Hubbard v. Gould*, 74 N. H. 25; *Duxbury v. Vermont Cent. R. Co.*, 26 Vt. 751; *Smith v. Compton*, 3 B. & Ad. 407; *Pitkin v. Leavitt*, 13 Vt. 379; *Hayden v. Cabot*, 17 Mass. 169; *Wynn v. Brooke*, 5 Rawle, 106; *New Haven & N. Co. v. Hayden*, 117 Mass. 433; *Bonney v. Seely*, 2 Wend. 481; *Howard v. Lovegrove*, L. R. 6 Ex. 43; *Ottumwa v. Parks*, 43 Iowa, 119; *Baxendale v. London, etc. R. Co.*, L. R. 10 Ex. 35; *Collen v. Wright*, 7 El. & Bl. 301; *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *Aguis v. Great Western C. Co.*, [1899] 1 Q. B. 413.

But if the action is to enforce an

unliquidated demand and the person against whom judgment has been rendered has had no opportunity to defend it he is not liable for the costs and expenses of the defense made by the person against whom judgment was rendered. *Nashua I. & S. Co. v. Brush*, 33 C. C. A. 456, 91 Fed. 213.

⁸⁶ *Wrightup v. Chamberlain*, 7 Scott, 598; *Kiddle v. Lovett*, 16 Q. B. Div. 605; *Gillett v. Rippon*, *Moody & M.* 406.

⁸⁷ *Mayne on Dam.*, 8th ed., p. 110; *Mors-le-Blanch v. Wilson*, L. R. 8 C. P. 227; *Detroit v. Grant*, 135 Mich. 626.

sarily so far defend the action as to obtain the best practicable assurance that the amount which he pays he will have a legal right to have reimbursed.

§ 83. Same subject; indemnity to municipalities; counsel fees.

Municipal corporations charged with the duty of keeping public ways in repair have a right of indemnity against parties contracting to perform this duty if they fail to fulfill; and against parties who, by abuse of license or tortiously, put such ways out of repair, when such corporations have been compelled to pay damages to some person injured in consequence of such defect or want of repair.⁸⁸ The corporation, not being *in pari delicto*, is not subject to the principle which excludes contribution or indemnity between wrong-doers, and has a right of recovery over against the party by whose fault the injury was suffered.⁸⁹ Where notice has been given to the person primarily at fault to take upon himself the defense, he is bound by the judgment as to the damages paid and costs.⁹⁰ In such cases

⁸⁸ Blocker v. Owensboro, 129 Ky. 75; Cambridge v. Hanscom, 186 Mass. 54; Ashley Borough v. Lehigh, etc. C. Co., 232 Pa. 425; Rochester v. Montgomery, 72 N. Y. 65; Port Jervis v. First Nat. Bank, 96 id. 550; Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; Robbins v. Chicago, 4 Wall. 657, 18 L. ed. 427; Woburn v. Henshaw, 101 Mass. 193, 3 Am. Rep. 333; Stoughton v. Porter, 13 Allen, 191; Boston v. Worthington, 10 Gray, 496, 71 Am. Dec. 678; Lowell v. Boston, etc. R. Co., 23 Pick. 24; Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469; Ottumwa v. Parks, 43 Iowa 119; Duxbury v. Vermont Cent. R. Co., 26 Vt. 751; Littleton v. Richardson, 32 N. H. 59; Proprietors of L. & C. v. Lowell H. R. Co., 109 Mass. 221; Corsicana v. Tobin, 23 Tex. Civ. App. 492.

⁸⁹ Baltimore & O. R. Co. v. Howard County, 113 Md. 404.

⁹⁰ Cases cited in first note to this

section: Mayor v. Brady, 151 N. Y. 611; Byne v. Americus, 6 Ga. App. 48; Fleming v. Anderson, 39 Ind. App. 343; Baltimore & O. R. Co. v. Howard County, 111 Md. 176, 40 L.R.A.(N.S.) 1172; New York v. Corn, 133 App. Div. (N. Y.) 1; Seattle v. Regan, 52 Wash. 262, 132 Am. St. 963; Seattle v. Puget Sound I. Co., 47 Wash. 22, 12 L.R.A.(N.S.) 949, 125 Am. St. 884; Seattle v. Saulez, 47 Wash. 365.

In Ottumwa v. Parks, 43 Iowa, 119, where the party sought to be made liable to the city assumed the defense of the action against it the taxable costs were allowed so far as they were paid by the city; but the costs of an appeal were disallowed, there being no evidence that it was taken at the defendant's request.

Notice need not be given if the party sued jointly with the city has procured a discontinuance of the action as to himself. Detroit v. Grant, 135 Mich. 626.

the demands for damages are unliquidated and generally disputable, and a defense would be proper and judicious, whether the party ultimately liable has notice and assumes it or not. The costs taxed against the corporation, where a reasonable defense is made, in case of recovery, and the expense of the defense, including counsel fees, are proper items for damage for which it may claim indemnity. They are among the direct consequences of the defendant's fault and the breach of the implied promise or duty to save harmless.

In a Massachusetts case⁹¹ Lord, J., said: "The difficulty is not in stating the rule of damages, but in determining whether in the particular case the damages claimed are within the rule. Natural and necessary consequences are subjects of damages; remote, uncertain and contingent consequences are not. Whether counsel fees are natural or necessary, or remote and contingent, in a particular case, we think may be determined upon satisfactory principles; and, as a general rule, when a party is called upon to defend a suit founded upon a wrong for which he is held responsible in law without misfeasance on his part, but because of the wrongful act of another against whom he had a remedy over, counsel fees are the natural and reasonably necessary consequence of the wrongful act of the other, if he has notified the other to appear and defend the suit. When, however, the claim against him is upon his own contract or for his own misfeasance, though he may have a remedy against another, and the damages recoverable may be the same as the amount of the judgment recovered against himself, counsel fees paid in defense of the suit against himself are not recoverable."⁹² It appears to the writer that such expenses being

⁹¹ *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292.

⁹² In *Chase v. Bennett*, 59 N. H. 394, an action for neglect of a clerk to index a mortgage, whereby the plaintiff was induced to take a mortgage of the property supposing it to be unincumbered, it was held that counsel fees paid in defending a suit by the prior mortgagee for the property were not damages for which the

defendant was liable because they were not the natural and reasonable consequence of his neglect, and because he was not notified to defend that suit.

Such fees are not recoverable against the person liable over for a defect in a highway. *Corsicana v. Tobin*, 23 Tex. Civ. App. 492.

If the counsel fees are paid by a third party for its benefit and the

recognized as not remote and contingent, the test here given for their allowance or rejection is not sound. They were allowed in that case, the plaintiff, a municipal corporation, having defended a suit for damages brought against it for a defect in a sidewalk caused by the defendant; but by the rule laid down, an innocent agent who does at the request of his principal a wrongful and injurious act, on being sued therefor would have no recourse for fees of counsel employed to defend that action.⁹³ And yet in this opinion the learned judge says: "Within this rule a master who is immediately responsible for the wrongful acts of a servant, though there is no misfeasance on his part, might recover against such servant not only the amount of the judgment recovered against him, but his reasonable expenses, including counsel fees, if notified to defend the suit." Where there is an implied or express indemnity which covers the consequences of being sued and having to defend an action, all the usual concomitants of such a situation are necessarily within the contemplation of the parties; and if there is no objection of improvidence or bad faith the expense of counsel is obviously as proper to be allowed as the fees of witnesses,

city is not bound to reimburse him they are not recoverable. *Cambridge v. Hanscom*, 186 Mass. 54.

⁹³ See *Howe v. Buffalo, etc. R. Co.*, 37 N. Y. 297.

In *Reggio v. Braggiotti*, 7 Cush. 166, the defendant sold to the plaintiff an article which he warranted to be one known in commerce as opium, with a view of its being sold as such; but it was not opium, or of any value; the plaintiff having sold with like warranty, relying on the defendant's warranty, had been sued by his vendee and compelled to pay damages and costs; he gave the defendant notice of that suit and requested him to defend it, and incurred large expense in and about it. Shaw, C. J., said: "As they (the plaintiffs) gave notice to the defendants of the pendency of the first action, they are entitled to

recover their taxable costs. See *Coolidge v. Brigham*, 5 Metc. (Mass.) 68. But the counsel fees cannot be allowed. They are expenses incurred by the party for his own satisfaction, and they vary so much with the character and distinction of the counsel that it would be dangerous to permit him to impose such a charge upon an opponent; and the law measures the expenses incurred in the management of a suit by the taxable costs." Counsel fees are here treated as in some sense uncertain in amount, and for this reason the party having a right of recovery over should not impose such a charge; but it is not correct to say that such services are so uncertain in value as to be incapable of being estimated. Nor is it satisfactory reasoning that because the charges of counsel vary no allow-

the clerk of the court or the sheriff.⁹⁴ Davis, J.,⁹⁵ said, speaking generally: "All the cases recognize fully the liability of the principal where the relation of master and servant or principal and agent exists; but there is a conflict of authority in fixing the proper degree of responsibility where an independent contractor intervenes."⁹⁶

§ 84. **Same subject; liability for losses and expenses.** In cases of express indemnity or where there is a duty of that nature springing from those relations the obligation is directly to reimburse expenses and losses; they are the immediate subjects of the contract or duty rather than the damages for the breach of either. But in many other cases suits against one person or party may result from the tort or breach of contract of another; and then, whether damages therefor, including the costs and expenses, may be recovered for such wrong or breach of contract will depend on whether such suits, with the consequences and incidents in question, were the natural and proximate result of the act complained of or were within the contemplation of the parties.⁹⁷ Where a person falsely pro-

ance whatever should be made for such an expense when it is among the natural and proximate consequences of the breach of contract. It was obviously as natural and proximate a consequence as the other expenses of the suit.

⁹⁴ *Houser v. United States*, 39 Ct. of Cls. 508, quoting the text.

⁹⁵ *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298.

⁹⁶ See *Randell v. Trimen*, 18 C. B. 786; *Moule v. Garrett*, L. R. 7 Ex. 101; *Baxendale v. London, etc. R.*, L. R. 10 Ex. 35; *Fisher v. Val de Travers A. Co.*, 1 C. P. Div. 511; *Mors-le-Blanch v. Wilson*, L. R. 8 C. P. 227; *Randall v. Raper*, 96 Eng. C. L. 84; *Richardson v. Dunn*, 8 C. B. (N. S.) 655; *Ronneberg v. Falkland Islands Co.*, 17 id. 1; *Brown v. Haven*, 37 Vt. 439; *Neale v. Wyllie*, 3 B. & C. 533; *Lewis v. Peake*, 7 Taunt. 153; *Pennell v. Woodburn*,

7 C. & P. 117; *Penley v. Watts*, 7 M. & W. 601; *Jones v. Williams*, id. 493; *Walker v. Hatton*, 10 id. 249; *Smith v. Howell*, 6 Ex. 730.

In *Kiddle v. Lovett*, 16 Q. B. Div. 605, a platform put up under contract for the plaintiff by the defendant, to enable the former to paint a house, fell because of defective construction and hurt a workman in the plaintiff's employ. The latter settled an action brought by his employee, and then sued defendant. The latter was held liable for nominal damages for the breach of his contract; but inasmuch as the plaintiff had employed a competent contractor to build the platform and was free from negligence he was not liable to the injured man and the amount paid him could not be recovered from the defendant.

⁹⁷ *Smith v. Baker*, 20 Fed. 709; *Missouri, etc. R. Co. v. Rancy*, 44

fesses to act as an agent there is an implied warranty that he is such. If he have no authority and his pretense is false, either the party whom he assumed to represent⁹⁸ or the party dealing with him on the faith of his being an agent⁹⁹ may hold him answerable for all damages resulting from his unauthorized contracts; and among other things for costs of actions brought or defended in consequence of such contracts. So a party who sells property with an express or implied warranty of title is liable for the costs of a successful action, as well as damages recovered therein against his vendee, by which such title is overthrown and the vendee dispossessed or compelled to pay for the property to another person.¹ The wrongful sequestration of property and the consequent appointment of a receiver involves responsibility for the expenses of the receivership.² A tenant who incurs expense in resisting a threatened forcible eviction may claim reimbursement.³

The right of a party who has bought property with a war-

Tex. Civ. App. 517; Atlanta, etc. R. Co. v. Thomas, 60 Fla. 412; Collins v. Cochran, 121 Ga. 785 (expense resulting from failure to submit matter to arbitration); Birtman v. Thompson, 136 Ill. App. 621; Hunt v. Boston E. R. Co., 199 Mass. 220; Ellis v. Nowell, 198 Mass. 367; Stern v. Knowlton, 184 Mass. 29; Hillquit v. Sun P. & P. Ass'n, 49 N. Y. Misc. 630; Southern Inv. Co. v. Postal Tel.-C. Co., 156 N. C. 259; Agincourt S. S. Co. v. Eastern Extension, etc. Tel. Co., [1907] 2 K. B. 305. See Northern Ohio R. v. Akron C. & H. Co., 30 Ohio C. C. 51; Agius v. Great Western C. Co., [1899] 1 Q. B. 413.

⁹⁸ Salvesen v. Rederi Aktiebolaget Nordstjerman, [1905] App. Cas. 302; Philpot v. Taylor, 75 Ill. 309, 20 Am. Rep. 241.

⁹⁹ Groeltz v. Armstrong, 125 Iowa, 39; Collen v. Wright, 7 El. & B. 301; Hughes v. Graeme, 23 L. J. (Q. B.) 335.

¹ Houser v. United States, 39 Ct. of Cls. 508, quoting the text; Staats v. Ten Eyck, 3 Caines 111; Pitcher v. Livingston, 4 Johns. 1, 4 Am. Dec. 229; Rickert v. Snyder, 9 Wend. 416; Bennet v. Jenkins, 13 Johns. 50; Harding v. Larkin, 41 Ill. 413; Crisfield v. Storr, 36 Md. 129, 11 Am. Rep. 480; Boyd v. Whitfield, 19 Ark. 447; Ryerson v. Chapman, 66 Me. 557; Williamson v. Williamson, 71 Me. 442; Brewster v. Countryman, 12 Wend. 446; Marlatt v. Clary, 20 Ark. 251; Giffert v. West, 33 Wis. 617; Eaton v. Lyman, 24 Wis. 438; Stewart v. Drake, 9 N. J. L. 139; Holmes v. Sinnickson, 15 id. 313, 29 Am. Dec. 687; Morris v. Rowan, 17 N. J. L. 304; Coleman v. Clark, 80 Mo. App. 339, citing the text.

² Wills Valley M. & M. Co. v. Galloway, 155 Ala. 628. See French v. Gifford, 31 Iowa, 428.

³ Gray v. Linton, 38 Colo. 175.

ranty of title to defend a suit brought against him based upon an adverse claim, after he has given notice to the vendor and requested him to assume the defense, and his failure to reply or refusal to defend, stands upon somewhat different considerations from those which apply to sureties and others in similar situations. A vendee has a right to the property he has purchased as between him and the vendor; and unless he is made aware that the vendor's title was defective or that the suit of a third person for the property cannot for some reason be defended, he has a right to defend in reliance upon the warranty to the end that he may have and enjoy the fruit of his purchase. So if there is a warranty of kind or quality the purchaser has a right to act upon the assumption that such warranty is true, and sell with like warranty and defend suits for its breach.⁴ But if he has notice that his title is bad or that the warranty cannot be maintained he is under the same restrictions as all other parties who have a right of recovery over against unnecessary expense or an unrighteous resistance of an action which cannot be defended.⁵ In an action on a warranty of the soundness of a horse which had been sold with like warranty, and in which the plaintiff had been beaten in a suit against him on his warranty, he was not entitled to recover as special damage the cost incurred by him in the defense of the former action, for the jury found that by reasonable examination of the horse he might have discovered it was unsound at the time he sold it.⁶ An examiner and guarantor of titles to real estate employed to conduct the purchase of a house procured from its owner, who also owned the adjoining house, a deed which through its negligence covered the wrong house: the grantee procured the reformation of such deed and, on obtaining possession of the house he desired, found it incumbered by a mortgage not disclosed to him by the examiner. After eviction by foreclosure, the grantor being insolvent, he recovered from

⁴ *Hammond v. Bussey*, 20 Q. B. Div. 79, stated in note to § 87; *Clare v. Maynard*, 7 C. & P. 741; *Curtis v. Hannay*, 3 Esp. 82; *Sweet v. Patrick*, 12 Me. 9; *Ryerson v. Chapman*, 66 Me. 561.

⁵ *Short v. Kalloway*, 11 A. & E. 28; *Wrightup v. Chamberlain*, 7 Scott, 598; *Lunt v. Wrenn*, 113 Ill. 168.

⁶ *Wrightup v. Chamberlain*, *supra*.

the examiner the money paid on the purchase price, that being less than the amount of the undisclosed mortgage.⁷ A conveyancer who overlooks a covenant in a deed in the chain of title requiring the land owner to erect and maintain a fence is liable for the cost of erecting it and for such annual sum as will keep it in repair and maintain it.⁸ But there cannot be a recovery because of losses resulting from carrying out an obligation with a third party; they are not the consequence of the conduct of the party in default.⁹ The value of the security lost by the unauthorized release of a lien, not exceeding the amount of the debt secured or the balance due, may be recovered,¹⁰ as may the expense of obtaining the reinstatement of a race horse wilfully and maliciously suspended by the judges of the race.¹¹

§ 85. Same subject; bonds and undertakings; damages and costs. Upon statutory bonds and undertakings to pay damages and costs resulting from the issue of certain writs, as an injunction, sequestration or attachment in case it shall be decided that the party obtaining it was not entitled to it, the recovery depends mainly upon the terms of the instrument; but "damages and costs" include, among other things, the costs incident to the particular writ and of the proceedings to procure its discharge, including counsel fees, except in the federal and a few state courts.¹² On principle and the weight of authority,

⁷ *Ehmer v. Title G. & T. Co.*, 156 N. Y. 10.

Moneys paid by a corporation to establish the business in which it is engaged cannot be recovered by the shareholders in an action against the directors for negligence. *Bloom v. National United B. S. & L. Co.*, 152 N. Y. 114.

⁸ *Bodine v. Wayne T. & T. Co.*, 33 Pa. Super. 68.

⁹ *Jester v. Bainbridge State Bank*, 4 Ga. App. 469.

¹⁰ *Busch v. Brown* (Tex. Civ. App.), 152 S. W. 683.

¹¹ *Carleton v. Fletcher*, 109 Me. 576.

¹² *Corcoran v. Judson*, 24 N. Y. 106; *Hovey v. Rubber T. P. Co.*, 50 N. Y. 335; *Groat v. Gillespie*, 25 Wend. 383; *Edwards v. Bodine*, 11 Paige, 223; *Rose v. Post*, 56 N. Y. 603; *Rosser v. Timberlake*, 78 Ala. 162; *Pettit v. Mercer*, 8 B. Mon. 51; *Meshke v. Van Doren*, 16 Wis. 319; *Andrews v. Glenville W. Co.*, 50 N. Y. 282; *Gear v. Shaw*, 1 Pin. 608; *Barton v. Fisk*, 30 N. Y. 171; *Tamara v. Southern Illinois University*, 54 Ill. 334; *Elder v. Sabin*, 66 Ill. 126; *Wilson v. McEvoy*, 25 Cal. 170; *Cummings v. Burleson*, 78 Ill. 281; *Prader v. Grim*, 13 Cal. 585; *Guild v. Guild*, 2 Mete. (Mass.) 229; *Brown*

where the prosecution or defense of suits is rendered naturally and proximately necessary by a breach of contract or any wrongful act the costs of that litigation, reasonably and judiciously conducted, paid or incurred, including reasonable counsel fees, are recoverable as part of the damages.¹³

§ 86. Same subject; necessity of notice to indemnitor to fix liability. Where a judgment recovered may, by notice to one ultimately liable, fix the amount which the latter is liable to pay to the party against whom the judgment is obtained, in some states notice is required in order to entitle the party sued to the

v. Jones, 5 Nev. 374; Baggett v. Beard, 43 Miss. 120; Raupman v. Evansville, 44 Ind. 392; Alexander v. Colcord, 85 Ill. 323; Steele v. Thatcher, 56 Ill. 257; Miller v. Garrett, 35 Ala. 96; Holmes v. Weaver, 52 id. 516; Noble v. Arnold, 23 Ohio St. 264; Riddle v. Cheadle, 25 id. 278; McRae v. Brown, 12 La. Ann. 181; Campbell v. Metcalf, 1 Mont. 378; Derry Bank v. Heath, 45 N. H. 524; Langworthy v. McKelvy, 25 Iowa 48; Behrens v. McKenzie, 23 Iowa 333, 92 Am. Dec. 428; Wallace v. York, 45 Iowa 81; Bonner v. Copley, 15 La. Ann. 504; Sandback v. Thomas, 1 Stark. 306; Pritchett v. Boevey, 1 Cr. & M. 775; Holloway v. Turner, 6 Q. B. 928; Houser v. United States, 39 Ct. of Cls. 508, quoting the text; Pruett v. Williams, 156 Ala. 346; People v. Barrett, 141 Ill. App. 168 (costs of suit to set aside a judgment based on a false return). See Manning v. Grinstead, 121 Ky. 802; Day v. Woodworth, 13 How. 363, 14 L. ed. 181; Oelrichs v. Spain, 21 L. ed. 43; §§ 512, 524.

Attorney fees are not allowed in an action for infringement of a patent. Teese v. Huntingdon, 23 How. 2, 16 L. ed. 479.

Counsel fees for services rendered in the supreme court on appeal may

be recovered for. Bolling v. Tate, 65 Ala. 417, overruling earlier cases.

¹³ Hughes v. Graeme, 33 L. J. (Q. B.) 335; Ziegler v. Powell, 54 Ind. 173; Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Krug v. Ward, 77 Ill. 603; Westfield v. Mayo, 122 Mass. 100, 23 Am. Rep. 292; New Haven & N. Co. v. Hayden, 117 Mass. 433; Noyes v. Ward, 19 Conn. 250; Pond v. Harris, 113 Mass. 114; White v. Madison, 26 N. Y. 117; Henderson v. Squire, L. R. 4 Q. B. 170; Webber v. Nicholas, 4 Bing. 16; Noble v. Arnold, 23 Ohio St. 264; Alexander v. Jacoby, id. 358; Godwin v. Francis, L. R. 5 C. P. 295; Ryerson v. Chapman, 66 Me. 557; Dubois v. Hermance, 56 N. Y. 673; Call v. Hagar, 69 Me. 521; Bonesteel v. Bonesteel, 30 Wis. 511; Ah Thaie v. Quan Wan, 3 Cal. 216; Henay v. Hand, 36 Ore. 492, citing the text. See Barnard v. Poor, 21 Pick. 378; Rice v. Austin, 17 Mass. 197; Guild v. Guild, 2 Mete. (Mass.) 229; Arcambel v. Wiseman, 3 Dall. 306, 1 L. ed. 613; Gould v. Barratt, 2 Mood. & Rob. 171; Malden v. Fyson, 11 Q. B. 292; In re United Service Co., L. R. 6 Ch. 212; Tindall v. Bell, 11 M. & W. 228; Dixon v. Fawcass, 3 E. & E. 537; Hammond v. Bussey, 20 Q. B. Div. 79; Murrell v. Fysh, 1 Cab. & E. 80; § 58.

ulterior recourse for the costs of defending; because the defense is to be made or not solely in the interest of the party who must in the end be chargeable with the proper consequences of the liability upon which the judgment is founded; therefore, he is entitled to be consulted and to have no expenses incurred and charged to him except at his request or with his sanction. Confined to cases covered by an obligation of indemnity and those where there is no right of the immediate defendant or party to the suit peculiar to himself to be asserted in the action, the rule is a wholesale one and rests upon sound principles. On this class are actions against an agent, servant or surety for acts of which the master or principal must bear the whole responsibility; suits against which there is an express indemnity and those in which the party proceeded against is sought to be made liable without actual misfeasance for the acts of another who must respond for the consequences of that liability.¹⁴ The object of the notice is not to give a ground of action. If a demand be sued which the person indemnifying is bound to pay and notice be given to him and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, the other party is estopped after such notice from disputing it or from claiming that the party sued was not bound to pay it.¹⁵ Its effect is to let in the party who is bound to indemnify to defend the suit against the indemnified party and to preclude the former from showing, when sued for such indemnity, that the plaintiff has no claim for the alleged loss, or not to the amount alleged; that he made an improvident bargain and the defendant might have obtained better terms if the opportunity had been given him.¹⁶ It is not necessary to the produc-

¹⁴ *Schneider v. Augusta*, 118 Ga. 610; *Busell Trimmer Co. v. Coburn*, 188 Mass. 254, 69 L.R.A. 821; *Great Northern R. Co. v. Akeley*, 88 Minn. 237; *Hawes v. Birkholz* (N. Y. Misc.), 114 Supp. 765; *Lowell v. Boston, etc. R. Co.*, 23 Pick. 24; *Proprietors of L. & C. v. Lowell H. R. Co.*, 109 Mass. 221; *Ottumwa v. Parks*, 43 Iowa 119; *Apgar v. Hil-ler*, 24 N. J. L. 812; *Beckley v. Mun-*

son, 22 Conn. 299; *Holmes v. Weed*, 24 Barb. 546; *Fisher v. Fallows*, 5 Esp. 171; *Brooklyn v. Brooklyn City R. Co.*, 57 Barb. 497; *Finekh v. Evers*, 25 Ohio St. 82.

¹⁵ *May v. Poluhoff*, 65 N. Y. Misc. 546; *Duffield v. Scott*, 3 T. R. 374.

¹⁶ *Smith v. Compton*, 3 B. & Ad. 407; *French v. Parish*, 14 N. H. 496; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550.

tion of this result that the indemnitor should have notice in writing, or even express notice, of the action; notice may be implied from his knowledge of the action and participation in its defense.¹⁷ A formal request that he assume the defense of the action is not essential.¹⁸

In such actions two questions arise: first, has the plaintiff a legal cause of action; second, to what extent has he been damaged? The indemnifying party is entitled to his day in court on these questions. If he has notice to defend a suit brought against another who has a right of recovery over against him that opportunity is offered him; and the right to defend at his expense will depend on his answer, and he cannot be charged with costs of an improvident defense or one made contrary to his expressed will.¹⁹ If notice cannot be given it is reasonable that the indemnified party should exercise some judgment whether to defend or not if the amount is unliquidated or the demand disputable. Where he does so without notice and judgment is recovered against him it is *res inter alios acta* as to the first of these questions, and *prima facie* evidence on the second, though the contract of indemnity is general.

§ 87. **Same subject.** There are not the same reasons for notice to the party ultimately liable, though there are reasons, where the action, the costs of which are claimed, is brought on some independent contract or is the alleged result of a tortious act of such party; and where the party claiming for the costs of defending such action defended it to maintain his own legal rights derived from that party and does not make the defense in his interest he may still have his recourse to him for indemnity.²⁰ A vendee, having a warranty of title, may defend a suit brought by a third person for the property without consulting

¹⁷ Meyer v. Purcell, 214 Ill. 62; Barney v. Dewey, 13 Johns. 224, 7 Am. Dec. 372; Beers v. Pinney, 12 Wend. 309; Heiser v. Hatch, 86 N. Y. 614; Port Jervis v. Bank, *supra*.

¹⁸ Heiser v. Hatch, *supra*; Nashua I. & S. Co. v. Brush, 33 C. C. A. 456, 91 Fed. 213.

¹⁹ See New York State M. Ins. Co. v. Protection Ins. Co., 1 Story, 458.

Expenses and attorney's fees have been recovered though the vendor protested against the defense. See § 623 note.

²⁰ Parsons v. District, 35 App. D. C. 326.

his vendor. He has a right, as between himself and the latter, to retain the property and maintain, if he can, the title warranted to him; he is not obliged to content himself with a remedy on his warranty and acquiesce in any adverse claim that may be set up unless the circumstances show that it cannot be contested; he may defend a suit brought on his own warranty made to his vendee on the faith of the warranty of his vendor. A person purchasing from another who falsely pretends to be an agent may sue the supposed principal on that contract to enforce it. In case of defeat the expenses of such litigation are the natural and proximate result of the breach of contract and, if not improvidently incurred, are recoverable on the same principle as expenses incurred in other ways after a breach in furtherance of the object of a contract or to lessen the damages which would otherwise result from its infraction.²¹ And such items will presently be considered as a distinct topic.²²

The authorities are in conflict on the necessity of notice, and no clear rule or principle can be deduced from them; but the foregoing views appear to be those supported by the best considered cases and most in harmony with the principles applied in analogous cases. Under certain conditions a notice may make the judgment conclusive evidence against the party notified in favor of one giving the notice and having a right of recovery over against him. This is the case where notice is given to a vendor by his vendee of proceedings founded upon an adverse title which becomes paramount.²³ So in case of other warranties, where the warrantee has acted upon them in such manner as was within the contemplation of the parties at the time of contracting, as by giving like warranty and has been sued upon it.²⁴ It is a part of the contract of warranty that the

²¹ See *Baumgarten v. Chipman*, 30 Utah, 466; *Nashua I. & S. Co. v. Brush*, 33 C. C. A. 456, 91 Fed. 213; *Chase v. Bennett*, 59 N. H. 394. Compare, however, *Houser v. United States*, 39 Ct. of Cls. 508.

²² *Hughes v. Graene*, 39 L. J. (Q. B.) 335; *Ryerson v. Chapman*, 66 Me. 561; § 88.

²³ *Thurston v. Spratt*, 52 Me. 202; *Boyd v. Whitfield*, 19 Ark. 447; *Marlatt v. Clary*, 20 Ark. 251; *Harding v. Larkin*, 41 Ill. 413; *Castleton v. Miner*, 8 Vt. 209; *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480.

²⁴ *Reggio v. Braggiotti*, 7 Cnsh. 166; *Collen v. Wright*, 8 El. & B. 647; *Randell v. Trimen*, 18 C. B.

warrantor shall defend the title, and by the warrantee giving notice when the title is attacked two objects are attained: first, it gives the defendant the advantage of the better information

786; *Brown v. Haven*, 37 Vt. 439; *Moule v. Garrett*, L. R. 7 Ex. 101; *Mors-le-Blanch v. Wilson*, L. R. 8 C. P. 227, overruled in the case next cited.

In *Baxendale v. London, etc. R. Co.*, L. R. 10 Ex. 35, the case was that H. having contracted with the plaintiffs who were carriers for the carriage of two pictures from London to Paris, the plaintiffs contracted with the defendants for the carriage by them of the pictures over a part of the distance. The pictures were damaged on the journey by the defendants' negligence. H. thereupon brought an action against the plaintiffs, who gave notice of it to the defendants and requested them to defend it. They refused and told the plaintiffs to take their own course. The latter defended the action brought against them by H. without success, and then sued the defendants to recover not only the damages found by the jury to have been sustained by H., but also the costs of the unsuccessful defense. The court held that the costs were not recoverable, inasmuch as they could not be regarded as the natural consequence of the defendants' default, the contracts between H. and the plaintiffs, and between the plaintiffs, and the defendants, being separate and independent.

The latest exposition of English law upon this question is given in *Hammond v. Bussey*, 20 Q. B. Div. 79, where *Baxendale v. London, etc. R. Co.*, L. R. 10 Ex. 35, is distinguished. The question decided is thus stated by the reporter: "The defendant contracted for the sale of coal of a particular de-

scription to the plaintiffs, knowing that they were buying such coal for the purpose of reselling it as coal of the same description. The plaintiffs did so resell the coal. The coal delivered by the defendant to the plaintiffs under the contract and by them delivered to their sub-vendees did not answer such description, but this could not be ascertained by inspection of the coal, and only became apparent upon its use by the sub-vendees. The sub-vendees thereupon brought an action for breach of contract against the plaintiffs. The plaintiffs gave notice of the action to the defendant, who, however, repudiated all liability, insisting that the coal was according to contract. The plaintiffs defended the action against them, but at the trial the verdict was that the coal was not according to contract, and the sub-vendees accordingly recovered damages from the plaintiffs. The plaintiffs thereupon sued the defendant for breach of contract, claiming as damages the amount of the damages recovered from them in the action by their sub-vendees, and the costs which had been incurred in such action." Liability for costs was denied. *Held*, that the defense of the previous action being, under the circumstances, reasonable, the costs incurred by the plaintiffs as defendants in such action were recoverable under the rule in *Hadley v. Baxendale* as being damages which might reasonably be supposed to have been in the contemplation of the parties, at the time when they made the contract, as the probable result of a breach of it.

the warrantor is supposed to possess in relation to the title; and second, saves the necessity of trying the same title again in an action against the warrantor. The notice to the latter makes him privy to the record and he is bound by it to the extent to which his rights have been tried and adjudged; and, in an action against him at the suit of the warrantee, in addition to the record, all that is necessary to be shown is that his title was in issue and judgment given upon it.²⁵ The warrantor is at liberty to show any other fact not involved in that adjudication which will be beneficial to his defense, as that the defect of title arose after he sold the property and, therefore, that he had no interest in the determination of the question tried.²⁶

§ 88. **Expenses incurred to prevent or lessen damages.** Fifth, such losses may consist of labor done and expenses incurred to prevent or lessen damages which would otherwise result from the defendant's default or misconduct. The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or wilfulness he allows the damages to be unnecessarily enhanced the increased loss, that which was avoidable by the performance of his duty, falls upon him.²⁷ This is a prac-

²⁵ Jones v. Balsley, 154 N. C. 61; Davis v. Wilbourne, 1 Hill (S. C.), 27, 26 Am. Dec. 154; Miner v. Clark, 15 Wend. 425; Barney v. Dewey, 13 Johns. 225, 7 Am. Dec. 372; Pickett v. Ford, 4 How. (Miss.) 246; Colburn v. Pomeroy, 44 N. H. 19; Shelby v. Missouri Pac. R. Co., 77 Mo. App. 205, citing the text.

²⁶ Thurston v. Spratt, 52 Me. 202.

²⁷ Mabb v. Stewart, 147 Cal. 413, quoting the text; Western U. Tel. Co. v. Truitt, 5 Ga. App. 809; Sapp v. Bradfield, 137 Ky. 308, 136 Am. St. 291, citing the text; Louisville & N. R. Co. v. Mount, 125 Ky. 593; Dooley v. Boston E. R. Co., 201 Mass. 429; Sullivan v. Old Colony St. R., 200 Mass. 303; Glasgow v. Metropolitan St. R. Co., 191 Mo. 347;

Allen v. Bear Creek C. Co., 43 Mont. 269, citing the text; Caves v. Bartek, 85 Neb. 511; Hocutt v. Western U. Tel. Co., 147 N. C. 186, quoting the text; Edwards v. Same, 147 N. C. 126; Huntington E. P. Co. v. Parsons, 62 W. Va. 26, 9 L.R.A.(N.S.) 1130, 125 Am. St. 954, quoting the text; Northern Colorado I. Co. v. Pouppirt, 22 Colo. App. 563, quoting the text; Tompkins v. Monticello C. O. Co., 153 Fed. 817; Southern H. & S. Co. v. Standard E. Co., 158 Ala. 596; Southern R. Co. v. Reeder, 152 Ala. 227, 126 Am. St. 23; Syson T. Co. v. Dickens, 146 Ala. 471; Southern R. Co. v. Webb, 143 Ala. 304; Same v. Gilmer, 143 Ala. 490; Hartgrove v. Southern C. O. Co., 72 Ark. 31; Vincent v. New

tical obligation under a great variety of circumstances, and as the damages which are suffered by a failure to perform it are

York, etc. R. Co., 77 Conn. 431; Bernhard v. Curtis, 75 Conn. 476, citing the text; Telfair County v. Webb, 119 Ga. 916; Hey v. Hawkins, 120 Ill. App. 483; Silva v. Souza, 14 Hawaii 46; Cromer v. Logansport, 38 Ind. App. 661; Helton v. Ashier, 135 Ky. 751; Fifty Associates v. Boston, 201 Mass. 585; Atwood v. Boston F. & T. Co., 185 Mass. 557; Putz v. St. Paul G. L. Co., 108 Minn. 243; Hilley v. Western U. Tel. Co., 85 Miss. 67; Price v. St. Louis, etc. R. Co., 133 Mo. App. 653, (neglect of duty to provide farm crossing); Larson v. Calder, 16 N. D. 248; Gardner v. Welch, 21 S. D. 151, citing the text; Missouri, etc. R. Co. v. Allen, 39 Tex. Civ. App. 236; Same v. Wetz, 38 id. 563; Loehr v. Dickson, 141 Wis. 332, 30 L.R.A. (N.S.) 495; Kelley v. La Crosse C. Co., 120 Wis. 84, 102 Am. St. 971; Ohio & M. R. Co. v. McGehee, 47 Ill. App. 348; Hartford D. Co. v. Calkins, 186 Ill. 104, quoting the text; Southern R. Co. v. Ward, 110 Ga. 793; McCarty v. Boise City C. Co., 2 Idaho, 225; Factors' & T.'s Ins. Co. v. Werlein, 42 La. Ann. 1046, 11 L.R.A. 361; Gniadek v. Northwestern I. & B. Co., 73 Minn. 87, Sweeney v. Montana Cent. R. Co., 19 Mont. 163; Loomer v. Thomas, 38 Neb. 277, quoting the text; Gulf, etc. R. Co. v. Simonton, 2 Tex. Civ. App. 558; Southern Kansas R. Co. v. Isaacs, 20 id. 466; Austin v. Chicago, etc. R. Co., 93 Wis. 496; Cullerton v. Miller, 26 Ont. 36, 45, quoting the text; Fullerton v. Fordyce, 144 Mo. 519, 3 Am. Neg. Rep. 696; Sherman Center T. Co. v. Leonard, 46 Kan. 354, 26 Am. St. 101; Fowle v. Park, 48 Fed. 789; Pennsylvania R. Co. v. Washburn, 50 id. 335; Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330; Rexter v. Starin, 73 N. Y. 601; Costigan v. Mohawk, etc. R. Co., 2 Denio, 609; Taylor v. Read, 4 Paige, 572; Dillon v. Anderson, 43 N. Y. 231; Dorwin v. Potter, 5 Denio, 306; Hochster v. De la Tour, 2 El. & B. 678; Loker v. Damon, 17 Pick. 284; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; Cherry v. Thompson, L. R. 7 Q. B. 573; Driver v. Maxwell, 56 Ga. 11; Roper v. Johnson, L. R. 8 C. P. 167; Simpson v. Keokuk, 34 Iowa 568; Beymer v. McBride, 37 id. 114; Frost v. Knight, L. R. 7 Ex. 111; Hecksher v. McCrea, 24 Wend. 304; Davis v. Fish, 1 G. Greene, 406, 48 Am. Dec. 387; Allender v. C. R. I. & P. R. R. Co., 37 Iowa 264; Dobbins v. Duquid, 65 Ill. 464; Chamberlain v. Morgan, 68 Pa. 168; New Orleans, etc. Co. v. Echols, 54 Miss. 264; Hathorn v. Richmond, 48 Vt. 557; Pinney v. Andrus, 41 Vt. 631; Bradley v. Denton, 3 Wis. 557; Gordon v. Brewster, 7 Wis. 355; Fitzpatrick v. Boston & M. R., 84 Me. 33; Williams v. Yoe, 19 Tex. Civ. App. 281; Dietrich v. Hannibal, etc. R. Co., 89 Mo. App. 36; Webb v. Metropolitan St. R. Co., id. 604; Warren v. Stoddard, 105 U. S. 224, 26 L. ed. 1117; Peck v. Kansas City M. R. & C. Co., 96 Mo. App. 212; Atkinson v. Kirkpatrick, 90 Kan. 515; Carthage Stone Co. v. Travelers' Ins. Co., 186 Mo. App. 318, quoting the text; National Nassau Bank of New York v. I. M. Ludington's Sons, 164 App. Div. (N. Y.) 466; Smith v. Postal Telegraph-Cable Co., 167 N. C. 248, quoting the text; A. S. Cameron Steam Pump Works v. Lubbock L. & I. Co., — Tex. Civ. App. —, 167 S. W. 256;

not recoverable it is of much importance. Where it exists the labor or expense which its performance involves is chargeable to the party liable for the injury thus mitigated; in other words, the reasonable cost of the measures which the injured party is bound to take to lessen the damages, whether adopted or not, will measure the compensation he can recover for the injury or the part of it that such measures have or would have prevented.²⁸ This is on the principle that if the efforts made are successful the defendant will have the benefit of them; if they prove

Spokane Casket Co. v. Mitchell, 76 Wash. 425.

Failure of the plaintiff to use due care to reduce or avoid damage is a matter of defense distinct from contributory negligence and must be pleaded and proved by the defendant. *Crosley v. Plummer*, 111 Me. 355.

²⁸ *Id.*; *Coffman v. Saline Val. R. Co.*, 183 Mo. App. 622; *Thompson v. Field*, — Tex. Civ. App. —, 164 S. W. 1115; *Atlanta & B. A. L. R. Co. v. Brown*, 158 Ala. 607; *Mogolon G. & C. Co. v. Stout*, 14 N. M. 245; *Sullivan v. Anderson*, 81 S. C. 478; *Griffith v. Blackwater B. & L. Co.*, 55 W. Va. 604, 69 L.R.A. 124, quoting the preceding part of this section; *Monroe v. Lattin*, 25 Kan. 351; *Board of Com'rs v. Arnett*, 116 Ind. 438; *Texas & P. R. Co. v. Levi*, 59 Tex. 674; *Long v. Clapp*, 15 Neb. 417, quoting the text; *Travis v. Pierson*, 43 Ill. App. 579; *Hewson-H. S. Co. v. Minnesota B. Co.*, 55 Min. 530; *Monroe v. Connecticut River L. Co.*, 68 N. H. 89; *Hughes v. Austin*, 12 Tex. Civ. App. 178, citing the text; *Nading v. Denison & P. R. Co.*, 22 *id.* 173, quoting the text; *Nelson v. St. Louis, etc. R. Co.*, 49 Kan. 165; *Uhlig v. Barnum*, 43 Neb. 584, 594, quoting the text; *Galbreath v. Carnes*, 91 Mo. App. 512, quoting the text; *Armistead v. Shreveport, etc. R. Co.*, 108 La. 171,

citing the text; *Chicago, etc. R. Co. v. Word* (Tex. Civ. App.), 158 S. W. 561.

A father from whom a minor child has been abducted may recover the reasonable expenses incurred in an effort to obtain the child though the defendant was not actuated by malice. *Rice v. Nickerson*, 9 Allen 478.

Where servants were enticed away from their master he recovered, in addition to the value of the services lost, the expenses necessarily incurred in getting them back, and damages for loss of time, trouble and injury sustained. *Hays v. Borders*, 6 Ill. 46.

"Legal expenses are recoverable as damages when incurred in proceedings taken by the injured party to prevent or reduce the damage which he would incur by the continuance of the wrong which he has abated by resort to such proceedings." *Clason v. Nassau F. Co.*, 20 N. Y. Misc. 315, citing this section.

In an action to punish defendants for contempt in violating an injunction the expense of a second injunction was included in the fine imposed on them, it being considered that such expense was incurred in an action brought expressly to restrain a continuance of the damage. *Jewelers' M. Agency v. Rothschild*, 6 App. Div. (N. Y.) 499. See §

abortive it is but just that the expense attending them shall be borne by him.²⁹ When, after a contract has been entered into, notice is given by one of the parties that it is rescinded on his part he is only liable for such damages and loss as the other has suffered by reason of such rescinding; and it is the duty of the latter, upon receiving such notice, to save the former, as far as it is in his power, all further damages though to do so may call for affirmative action.³⁰ If a person hired for service for a given term is wrongfully dismissed he is entitled to the stipulated wages for the term of his engagement if that is his loss. It is *prima facie* his loss; but the law imposes on him the duty to seek other employment; and to the extent that he obtains it and earns wages, or might have done so, his damages will be reduced.³¹ The rule as stated was deemed applicable where the owner of water lots upon a lake front, subject to the reservation of free passage thereon, refused to allow the

46 as to the rule where there is a failure to prosecute a suit in which a writ of *ne exeat* has been issued.

²⁹ *Watson v. Proprietors Lisbon Bridge*, 14 Me. 201, 31 Am. Dec. 49; *Summers v. Tarney*, 123 Ind. 560. See § 693. In *Miller v. Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341, is a sound exposition of this duty.

In *Hogle v. New York, etc. R. Co.*, 28 Hun, 363, the trial court refused to charge that when plaintiff discovered a fire on his premises he could not recover for subsequent damages if he neglected to use reasonable practicable means to suppress it, on the ground that the fire was not attributable to his fault. This was considered as not being far from saying that he might do what he could to increase it. He was bound to use all reasonable efforts in his power to stop the fire. *Bevier v. D. & H. C. Co.*, 13 Hun, 254; *Milton v. Hudson River S. Co.*, 37 N. Y. 214. See *O'Neill v. New York, etc. R. Co.*, 45 Hun 458, as to

an excuse for nonperformance of duty.

³⁰ *Montgomery v. Arkansas C. S. & I. Co.*, 93 Ark. 191; *Tradesman Co. v. Superior Mfg. Co.*, 147 Mich. 702; *Peyser v. Lund*, 89 App. Div. (N. Y.) 195; *Hewson-H. S. Co. v. Minnesota B. Co.*, 55 Minn. 530, quoting the text; *Dillon v. Anderson*, 43 N. Y. 231; *Grant v. Gallup*, 111 Ill. 487, 53 Am. Rep. 638 (one who has learned of the breach of a contract to insure his property must try to obtain insurance elsewhere; failure to do so prevents a recovery for the loss); *Sackville v. Storey* (Tex. Civ. App.), 149 S. W. 239, citing the text.

³¹ *Borden M. Co. v. Barry*, 17 Md. 419; *Sutherland v. Wyer*, 67 Me. 64; *Gillis v. Space*, 63 Barb. 177; *Heavilon v. Kramer*, 31 Ind. 241; *Heilbronner v. Hancock*, 33 Tex. 714; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Williams v. Chicago C. Co.*, 60 Ill. 149; *Raleigh v. Clark*, 114 Ky. 732, quoting the text.

plaintiff to haul ice cut from the lake over such lots, when frozen, to the wharf from which the plaintiff desired to ship the ice for the purposes of his business, unless he paid toll, which he refused to do; the defendant having acted without malice and under a *bona fide* mistake as to his rights the plaintiff ought to have paid the toll under protest, and because he did not he could not recover for the loss of his business consequent on the failure to ship ice.³² In an action for damages resulting from alleged defects in the construction of a building so that the roof leaked and injured the interior work or property therein,³³ or for breach of a contract to repair a building from which similar injuries ensued;³⁴ or for injury to crops through default of the defendant in not building or repairing a fence, or his tortious opening of the same,³⁵ where the party suffering from the injury is aware of the fact and the cause and that by a little timely labor and expense the damage could be avoided the law imposes the duty on him to stay the injury, when he is in a favorable situation to do it, and enforces the duty by confining his redress for the injury thus avoidable to compensation for the necessary and proper means of prevention.³⁶ The duty in such cases is not arbitrarily imposed on the injured party and exacted of him in all cases to do or amend the work of the other party or to finish it; but only

³² Cullerton v. Miller, 26 Ont. 36.

³³ Mather v. Butler County, 28 Iowa, 253; Haysler v. Owen, 61 Mo. 270.

³⁴ Dorwin v. Potter, 5 Denio, 306; Cook v. Soule, 56 N. Y. 420; Thompson v. Shattuck, 2 Metc. (Mass.) 615.

³⁵ Andrews v. Jones, 36 Tex. 149; Campbell v. Miltenberger, 26 La. Ann. 72; Loker v. Damon, 17 Pick. 284; Fisher v. Goebel, 40 Mo. 475; Waters v. Brown, 44 Mo. 302; St. Louis, etc. R. Co. v. Ritz, 33 Kan. 404; Same v. Sharp, 27 id. 134; Smith v. C. C. & D. R. Co., 38 Iowa, 518.

³⁶ Western R. E. Trustees v. Hughes, 172 Fed. 206, 96 C. C. A.

658, citing the text; Cromer v. Logansport, 38 Ind. App. 661, citing the text; Sherman Center T. Co. v. Leonard, 46 Kan. 354, 26 Am. St. 101; Dryer v. Lewis, 57 Ala. 551 (there cannot be a recovery for the loss of a crop because of the breach of a contract to perform service unless efforts were made to secure another person to perform the service called for in the broken contract).

The financial condition of a person whose stocks have been converted is immaterial so far as the performance of his duty to replace them within a reasonable time is concerned. Ling v. Malcom, 77 Conn. 517.

when in view of all the circumstances of the particular case it is a reasonable duty which he ought to perform instead of passively allowing a greater damage.³⁷ Where the nature of the case is such as to allow it, the test of reasonableness on the part of the injured person is the ratio of his expenditure as compared with the injury which might follow the wrongdoer's act or neglect.³⁸ In other cases the law will take notice of the relations of the persons whose rights are involved: A father may recover for physical and mental suffering in consequence of being without food though he did not deny food to his wife and children in order to appease his own hunger.³⁹ Where the party whose duty it is primarily to do the work necessary to fulfill the contract and to prevent damage from past failure or to stay injuries resulting from his negligence or other wrong is in possession or has equal knowledge and opportunity he alone may be looked to to fulfill that duty, and it will not avail him to say the injured party might have lessened the damages by performing the duty for him.⁴⁰ It is not required that the person who has exerted himself to lessen the injury done him should have paid the expenses incurred therefor.⁴¹

§ 89. **Same subject; between vendor and vendee.** If the party claiming damages is a purchaser he can recover no more than it would cost him, with reasonable diligence, to supply himself with the same property by resort to the market⁴² or other

³⁷ *Cromer v. Logansport*, 38 Ind. App. 661; *Armistead v. Shreveport*, etc. R. Co., 108 La. 171, quoting the text; *Raleigh v. Clark*, (Ky.) 71 S. W. 857, quoting the text.

³⁸ *Atlanta & B. A. L. R. Co. v. Brown*, 158 Ala. 607; *St. Louis*, etc. R. Co. v. *Ritz*, 33 Kan. 404.

³⁹ *Western U. Tel. Co. v. Mills*, 50 Fla. 474, 2 L.R.A. (N.S.) 1072, 111 Am. St. 129.

⁴⁰ *Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 id. 561; *Schwinger v. Raymond*, 83 id. 192, 38 Am. Rep. 415; *Keys v. Western Vermont S. Co.*, 34 Vt. 81; *Haysler v. Owen*, 61 Mo. 270; *Fisher v. Goebel*, 40 Mo.

475; *Green v. Mann*, 11 Ill. 613; *Waters v. Brown*, 44 Mo. 302; *Smith v. Chicago*, etc. R. Co., 38 Iowa, 518; *Chicago*, etc. R. Co. v. *Ward*, 16 Ill. 522; *Flynn v. Trask*, 11 Allen, 550; *Priest v. Nichols*, 116 Mass. 401; *Gardner v. Smith*, 7 Mich. 410, 74 Am. Dec. 722; *St. Louis*, etc. R. Co. v. *Mackie*, 71 Tex. 491, 8 Am. Neg. Cas. 636, 10 Am. St. 766, 1 L.R.A. 667.

⁴¹ § 1250; *Logansport*, etc. R. Co. v. *Wray*, 52 Ind. 578.

⁴² *Parsons v. Sutton*, 66 N. Y. 92; *McIlrose v. Fulmer*, 73 Pa. 365; *Gainsford v. Carroll*, 2 B. & C. 624; *Barrow v. Arnaud*, 8 Q. B. 604;

source or means of supply.⁴³ So where property is sold with a warranty of fitness for a particular purpose, if it be of such a nature that its defects can be readily, and in fact are, ascertained, yet the purchaser persists in using it, whereby losses and expenses are incurred, they come of his own wrong and he cannot recover damages for them as consequences of the breach of warranty.⁴⁴ A. sold to B. a quantity of pork in barrels with a warranty that the barrels would not leak; B. stored it in a suitable place, but found afterwards that some of the barrels were leaking. In order to preserve the pork he filled the leaking barrels from time to time with new brine; but they continued to leak and a considerable quantity of the pork was spoiled. B. did not give notice to A. of the condition of the barrels, nor offer to return the pork. It was the established practice among persons dealing in pork, of which B. was presumed to be cognizant, where the leaking of the barrels continued after they had been filled with new brine, to take out the pork and repack it in new barrels. In a suit brought by A. for the price of the pork B. claimed a deduction of the damages for breach of the warranty; the only deduction he was

Hassard-Short v. Hardison, 114 N. C. 482; *Creve Coeur Lake L. Co. v. Tamm*, 90 Mo. App. 189; *Lawrence v. Porter*, 26 L.R.A. 167, 63 Fed. 62; *Howard S. Co. Wells*, 176 Fed. 512, 100 C. C. A. 70; *United States v. Withers*, 130 Fed. 696, 65 C. C. A. 16; *Czarnikow v. Baxter*, 146 App. Div. (N. Y.) 81; *Tillinghast v. Cotton Mills*, 143 N. C. 268; *Coal Co. v. Ice Co.*, 134 N. C. 574, citing the text; *Anderson v. Savoy*, 142 Wis. 127. Some cases to the contrary are cited in § 652.

A vendor need not sell unaccepted goods to one whose checks are not being paid. *Moss T. Co. v. Phelps*, 143 Ky. 839.

There is no duty resting upon the vendee to go into the market and supply himself with that which he was entitled to under the broken

contract. *Brown v. Muller*, L. R. 7 Ex. 322.

⁴³ *Joseph v. Sulzberger*, 136 App. Div. (N. Y.) 499; *Central L. Co. v. Arkansas Valley L. Co.*, 86 Kan. 131; *Benton v. Fay*, 64 Ill. 417; *Beymer v. McBride*, 37 Iowa 114; *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. ed. 71; *Hinde v. Liddell*, L. R. 10 Q. B. 265.

⁴⁴ *Carson v. Bunting*, 154 N. C. 530; *Wright v. Computing S. Co.*, 47 Wash. 107; *Northern S. Co. v. Wangard*, 123 Wis. 1, 107 Am. St. 984; *British Westinghouse E. & Mfg. Co. v. Underground E. R. Co.*, [1911] 1 K. B. 575; *Carter v. Fischer* (N. Y. Misc.), 121 Supp. 614; *Draper v. Sweet*, 66 Barb. 145; *Maynard v. Maynard*, 49 Vt. 297; *Frick Co. v. Falk*, 50 Kan. 614.

entitled to was the sum which he would have been compelled to pay for new barrels in the place of the leaky ones, and for the repacking of the pork in them. If B., without knowledge that the barrels were leaky and without care in informing himself of their condition, had suffered the pork to remain in them for a reasonable time and it had thereby become spoiled he could have recovered in an action on the warranty the value of the pork spoiled. But as he knew that the barrels were leaky and might have prevented the injury by procuring new ones and repacking the pork, the loss should be regarded as attributable to his own want of care rather than to the defect of the barrels.⁴⁵ Expenses incurred in the exercise of reasonable judgment and in good faith on account of the breach of a warranty as to the condition of property may be recovered though an offer to rescind the contract was previously made.⁴⁶ Expenses can be recovered only in so far as they were incurred during the life of the contract; they are not an element of the damages if incurred because of the refusal to renew a contract.⁴⁷

§ 90. Same subject; extent of the duty. The principle that the injured party must reasonably exert himself to prevent damage applies alike to many (but not all) cases of contract and tort.⁴⁸ He is not required to commit a tort to prevent dam-

⁴⁵ *Hitchcock v. Hunt*, 28 Conn. 343; *Beleher v. Case T. M. Co.*, 78 Neb. 798. See *Empire State B. Co. v. McDermott*, 89 App. Div. (N. Y.) 234.

⁴⁶ *Sapp v. Bradfield*, 137 Ky. 308, 136 Am. St. 291.

⁴⁷ *Givens v. North Augusta E. & I. Co.*, 91 S. C. 417.

⁴⁸ *Maddux v. Western Union Tel. Co.*, 92 Kan. 619; *Hamilton v. McKenna*, 95 Kan. 20, 7 L.R.A.1915E, 455; *Carthage Stone Co. v. Travelers' Ins. Co.*, 186 Mo. App. 318; *Pope v. Graniteville Mfg. Co.*, 1 Ga. App. 176; *Citizens' T. & G. Co. v. Ohio Valley T. Co.*, 138 Ky. 421; *Ingraham v. Pullman Co.*, 190 Mass. 33, 2 L.R.A.(N.S.) 1087; *Harrington-W. Co. v. Blomstrom Mfg. Co.*,

166 Mich. 276; *Ramsey v. Perth Amboy S. & E. Co.*, 72 N. J. Eq. 165; *Bleakley v. Sheridan*, 120 App. Div. (N. Y.) 471; *Brown v. Weir*, 99 App. Div. (N. Y.) 78; *Carter v. Southern R.*, 75 S. C. 355; *Factors' & T.'s Ins. Co. v. Werlein*, 42 La. Ann. 1046, 11 L.R.A. 361, quoting the text; *Sutherland v. Wyer*, 67 Me. 64.

A lower proprietor is not required to avoid damages to his land by digging ditches to carry off surface water wrongfully diverted from its natural flow by an upper proprietor. *Barelliff v. Norfolk Southern R. Co.*, 168 N. C. 268; *Roberts v. Baldwin*, 151 N. C. 407, nor to allow the upper proprietor to dig ditches on his (lower proprietor's) land for

ages,⁴⁹ nor to anticipate and provide against a threatened trespass,⁵⁰ nor to assume that the other party will not keep his promise to remedy the cause of the damage so long as there is reason for expecting him to perform it.⁵¹ A purchaser of land who has made preparations to build on it is not bound to build elsewhere.⁵² A business man is not bound to suspend business because of the daily loss of a small quantity of meat in consequence of the breach of the warranty of a refrigerator used in his business, the vendor attempting from time to time to remedy the defects.⁵³ The plaintiff had a lease of a grazing farm which he had occasion to use to its capacity in grazing his cattle intended for sale; the defendant wrongfully turned other cattle of his own upon the farm and persisted, against the plaintiff's remonstrance, in keeping them there; in consequence the plaintiff suffered serious loss to his stock for want

such purpose. *Waters v. Kear*, 168 N. C. 246.

Where the plaintiff contracted to saw logs for the defendant who agreed to haul them to the plaintiff's mill, on breach by defendant the plaintiff is not bound to haul the logs himself. *Howard v. Brown*, — Iowa —, 148 N. W. 987.

Some contracts between landlord and tenant afford illustrations of exceptions to the rule stated in the text. See § 871.

Where a joint enterprise failed and one of the parties was possessed of unsalable stock and confronted with liability which would render his investment a total loss, it was held to be his duty to exercise due diligence to minimize his loss by disposing of his stock; he might also use his best judgment and efforts to promote the welfare of the enterprise by disposing of the joint property to the best advantage, and pay what was necessary to prevent further loss. *Davidor v. Bradford*, 129 Wis. 524.

⁴⁹ *Mansfield v. Tenney*, 202 Mass.

312, 25 L.R.A.(N.S.) 731; *Jones v. Bondurant*, 21 Colo. App. 24; *Cincinnati, etc. R. Co. v. Ward*, 120 Ill. App. 212; *Wolf v. St. Louis I. W. Co.*, 15 Cal. 319; *Hubbell v. Meigs*, 50 N. Y. 480. See *Wing Chung v. Los Angeles*, 47 Cal. 531.

⁵⁰ *Garrett v. Winterich*, 44 Ind. App. 322; *Payne v. Moore*, 31 id. 360; *Phillips v. Railroad*, 138 N. C. 12; *Plummer v. Penobscot L. Ass'n* 67 Me. 363; *Reynolds v. Chandler River Co.*, 43 Me. 513. See *Driver v. Western Union R. Co.*, 32 Wis. 569, 14 Am. Rep. 726; *Chicago & N. R. Co. v. Strond*, 129 Ill. App. 348.

⁵¹ *Hartford D. Co. v. Calkins*, 109 Ill. App. 579; *Lillard v. Kentucky D. & W. Co.*, 134 Fed. 168, 67 C. C. A. 74; *Kentucky D. & W. Co. v. Lillard*, 160 Fed. 34, 87 C. C. A. 190; *Kelley v. La Crosse C. Co.*, 120 Wis. 84, 102 Am. St. 971.

⁵² *Curtley v. Security Sav. Soc.*, 46 Wash. 50.

⁵³ *National R. & B.'s S. Co. v. Parmalee*, 9 Ga. App. 725.

of sufficient pasturage. It was not the duty of the plaintiff under such circumstances to provide other pasturage for his cattle to lessen damages in exoneration of the defendant.⁵⁴ But that duty may devolve upon a tenant in favor of his landlord.⁵⁵ The rule that one who seeks special damages for the breach of a contract to loan money must allege that he used all reasonable means to avoid loss,⁵⁶ does not govern where the contract would not have been made but for a condition in it essential to enable the plaintiff to perform it, and if such efforts as he might have made would not have made him whole.⁵⁷ Under the Georgia Code a party who commits a continuous, positive tortious act to the property of another cannot avoid liability for all the consequences because the person wronged took no steps to lessen the injury.⁵⁸ Such is probably the law regardless of legislative declaration. The duty under consideration devolves upon the party who has broken his contract or obligation. Such a party may not demand that the other shall continue to run his factory for a series of years in order that his liability for the breach of his contract to buy the entire product of it shall be lessened.⁵⁹ The measure of the duty is such care and diligence as a man of ordinary prudence would use under the circumstances. One may not have done the very thing nor used the very means that should have been used, as developed by subsequent information, and yet not be in fault. One is not bound to inquire as to the means of getting what his vendor has deprived him of unless he knew such facts as would put a prudent man upon inquiry.⁶⁰

⁵⁴ *Gilbert v. Kennedy*, 22 Mich. 117; *Shannon v. McNabb*, 29 Okla. 829, 38 L.R.A.(N.S.) 244; *Price v. High Shoals Mfg. Co.*, 132 Ga. 246, 22 L.R.A.(N.S.) 684, citing local cases. Compare *Hughes v. Austin*, 12 Tex. Civ. App. 178. See *Lawson v. Price*, 45 Md. 123.

⁵⁵ *Kellogg v. Malick*, 125 Wis. 239.

⁵⁶ *Lowe v. Turpie*, 147 Ind. 652, 37 L.R.A. 233; *Western U. Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67.

⁵⁷ *Bixby-T. L. Co. v. Evans*, 167 Ala. 431, 29 L.R.A.(N.S.) 194.

⁵⁸ *Price v. High Shoals Mfg. Co.*, 132 Ga. 246, 22 L.R.A.(N.S.) 684.

⁵⁹ *Allen v. Field*, 130 Fed. 641, 65 C. C. A. 19. A party whose rights have not been violated is not bound to lessen the loss of another. *Stoomvaart Maatschappij Nederlandsche Lloyd v. Lind*, 170 Fed. 918, 96 C. C. A. 134.

⁶⁰ *Waco A. W. Co. v. Cauble*, 19 Tex. Civ. App. 417; *Scott v. Longwell*, 139 Mich. 12.

Reasonable effort and moderate expenses are the measure of a plain-

An injured person is not required to forego any of his legal rights for the benefit of the wrongdoer.⁶¹ A lessee is not bound to go to an expenditure of \$300 in constructing a ditch to protect his property from injury resulting from negligence in the construction of a railroad.⁶² The efforts made to reduce the effects of the wrong must be confined to such as are reasonable and made in good faith.⁶³ The expense resulting from them can be recovered only to the extent that it is within the loss which would otherwise have been sustained.⁶⁴ If the courts can protect the rights of the injured party he must resort to

tiff's duty. *Chattanooga C. & F. Co. v. Lefebvre*, 113 La. 487.

⁶¹ § 693.

A passenger is not bound to leave a coach because he suffered from the cold. *Atlantic C. L. R. Co. v. Powell*, 127 Ga. 805, 9 L.R.A.(N.S.) 769.

⁶² *Yazoo & M. V. R. Co. v. Sultan*, — Miss. —, 49 L.R.A.(N.S.) 760, 63 So. 672, quoting the text; *Galveston, etc. R. Co. v. Borsky*, 2 Tex. Civ. App. 545. Compare *Mahoney v. Kansas City*, 106 Mo. App. 39. See § 871.

⁶³ *Murphy v. McGraw*, 74 Mich. 318, *Ellis v. Hilton*, 78 Mich. 150, 18 Am. St. 438, 6 L.R.A. 454; *Mt. Sterling v. Crummy*, 73 Ill. App. 572; *Lodge Holes C. Co. v. Wednesday*, [1908] App. Cas. 323. The Lord Chancellor said: "When a road is let down or land let down, those entitled to have it repaired find themselves saddled with a business they did not seek, and for which they are not to blame. Errors of judgment may be committed in this as in other affairs of life. It would be intolerable if persons so situated could be called to account by the wrongdoer in a minute scrutiny of the expense, as though they were his agents, for any mistake or miscalculation, provided they act honestly and reasonably.

Suth. Dam. Val. I.—21.

In judging whether they have acted reasonably, I think a court should be very indulgent and always bear in mind who was to blame. Accordingly, if the case of the plaintiffs had been that they had acted on the advice of competent advisers in the work of reparation and had chosen the course they were advised was necessary it would go a very long way with me; it would go the whole way unless it became clear that some quite unreasonable course had been adopted." Because the authorities did not consider whether a road whose subsidence the defendant had caused could be restored without unnecessary expense it was held that the cost of raising it to its former level could not be recovered. *S. C.* [1905] 2 K. B. 823.

Expenses incurred in apprehension of damage, if based upon mere rumors, are not recoverable. *Holt v. Silver*, 169 Mass. 435, 456.

⁶⁴ *Murphy v. McGraw*, *Ellis v. Hilton*, *supra*; *Keyes v. Minneapolis, etc. R. Co.*, 36 Minn. 290; *St. Louis, etc. R. Co. v. Ritz*, 33 Kan. 404. *Contra*, *Gulf, etc. R. Co. v. Keith*, 74 Tex. 287, 12 Am. Neg. Cas. 600.

In an action against a railroad company which had failed to construct cattle-guards, as required by

them instead of using his individual efforts to counteract the wrong being done.⁶⁵

A surety is not bound to pay his principal's debt as a duty to prevent the costs incident to a suit for its collection.⁶⁶ Any loss or expense occasioned by an attempt to avoid payment of an obligation cannot be contemplated by the parties as a subject of indemnity, the true meaning of the contract being that if the surety pays voluntarily he shall be reimbursed; if he is compelled by suit to pay he shall also be indemnified for his costs and expenses. Flight to avoid payment of the debt is an accident wholly unforeseen, and its consequences cannot be considered as provided for. The principal had a right to calculate upon the surety's ability to pay, and did not stipulate to save him harmless from anything but the payment of money. If the surety were put in prison or if his goods were sold at a sacrifice these would not be legal grounds of a suit for indemnity

statute, the plaintiff was entitled to recover for services in herding his cattle up to, but only up to, the value of the things belonging to himself and others which might have been injured by the cattle if they had been permitted to run at large, and which things the plaintiff had the right to protect, or which he was under obligation to protect from the depredations of his cattle. In answer to the contention that the defendant was liable for the value of the herding only up to the amount of the damages which the cattle would have committed if they had been permitted to run at large, it was said that it would be in a degree correct if it could be ascertained with any degree of certainty just the amount of the damage which would have resulted in that event. But it was not shown how much or how little damage, or how much or how little injury the cattle might have done if they had been permitted to run at large. Besides,

if the plaintiff is to recover for the herding only up to the amount of the damages which the cattle might have done if they had been permitted to run at large, then how is the plaintiff to obtain compensation for the loss of his pasture and the possible loss of his cattle and the possible shrinkage in their value because of a possible loss of proper food, and how is he to obtain compensation for his time and trouble and expense in hunting for and recovering his cattle? *Chicago, etc. R. Co. v. Behney*, 48 Kan. 47. In so far as it is intimated that a recovery might be had for possible loss, the language used is contrary to the fundamental idea governing the law of compensation.

⁶⁵ *Bowen v. King*, 146 N. C. 385; *Brown v. Weir*, 99 App. Div. (N. Y.) 78; *Fowle v. Park*, 48 Fed. 789. *Contra*, *Cole v. Stearns*, 20 N. Y. Misc. 502, 505.

⁶⁶ *McKee v. Campbell*, 27 Mich. 497; *Holmes v. Weed*, 24 Barb. 546.

because they might be avoided by payment, which he must be considered as stipulating he could make.⁶⁷

If work is improperly done or is not done within the agreed time, but is of use to and appropriated by the employer, the *quantum meruit* claim for it is reducible by allowance of the damages for failure to perform the contract in manner and time; but in such a case if the employer can protect himself from damage by reason of the defective or dilatory work at a moderate expense or by ordinary and reasonable efforts he is bound to do so, and can charge the delinquent party therefor and with the damages which could not be thus avoided.⁶⁸ A vendor is not bound to resell the goods his vendee has refused to accept; he may carry forward as many contracts as he may make and realize the profits on them.⁶⁹ It is not required that a party shall submit to coercion, as by paying what the other is not entitled to receive; he may go elsewhere and supply himself with that he was entitled to under his contract.⁷⁰

In case of wrongful injury to person or property the injured party is required to use reasonable exertion to lessen or moderate the resulting damage.⁷¹ Land adjacent to a railroad was flooded by water turned on to it by the construction of the road; it

⁶⁷ Hayden v. Cabot, 17 Mass. 169.

⁶⁸ Northwestern S. B. & Mfg. Co. v. Great Lakes E. Works, 181 Fed. 38, 104 C. C. A. 52; Davis v. Fish, 1 G. Greene, 406, 48 Am. Dec. 387; Mather v. Butler County, 28 Iowa, 259.

⁶⁹ Hollenbach C. Co. v. Wilkins, 130 Ky. 51.

⁷⁰ Rollins v. Bowman C. Co., 96 App. Div. (N. Y.) 365; Sun Mfg. Co. v. Egbert, 37 Tex. Civ. App. 512.

⁷¹ Hay v. Long, 78 Wash. 616; Lillard v. Kentucky D. & W. Co., 134 Fed. 168, 67 C. C. A. 74; Maxwell v. Speth, 9 Ga. App. 745; Davis v. Poland, 102 Me. 192, 10 L.R.A. (N.S.) 212, 120 Am. St. 480; Wise v. Wabash R. Co., 135 Mo. App. 230, (by substantially observing di-

rections of the physician); Railroad Co. v. Hardware Co., 143 N. C. 54; Cason v. Western U. Tel. Co., 77 S. C. 157; Missouri, etc. R. Co. v. Hogan, 42 Tex. Civ. App. 133; Texas P. C. Co. v. Poe, 32 id. 469; Central R. Co. v. Steverson, 3 Ala. App. 313; Western U. Tel. Co. v. Ivy, 102 Ark., 246, citing the text; Hunter v. Southern R. Co., 90 S. C. 507; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; Allender v. C. R. I. & P. R. Co., 37 Iowa, 264; The Baltimore, 8 Wall. 377, 19 L. ed. 463, 1 Am. Neg. Cas. 419; Little v. McGuire, 43 Iowa, 447; Fullerton v. Fordyce, 144 Mo. 519, 3 Am. Neg. Rep. 696; Webb v. Metropolitan St. R. Co., 89 Mo. App. 604. See ch. 36.

One whose property has been wil-

got into the cellar of the house thereon and injured the walls. It was held that the owner was bound to use reasonable care, skill and diligence, adapted to the occasion, to prevent this consequence, notwithstanding the wrongful agency of the company in turning the water upon the premises.⁷² Recovery cannot be had against a notary for negligent omission to give notice of protest to an indorser where the holder could, but would not, resort to other grounds for charging the latter.⁷³ Persons whose goods are destroyed by a riotous mob are not entitled to recover from the city their value unless such persons, if they knew of the impending peril, used reasonable diligence to notify the mayor or sheriff of the threatened riot and the apprehended danger to their property.⁷⁴ The owner of land on which a personalty tax has been irregularly charged by a tax collector will be denied any remedy against him therefor if it is in the power of the former, with very little trouble and expense, to appear before the board or tribunal having authority in the premises and procure a correction.⁷⁵ A party interested in a decree for a fund invested can claim no indemnity for depreciation of the fund during his delay to enforce the decree, it being his duty to apply seasonably to the court for its enforcement.⁷⁶ A claimant of damages is bound to accept reasonable offers of the other party or a third person having direct reference to the subject of the loss which would have the effect of reducing or preventing damage;⁷⁷ and it has been said that it is the duty of a vendee

fully destroyed is not bound to collect the fragments, but may leave them where the defendant left them and recover their value. *Eiselle v. Oddie*, 128 Fed. 941. In Georgia a person deprived of the fullest enjoyment of his property by a positive tort is not bound to take any action to lessen the consequences of the wrong. *Athens Mfg. Co. v. Rucker*, 80 Ga. 291; *Holbrook v. Norcross*, 121 Ga. 319.

An injured person who has been attended by a physician of his own choice and also by the defendant's physician may recover unless he un-

reasonably refused to follow the latter's instructions. *Roanoke R. & E. Co. v. Sterrett*, 111 Va. 293.

⁷² *Chase v. New York Cent. R. Co.*, 24 Barb. 273; *Louisville & N. R. Co. v. Goodin*, 14 Ky. L. Rep. 622; *Same v. Finley*, 7 id. 129.

⁷³ *Franklin v. Smith*, 21 Wend. 624.

⁷⁴ *Wing Chung v. Los Angeles*, 47 Cal. 531.

⁷⁵ *State v. Powell*, 44 Mo. 436; *Wright v. Keith*, 24 Me. 158.

⁷⁶ *Carson v. Jennings* 1 Wash. C. C. 129.

⁷⁷ *Dobbins v. Duquid*, 65 Ill. 464;

who has broken his contract to point out to the vendor the means by which his damages may be mitigated.⁷⁸ Where damages can be thus saved by timely preventive measures by the injured party it is his *duty* to exert himself for that purpose; but he has a correlative *right* in similar cases to employ other means to attain the object of the contract broken which was within the contemplation of the parties at the time of contracting, or to extricate himself from any predicament in which the wrong complained of may have placed him.⁷⁹

In an action to recover for personal injuries the defendant insisted that the plaintiff should submit to a surgical operation, the testimony as to the certainty of a cure in that event being that it would probably be effected. The court said: While the person who inflicts the damage has the right to say that sure and safe means to diminish the evil results of the accident must be used, that is the extent of his right. Whether further means should be resorted to is for the plaintiff to determine. In making that determination the plaintiff has the right to consider the nature of the means used to effect a cure, and the possible or probable effect upon himself. In any given case it may be that the treatment which is given to the plaintiff is not the best that could be devised, but he is not the less entitled to his damages on that account if, in taking that treatment, he has consulted such a physician as a reasonably prudent man would consult. Having done that, he is entitled to his damages. If he did not, and the jury can say that some other treatment

Parsons v. Sutton, 66 N. Y. 92; *Beymer v. McBride*, 37 Iowa, 114; *Bisher v. Richards*, 9 Ohio St. 495; *Ashley v. Rocky Mountain Bell Tel. Co.*, 25 Mont. 286, 296, quoting the text; *Lawrence v. Porter*, 63 Fed. 62, 11 C. C. A. 27, 26 L.R.A. 167; *Borden v. Vinegar Bend L. Co.*, 2 Ala. App. 354. See *Rudell v. Grand Rapids C. S. Co.*, 136 Mich. 528.

The vendee in a transaction in the market of the world, "where it is well known that certificates and bills of lading are generally used to discharge contracts, and that the right to call for delivery of a staple

commodity at a recognized world market is generally of much greater value than the right to call for delivery at a place where there is no recognized market," is not bound to accept property at the latter place with an equalization of freight. *Pope Metals Co. v. Sadek*, 149 Wis. 394.

⁷⁸ *Parks v. Elmore*, 59 Wash. 584.

⁷⁹ *Hoffman v. Union F.*, 68 N. Y. 385; *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *James v. Hodsden*, 47 Vt. 127.

would have brought about a cure, and that treatment was one that a reasonably prudent man would have submitted to, then they must say that he has not used the care which he ought to have used and must take that into consideration in reaching their verdict.⁸⁰ An injured person is not affected by the mistake of the physician chosen by him in the exercise of ordinary care,⁸¹ and the question of good faith in rejecting the advice of

⁸⁰ *Blate v. Third Ave. R. Co.*, 44 App. Div. (N. Y.) 163; *Leitzell v. Delaware, etc. R. Co.*, 232 Pa. 475; *Birmingham R., L. & P. Co. v. Anderson*, 163 Ala. 72, citing the text; *Missouri, etc. R. Co. v. Schilling*, 32 Tex. Civ. App. 417. See *Beattie v. Detroit*, 137 Mich. 319; *Maroney v. Minneapolis & St. L. Ry. Co.*, 123 Minn. 480, 49 L.R.A. (N.S.) 756, citing the text. § 1244.

The principle is that if a patient refuses to submit to an operation which it is reasonable that he should submit to, the continuance of the malady or injury which such operation would cure is due to his refusal and not to the original cause. Whether such refusal is reasonable or not is a question to be decided upon all the circumstances of the case. If the medical attendant of the person injured be competent, and no attack be made upon his honesty, *Tutton v. Majestic*, [1909] 2 K. B. 54, is authority for saying that it is not unreasonable to refuse to submit to an operation against the advice of the attendant. *Bateman v. Middlesex*, 24 Ont. L. R. 84.

In *McNamara v. Metropolitan St. R. Co.*, 133 Mo. App. 645, it is said: We do not think plaintiff should be criticized and punished on account of his failure to undergo a surgical operation. He should be accorded the right to choose between suffering all his life or taking the risk of an unsuccessful outcome of a seri-

ous surgical operation. Certainly defendant, whose negligence produced the unfortunate condition, is in no position to compel plaintiff again to risk his life in order that the damages may be lessened.

It is for the jury to say whether a reasonable person would submit to etherization in order that a limb may be manipulated to improve its condition. *O'Donnell v. Rhode Island Co.*, 28 R. I. 245.

"An allowance of damages in cases of traumatic neurasthenia touches the border of speculation at best, and it is manifestly unfair, for one who seeks a recovery, to put a defendant to the hazard of a further speculation by refusing the aids which science affords and which are available, or by postponing the time of treatment until after a trial and a verdict." *Mickelson v. Fischer*, 81 Wash. 423.

Reasonable and prudent self-treatment is sufficient compliance with the rule requiring the party injured to endeavor to reduce damage. *Missouri, K. & T. Ry. Co. of Texas v. McCormick*, — Tex. Civ. App. —, 160 S. W. 429.

⁸¹ *Suelzer v. Carpenter*, — Ind. —, 107 N. E. 467; *Lyons v. Erie R. Co.*, 57 N. Y. 489, 9 Am. Neg. Cas. 618; *Sauter v. New York, etc. R. Co.*, 66 N. Y. 50, 6 Am. Neg. Cas. 208, 23 Am. Rep. 18; *Caven v. Troy*, 15 App. Div. (N. Y.) 163, 2 Am. Neg. Rep. 221; *Bethany v. Lee*, 124 Ill. App. 397; *Goss v. Goss*,

a physician is for the jury.⁸² Inability to secure the best medical attendance will not bar a recovery.⁸³ The recovery by an injured infant will not be affected by the neglect of his parents to secure medical treatment for him.⁸⁴ The defendant must show that the plaintiff failed to exercise proper diligence to mitigate his loss.⁸⁵

§ 91. **Same subject; employer may finish work at contractor's expense.** On the failure of a contractor to finish his contract the employer may cause it to be done by others and the reasonable sum required to be paid therefor may be recovered of the delinquent party.⁸⁶ One who has contracted for the shipment of goods or to be carried as a passenger may employ other reasonable means of transportation if the carrier fails to fulfill his contract, and recover the excess of cost as well as other damages.⁸⁷ The question whether the expense of the substituted

102 Minn. 346; Scholl v. Grayson, 147 Mo. App. 652; Pyke v. Jamestown, 15 N. D. 157; O'Donnell v. R. I. Co., 28 R. I. 245; Rowe v. Whatcom County R. & L. Co., 44 Wash. 658; Chicago City R. Co. v. Saxby, 213 Ill. 274, 68 L.R.A. 164, 104 Am. St. 218; Variety Mfg. Co. v. Landaker, 227 Ill. 22. See also, Ross v. City of Stamford, 88 Conn. 260, where the physician employed omitted to apply the remedy most approved in similar cases.

⁸² Sullivan v. Tioga R. Co., 112 N. Y. 643, 8 Am. St. 793, 16 Am. Neg. Cas. 820; Hope v. Troy & L. R. Co., 40 Hun, 438.

⁸³ Alberti v. New York, etc. R. Co., 118 N. Y. 77, 9 Am. Neg. Cas. 664, 6 L.R.A. 765; Pecos, etc. R. Co. v. Williams, 34 Tex. Civ. App. 100. See Glasgow v. Metropolitan St. R. Co., 191 Mo. 347.

⁸⁴ Louisville & N. R. Co. v. Wilkins, 143 Ky. 572. See § 27.

⁸⁵ Cromer v. Logansport, 38 Ind. App. 661; Howard S. Co. v. Wells, 176 Fed. 512, 100 C. C. A. 70.

⁸⁶ Pittsburgh, etc. R. Co. v. Wil-

son, 34 Ind. App. 324; Rowe v. Peabody, 207 Mass. 226; National C. Co. v. Hudson River W. P. Co., 118 App. Div. 65, quoting the text; Clark v. Russell, 110 Mass. 133; Smeed v. Foord, 1 E. & E. 602; Paine v. Sherwood, 21 Minn. 225; Hinde v. Liddel, L. R. 10 Q. B. 265.

In Wigsell v. School for Indigent Blind, 8 Q. B. Div. 357, the grantee of land covenanted with his grantor that the land should be and be kept inclosed with a brick wall. In an action to recover damages for the breach of this covenant it was shown that the value of the adjoining lands of the plaintiff was not diminished by the nonobservance of the covenant to anything like the sum which it would have cost to build the wall. The measure of damages was held to be the difference between the plaintiff's position with and without the wall, and the cost of building it was not the standard to be applied.

⁸⁷ Hamlin v. Great Northern R. Co., 1 H. & N. 408; Denton v. Same, 5 El. & B. 860; Cranston v. Mar-

mode of conveyance, as, indeed, whether any expense for a substituted performance or to counteract the injurious effect of the act complained of may be recovered, will depend on whether the act done for which such expense was incurred was a reasonable thing to do considering all the circumstances. A party to a contract which has been broken by the other has a right to fulfill it for himself, as nearly as may be, but he must not do this unreasonably as regards the other party, nor extravagantly,⁸⁸ but he may expend such sum as will give him what he was entitled to under his contract though that be more than the price for which the contractor was to have done the work.⁸⁹ On breach of a contract to carry by vessel an ordinary article of merchandise the shipper will not be justified in procuring shipment by rail if the railroad prices would render it unprofitable. A person has no right to put others to an expense of such a nature as he would not, as a reasonable man, incur on his own account.⁹⁰

§ 92. May damages for breach of contract include other than pecuniary elements? In actions upon contracts the losses sustained do not, by reason of the nature of the transactions which they involve, ordinarily embrace any other than pecuniary elements. There is, however, no reason why other natural and direct injuries may not justify and require compensation. Contracts are not often made for a purpose the defeat or impairment of which can, in a legal sense, inflict a direct and natural injury to the feelings of the wronged party. A breach of promise of marriage is an instance of such a contract, in which such considerations enter into the estimate of the damages.⁹¹

shall, 5 Ex. 395; *Ogden v. Marshall*, 8 N. Y. 349; *Collins v. Baumgardner*, 52 Pa. 461; *Le Blanche v. London, etc. R. Co.*, 1 C. P. Div. 286; *Ward's Central & P. L. Co. v. Elkins*, 34 Mich. 439, 22 Am. Rep. 544; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333.

⁸⁸ *Le Blanche v. R. Co.*, *supra*.

⁸⁹ *Spink v. Mueller*, 77 Mo. App. 85, citing the text; *Wright v. Sanderson*, 20 id. 524; *Haysler v. Owen*,

61 Mo. 276; *Hirt v. Hahn*, 61 Mo. 496.

⁹⁰ *Simmons v. Wittmann*, 113 Mo. App. 357, quoting the text; *Ward's Central & P. L. Co. v. Elkins*, *supra*.

⁹¹ *Wells v. Padgett*, 8 Barb. 323; *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Wilbur v. Johnson*, 58 Mo. 600; *Wadsworth v. Western U. Tel. Co.*, 86 Tenn. 695, 6 Am. St. 864, quoting the text. There cannot be a recovery for the results of

The action for such a cause is often referred to as an exceptional one. In a certain sense it is so; but only in the particular under consideration. It is an action upon contract; the damages allowed are such as will adequately compensate the person injured, the nature and benefits of the thing promised being considered. Being of a personal nature the damages cannot be wholly measured by a pecuniary standard; the cause of action, for the same reason, dies with the person, as all demands for personal injuries do. The damages are recoverable by the injured party because they proceed directly and naturally from the breach. Other actions upon contract may embrace like damages.⁹² Blackburn, J.,⁹³ said: "Where there is a contract to supply a thing and it is not supplied, the damages are the difference between that which ought to have been supplied and that which you have to pay for it, if it be equally good; or if the thing is not obtainable the damages would be the difference between the thing which you ought to have had and the best substitute you can get upon the occasion for the purpose. It was urged that though, when the plaintiff was . . . (left by a carrier short of his destination), . . . if he had been able to hire a fly or obtain a carriage and paid money for it, it was admitted he could recover that money,—yet inasmuch as he could get no carriage, and was compelled to walk under penalty of staying where he was all night he was not entitled to get anything. . . . Now, as I have said, what the passenger is entitled to recover is the difference between what he ought to

a venereal disease communicated by the defendant to the plaintiff. *Churan v. Sebesta*, 131 Ill. App. 330.

⁹² *Lignante v. Panama R. Co.*, 147 App. Div. (N. Y.) 97; *El Paso & N. R. Co. v. Sawyer*, 54 Tex. Civ. App. 387, quoting the preceding part of this section; *Pullman Co. v. Willett*, 27 Ohio C. C. 649, 7 Ohio C. C. (N. S.) 173, affirmed without opinion, 72 Ohio 690, (compensation for mental suffering accompanied by physical inconvenience and pain in consequence of the breach of a contract to supply a drawing room in a

sleeping car); *Browning v. Fies*, 4 Ala. App. 580; *Hale v. Bonner*, 82 Tex. 33, 27 Am. St. 850, 14 L.R.A. 336; *Western U. Tel. Co. v. Simpson*, 73 Tex. 422. See ch. 22.

As to the right to recover damages resulting from deprivation of the use of an article of luxury or pleasure, see *Banta v. Stamford Motor Co.*, — Conn. —, 92 Atl. 665; *Cook v. Packard Motor Car Co.*, of New York, 88 Conn. 590, L.R.A. 1915C 319.

⁹³ In *Hobbs v. London, etc. R. Co.*, L. R. 10 Q. B. 111.

have had and what he did have; and when he is not able to get a conveyance at all, but has to make the journey on foot, I do not see how you can have a better rule than that . . . the jury were to see what was the inconvenience to the plaintiffs in having to walk, as they could not get a carriage." While it is true that if the breach causes no actual injury beyond vexation and annoyance, as all breaches of contract do more or less, they are not subjects of compensation unless to the extent that the contract was made specially to procure exemption from them, nevertheless to the extent that a contract is made to secure relief from a particular inconvenience or annoyance or to confer a special enjoyment, the breach, so far as it disappoints in respect of that purpose, may give a right to damages appropriate to the objects of the contract.⁹⁴ Inconvenience, in the case quoted from, was a prominent element of damage; that consisted in a disagreeable walk of three miles when the contract entitled the injured party to be carried in a railway car a greater portion of the distance. It was a rainy night, and he had with him his wife and small children. Sickness ensued to some of them from taking cold; damages for this were excluded by perhaps too rigid an application of the rule that they must be the natural and proximate consequence of the breach,⁹⁵ but a verdict allowing 10*l.* damages for the *inconvenience* was sustained.⁹⁶ In an action for breach of a contract to convey the plaintiff on a steamship from London to Sheerness, where the breach con-

⁹⁴ As for the breach of a contract not to molest a person. *Fearon v. Earl of Aylesford*, 14 Q. B. Div. 792; *Silberman v. Silberman*, 10 New South Wales St. Rep. 554.

Compensatory damages are not limited to mere pecuniary loss if the broken contract was made with reference to a different standard, as where it contemplates service to avoid inconvenience and annoyance. *Carmichael v. Bell Tel. Co.* 157 N. C. 21. They include all damages which are not punitive. *Osborn v. Leach*, 135 N. C. 628, 66 L.R.A. 648.

⁹⁵ See §§ 48, 49.

⁹⁶ See *McInturf v. Western U. Tel. Co.*, 81 Kan. 476; *Dalton v. Kansas City, etc. R. Co.*, 78 Kan. 232, 17 L.R.A.(N.S.) 1226; *Miller v. Baltimore & O. R. Co.*, 89 App. Div. (N. Y.) 457; *Ward v. Smith*, 11 Price 19; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Jones v. Steamship Cortes*, 17 Cal. 487, 79 Am. Dec. 142; *Wadsworth v. Western U. Tel. Co.*, 86 Tenn. 695, 6 Am. St. 864, quoting the text.

If a contract is broken in a way and by such acts as constitute an offense against the law the jury

sisted in putting the plaintiff off, without just cause and with circumstances of aggravation, short of his destination, it was proper to show these circumstances, and Parke, B., thus remarked upon their admissibility: "Suppose, instead of a man landed at Gravesend from a steamboat, this had been the case of a passenger in a ship bound to the West Indies and he were put ashore on a desert island, without food, and exposed to the burning sun and danger of wild beasts, or even landed among savages, would not evidence be receivable to show the state of the island where he was left and the circumstances attending the violation of the contract?"⁹⁷ Inconvenience and annoyance are grounds of damage for shutting off water from premises in an action for breach of the contract to supply it.⁹⁸ But in such a case there cannot be a recovery for distress and outraged feelings; these terms being synonymous with mental suffering.⁹⁹ But a different view prevailed where there was a failure to furnish a wedding trousseau for a bride of wealth and high social standing; damages were allowed for her disappointment, mortification and humiliation on account of going to her husband without it and because of the foregoing of entertainments planned for her.¹

The views expressed in the opening part of this section have found acceptance in a well-considered case sustaining the right to recover damages for mental suffering resulting from delay in delivering a telegram announcing the time of holding the funeral of the plaintiff's mother, and determining that there

may consider the outrage to the feelings of the plaintiff, although the acts done were not directed against him in person, but against his son and employees. *Enders v. Skannal*, 35 La. Ann. 1000.

In *O'Meallie v. Moreau*, 116 La. 1020, a place rented by a picnic party was occupied by another such party; the defendant tendered the use of a less desirable place, which was not accepted; damages were awarded for disappointment, annoyance, vexation and mortification.

⁹⁷ *Coppin v. Braithwaite*, 8 Jur.

875. See *Rose v. Beattie*, 2 N. & McC. 538.

⁹⁸ *Birmingham W. W. Co. v. Ferguson*, 164 Ala. 494. The inconvenience (the majority of the court thought there was no material difference between inconvenience and annoyance) consisted in being deprived of the use of the bath tub and having to procure water elsewhere.

⁹⁹ *Birmingham W. W. Co. v. Vinter*, 164 Ala. 490.

¹ *Lewis v. Holmes*, 109 La. 1030, 61 L.R.A. 274.

might be a recovery either *ex contractu* or *ex delicto*: We find a well-recognized exception to the general rule that damages cannot be had for mental anguish in cases of breach of contract, in the action for breach of promise of marriage, and the reason for this exception is quite applicable here. In such cases the defendant, in making his contract, is dealing with the feelings and emotions. The contract relates almost wholly to the affections, and one is not allowed to so trifle with another's feelings. He knows at the time he makes the contract that if he breaks it the other will suffer great mental pain, and the courts, without exception, have allowed recovery in such a case.² In another and similar case the text is quoted, and it is said that it serves the purpose of showing that in the ordinary contract only pecuniary benefits are contemplated and that therefore the damages resulting from the breach of such a contract must be measured by pecuniary standards, and that where other than pecuniary benefits are contracted for other than pecuniary standards will be applied in the ascertainment of the damages flowing from the breach. The case before us (so far as it is an action for breach of contract) is subject to the same general rule, and the defendant is answerable in damages for the breach according to the nature of the contract, and the character and extent of the injury suffered by reason of its non-performance.³ If, in addition to physical inconvenience and discomfort, there results from the breach of a contract to carry vexation, worry or mental distress as the natural, proximate and reasonably to be expected consequence, these injuries afford cause for the recovery of increased compensation.⁴ The failure to secure a stateroom for a bridal party

² *Mentzer v. Western U. Tel. Co.*, 93 Iowa 752, 762, 57 Am. St. 294, 28 L.R.A. 72, citing *Holloway v. Griffith*, 32 Iowa 409; *Royal v. Smith*, 40 Iowa 615, and saying that the distinction pointed out is well stated in the text.

³ *Wadsworth v. Western U. Tel. Co.*, 86 Tenn. 695, 6 Am. St. 864; *Western U. Tel. Co. v. Crawford*, 29 Okla. 143, 35 L.R.A. (N.S.) 930. See

Carmichael v. Bell Tel. Co., 157 N. C. 21, 39 L.R.A. (N.S.) 651; §§ 77, 915, 942.

⁴ *Taxicab Co. v. Grant*, 3 Ala. App. 393. But see *Norton v. Kull*, 132 N. Y. Supp. 387, denying a recovery for injured feelings for the breach of a contract to bury the body of the plaintiff's husband in a specified manner.

involves liability for the worry and mental distress of the bride, and the fact that the plaintiff was a bride is material as to the extent of the distress endured.⁵ A person whose ticket of admission to a bathhouse is revoked may recover for the indignity put upon him at the time and by the method of the revocation though the sale of the ticket could not be demanded as of right.⁶ Inconvenience is a ground of damage for the breach of a contract to construct a private railroad crossing.⁷ The failure to supply medical and hospital assistance is attended with liability for the resulting physical and mental suffering; "the subject-matter of the contract was the health and physical condition of the" defendant's employee.⁸ Fraud in substituting a pine box in lieu of the coffin purchased, said box being too small to contain the remains of the deceased, and in failing to furnish a robe as agreed, is ground for the recovery of damages based on mental suffering by his next of kin.⁹ The breach of a contract to supply a carriage to convey the plaintiff and others to a church where he was to be married is cause for awarding compensation for the inconvenience, annoyance, mental embarrassment or distress, as well as mental pain the plaintiff endured, the purpose for which the carriage was required being made known to the defendant when the contract was made.¹⁰

§ 93. Elements of damage for personal torts. In actions for torts and personal injuries damages to relative rights are frequently in question; then every particular and phase of the injury may enter into the consideration of the jury in estimating compensation,¹¹ loss of time, with reference to the injured party's condition and ability to earn money in his business or

⁵ *Central R. Co. v. Knight*, 3 Ala. App. 436.

⁶ *Aaron v. Ward*, 203 N. Y. 351, 38 L.R.A.(N.S.) 204.

⁷ *Big Sandy R. Co. v. Rice*, 146 Ky. 619.

⁸ *Galveston, etc. R. Co. v. Rubio*, (Tex. Civ. App.) 65 S. W. 1126; *McDaniel v. United R. Co.*, 165 Mo. App. 678 (breach of contract that

injured person should be treated by a physician named).

⁹ *Dunn v. Smith* (Tex. Civ. App.), 74 S. W. 576.

¹⁰ *Browning v. Fies*, 4 Ala. App. 580. But compare *Gatzow v. Buening*, 106 Wis. 1, 49 L.R.A. 475, 80 Am. St. 17, stated in note to § 96.

¹¹ *Grimes v. Bowerman*, 92 Mich. 258, quoting the text.

calling;¹² impairment of ability of a married woman to perform duties personal to herself not constituting a claim for loss of time;¹³ damage to reputation;¹⁴ loss from permanent impairment of faculties, mental and physical pain and suffering, disfigurement and expenses.¹⁵ Where injury to a young girl

¹² *Miller v. Delaware River Transp. Co.*, 85 N. J. L. 700; *Wye-man v. Deady*, 79 Conn. 414; *Math-re v. Story City D. Co.*, 130 Iowa, 111; *Welch v. Ware*, 32 Mich. 77; *Whalen v. St. Louis R. Co.*, 60 Mo. 323, 12 Am. Neg. Cas. 204; *Penn-sylvania R. Co. v. Books*, 57 Pa. 339, 10 Am. Neg. Cas. 217, 98 Am. Dec. 229; *Ward v. Vanderbilt*, 4 Abb. App. Dec. 521; *Walker v. Erie R. Co.*, 63 Barb. 260, 9 Am. Neg. Cas. 666; *McKinley v. Chicago*, etc. R. Co., 44 Iowa, 314, 8 Am. Neg. Cas. 253, 24 Am. Rep. 748; *Pitts-burg*, etc. R. Co. v. *Andrews*, 39 Md. 329, 9 Am. Neg. Cas. 421, 17 Am. Rep. 568; *Toledo*, etc. R. Co. v. *Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; *Southern R. Co. v. Myers*, 32 C. C. A. 19, 87 Fed. 149. See ch. 36.

In *Keller v. Chicago, W. & V. Coal Co.*, 184 Ill. App. 248, an injured motorman recovered for suffering and loss of time and for any future suffering, though the specific amount awarded, \$3,400, was held excessive.

¹³ *Wood v. Louisville & N. R. Co.*, 183 Ill. App. 543.

¹⁴ *DeMinico v. Craig*, 207 Mass. 593, as where an unjustifiable strike was instituted to get rid of a fore-man.

¹⁵ *Girardo v. Wilmington & P. Trac. Co.*, — Del. —, 90 Atl. 476; *Reynolds v. Clark*, — Del. —, 92 Atl. 873; *Travers v. Hartman*, — Del. —, 92 Atl. 855; *Chicago, S. B. & N. I. Ry. Co. v. Roth*, — Ind. App. —, 107 N. E. 689; *Felker v. Bangor Ry. & Electric Co.*, 112 Me.

255; *Rhodes v. Rapid T. Co.*, 16 Hawaii 319; *Lutterman v. Romey*, 143 Iowa 233; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466, 4 Am. Neg. Cas. 268; *Johnson v. Wells*, etc. Co., 6 Nev. 224, 3 Am. Rep. 245; *Muldowney v. Illinois*, etc. R. Co., 36 Iowa, 462, 14 Am. Neg. Cas. 612, 618; *Mason v. Ells-worth*, 32 Me. 271; *Morse v. Au-burn*, etc. R. Co., 10 Barb. 621; *Lucas v. Flinn*, 35 Iowa, 9; *Stew-art v. Ripon*, 38 Wis. 584; *West v. Forrest*, 22 Mo. 344; *Filer v. New York Cent. R. Co.*, 49 N. Y. 42, 5 Am. Neg. Cas. 147; *Donnell v. Sandford*, 11 La. Ann. 645; *Lynch v. Knight*, 9 H. of L. Cas. 577; *Steiner v. Moran*, 2 Mo. App. 47; *Ashcraft v. Chapman*, 38 Conn. 230; *Seeger v. Barkhamsted*, 22 id. 290; *Pennsylvania & O. C. Co. v. Gra-ham*, 63 Pa. 290, 3 Am. Rep. 549; *Smith v. Overby*, 30 Ga. 241; *Smith v. Holcomb*, 99 Mass. 552; *Ford v. Jones*, 62 Barb. 484; *Hamilton v. Third Ave. R. Co.*, 8 Am. Neg. Cas. 552, 53 N. Y. 25; *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541; *Ripon v. Bittel*, 30 Wis. 614; *Moore v. Central R.*, 47 Iowa, 688, 14 Am. Neg. Cas. 657; *Ballou v. Farnum*, 11 Allen, 73; *Nones v. Northouse*, 46 Vt. 587; *Johnson v. Holyoke*, 105 Mass. 80; *Blackman v. Gardiner Bridge*, 75 Me. 214; *Bovee v. Dan-ville*, 53 Vt. 183; *Mayor*, etc. v. *Lewis*, 92 Ala. 352; *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 209; *Gibney v. Lewis*, 68 Conn. 392; *Louisville & N. R. Co. v. Logsdon*, 71 S. W. 905; (Ky.); *Newbury v.*

results in her permanent disfigurement the jury may consider what the effect will probably be on the prospects of her marriage when she reaches the age of womanhood and how far the money value of her life may be damaged by that circumstance. Such an element of damages is not speculative because it is difficult to estimate, nor in any other sense than almost every element of damages is speculative where the ascertainment depends on what the jury or other trier of the fact shall deem fair and just, and where, being uncertain and indefinite, the damages are not capable of adjustment with precision and accuracy. In such a case there may be a recovery on account of that loss without a special allegation of damage, the loss being a general prospect and not a particular one.¹⁶ As a general rule if only compensatory damages may be recovered there may not be a recovery on account of the plaintiff's attorney's fees.¹⁷

§ 94. Character as affecting damages for personal injuries, and in actions for death. In an action to recover for personal injuries sustained while traveling as a passenger on a railroad the question arose as to the effect of the plaintiff's character for chastity upon the measure of damages. The trial court charged that the fact that the plaintiff is an unchaste woman has nothing to do with the damages; that she is entitled to recover the same damages for injuries received as a chaste woman. The appellate court, Cole, C. J., writing the opinion, says it thinks the charge had a tendency to mislead the jury: "We do not wish to intimate that an unchaste woman who is maimed and

Getchell & M. L. & Mfg. Co., 100 Iowa 441, 457, 14 Am. Neg. Cas. 568, 62 Am. St. 582, citing the text. See ch. 36.

But see, Lake Street El. R. Co. v. Gormley, 108 Ill. App. 59, where in it is said: "The marring of personal appearance and humiliation resulting from contemplation of bodily disfigurement are not elements entering into the computation of pecuniary damages for personal injuries;" *Trzietowski v. Evening American Pub. Co.*, 185 Ill. App. 451; *Taylor v. Peoria, B. & C. T.*

Co., 184 Ill. App. 188, holding an instruction erroneous which called attention to the disfigurement of the plaintiff as a basis for estimating her damages.

¹⁶ *Smith v. Pittsburgh & W. R. Co.*, 90 Fed. 783; *Morin v. Ottawa E. R. Co.*, 18 Ont. L. R. 209 (court of appeal), citing the text. *Contra*, *Price v. Wright*, 35 New Bruns. 26. See § 1241.

¹⁷ *United P. Co. v. Matheny*, 81 Ohio 204, 28 L.R.A.(N.S.) 761, and cases cited.

disabled by an accident on the railroad may not suffer as much pain of body or anxiety of mind as a virtuous woman would from a like injury; but still, when it comes to a question of awarding damages, it may be that a jury would not give—perhaps ought not to give—the *same damages* for injuries to an unchaste woman that they would allow a virtuous, intelligent and industrious woman, who could command good wages or take care of a family. The fact of chastity, as well as other personal virtues and business qualifications, would be proper matters for a jury to consider in making up their verdict as to what damages should be given as a compensation for the injury received, in view of all the facts.”¹⁸ The opposing view is expressed by Judge Dedy in a case¹⁹ where it might have been omitted (if the Wisconsin case announces the law under any circumstances) with more propriety than in the case stated. He charged that compensatory damages for physical pain and mental anguish are not to be diminished by the fact that the plaintiff is an obscure man, a bartender, a professional gambler or even a vagrant. In another case, brought by the next of kin to recover damages for the negligent killing of the deceased, Shiras and Brewer, J.J., held that proof of the good or bad reputation of the plaintiffs could not be received.²⁰ In Texas

¹⁸ Abbot v. Tolliver, 71 Wis. 64. It is to be observed of this case that it would doubtless have been decided as it was independently of this proposition. Compare Lowe v. Ring, 123 Wis. 107.

¹⁹ Boyle v. Case, 18 Fed. 880.

²⁰ Johnson v. Wells, etc. Co., 6 Nev. 224, 240, 3 Am. Rep. 245; Hardy v. Minneapolis, etc. R. Co., 36 Fed. 657.

In Brown v. Memphis & C. R. Co., 7 Fed. 51, 5 id. 499, 8 Am. Neg. Cas. 705, Hammond, J., ruled, after full consideration, that the presence of an alleged prostitute in a ladies' car, no misconduct being indulged in there and the immorality being confined to the private life of the

passenger, was not sufficient ground for excluding her therefrom.

The character of a minor's mother is immaterial in an action by him to recover for a personal injury, no allegation as to his social position being made. South Omaha v. Suttle, 72 Neb. 746.

In an action for assault and battery and civil actions generally the character of neither party is in issue and cannot be attacked unless it is first supported by the adversary or placed in issue by the nature of the proceeding itself. Stewart v. Watson, 133 Mo. App. 44.

In Louisville & N. R. Co. v. Daniel, 122 Ky. 256, 3 L.R.A.(N.S.) 1190, evidence was received to show the plaintiff's character for indus-

evidence of the general character of the deceased is not admissible in an action by his wife and child to recover for his death.²¹

We think that a carrier cannot refuse to transport a person who presents himself as a passenger and who is properly dressed and whose conduct is not such as to enhance the risk of carrying him or endanger the comfort or safety of his fellow passengers on the ground that he is immoral or vicious in some of the relations of life. The right to be carried existing, a necessary result of it is that the rights and obligations of passenger and carrier attach. These cannot be affected by the character of the passenger so long as his conduct as such is correct. The law does not discriminate as to the rights of persons to redress for wrongs to their physical being or their property. If bad character should be ground for reducing damages good character would be reason for increasing them. Rights given by statute are not denied because of the character of the citizen if there is no exception made by the legislature. A homestead right is not lost because the owner uses the property for an immoral and unlawful purpose.²² Another reason for disapproving the Wisconsin case is that the introduction of such a question opens up too wide a field for the consideration of courts and juries, and adds vast elements of uncertainty to verdicts. So far as we have been able to ascertain the character of a plaintiff is not material when he seeks to recover for an injury to his person or property unless it contributed to provoke the wrong complained of;²³ except in so far as it may affect the probable loss of earnings in consequence of inability to secure

try and sobriety as affecting his earning capacity. The court said the admission of all such evidence should be accompanied by a strict admonition as to the purpose for which it is admitted. Nor should it, when it goes directly to the moral reputation of the plaintiff, be admitted at all, as whether he is a moral person or immoral, unless in-

Suth. Dam. Vol. I.—22.

troduced properly as impeaching evidence or in rebuttal of it.

²¹ *Holland v. Closs*, (Tex. Civ. App.) 146 S. W. 671.

²² *Prince v. Hake*, 75 Wis. 638.

²³ *Wright v. Kansas City*, 187 Mo., 678; *Breen v. St. Louis T. Co.*, 102 Mo. App. 479; *Cameron M. & E. Co. v. Anderson*, 34 Tex. Civ. App. 229. See *Colburn v. Marble*, 196 Mass. 376.

employment after the injury.²⁴ It has been held relevant in an action for assault and battery to show the plaintiff's quarrelsome disposition as bearing upon the award for his injured feelings,²⁵ and been intimated that the standing of the plaintiff in the community may affect the recovery for mental pain, wounded pride and self respect.²⁶

§ 95. *Mental suffering.* There has been a marked development of the law concerning liability for mental anguish since the publication of the first edition of this work. It was then well settled that such pain, when it resulted from physical injury, was an element of damages. There was formerly a little hesitancy on the part of some courts in reaching that conclusion,²⁷ but there is now no dissent from it.²⁸ The dam-

²⁴ *Carlton v. St. Louis & S. R. Co.*, 128 Mo. App. 451; *Kingston v. Ft. Wayne & E. R. Co.*, 112 Mich. 40, 40 L.R.A. 131.

Where the plaintiff was unemployed when injured and the testimony tended to show that his habits were dissolute, that he kept a house of doubtful character and had, before his injury, been discharged from several employments, it was contended that the defendant had the right to lay before the jury any facts concerning the plaintiff's conduct, habits, character or repute which might throw light on the probability of his securing employment, and the character and continuity of the same. The answer was that the doctrine could not be carried to that extent. The defendant undoubtedly had the right to lay before the jury any facts concerning the plaintiff's habits or conduct which might throw light on the probability of his securing employment, and the character and continuity of the same, but we know of no rule which would permit the defendant to go into proof of the plaintiff's character or repute.

Kingston v. Fort Wayne & E. R. Co. 1 Am. Neg. Rep. 467, *supra*.

It may be shown that the plaintiff was sober and industrious, his earning power being an element of damages. *Metropolitan St. R. Co. v. Kennedy*, 82 Fed. 158.

If the injuries for which a recovery is sought were the result of a life of dissipation or commonly follow such a life, the fact may be shown. *State v. Detroit*, 113 Mich. 643.

In a civil action for an assault with intent to ravish the defendant may show in mitigation of actual damages that the plaintiff was vulgar and obscene in conduct and language. *Parker v. Coture*, 63 Vt. 155, 25 Am. St. 750. But in such an action the general good character of the defendant cannot be shown, nor can the general reputation of the defendant as to chastity. *Sayen v. Ryan*, 9 Ohio C. C. 631. See ch. 36.

²⁵ *Lowe v. Ring*, 123 Wis. 107.

²⁶ *Matson v. Matson*, 105 Me. 152.

²⁷ *Johnson v. Wells, etc. Co.*, 6 Nev. 224, 3 Am. Rep. 245.

²⁸ *Baisdrengien v. Missouri, K.*

ages allowed therefor are purely compensatory.²⁹ The mental suffering which can thus be recovered for must proceed from and be caused by the act or neglect which produced the physical injury;³⁰ hence there cannot be a recovery by one who has suffered a miscarriage for the loss of the anticipated society of the prospective child.³¹ The bodily hurt which gives a right of recovery for the resulting mental suffering may be very small; if it is a ground of action it is enough.³² In actions for assault and battery the jury may consider, not only the mental distress which accompanies and is a part of the bodily pain, but that other condition of the mind of the injured person which is caused by the insult of the blows received.³³ The same state

& T. Ry. Co., 91 Kan. 730; Adams v. Brosius, 69 Ore. 513, 51 L.R.A. (N.S.) 36; Folk v. Seaboard Air Line Ry., 99 S. C. 284; Big Sandy R. Co. v. Blankenship, 133 Ky. 438, 23 L.R.A. (N.S.) 345; Bovee v. Danville, 53 Vt. 183; Ferguson v. Davis County, 57 Iowa, 601; Porter v. Hannibal, etc. R. Co., 71 Mo. 66, 16 Am. Neg. Cas. 455, 36 Am. Rep. 454; Indianapolis, etc. R. Co. v. Stables, 62 Ill. 313; Salina v. Trosper, 27 Kan. 544. See ch. 36.

²⁹ Morris v. Duncan, 126 Ga. 467, 115 Am. St. 105.

³⁰ Bovee v. Danville, *supra*; Chicago City R. Co. v. Taylor, 170 Ill. 49; Loomis v. Hollister, 75 Conn. 275; Haupt v. Swenson, 125 Iowa, 694.

³¹ Finer v. Nichols, 158 Mo. App. 539, § 1244.

If injury done to the person results in a miscarriage the physical and mental suffering connected therewith is to be considered; but injured feelings following the miscarriage and not part of the pain naturally attending it are too remote. Western U. Tel. Co. v. Cooper, 71 Tex. 507, 1 L.R.A. 728.

³² Curtis v. Sioux City, etc. R. Co., 87 Iowa, 622, 8 Am. Neg. Cas. 252;

Birmingham R. & E. Co. v. Ward, 124 Ala. 409; Canning v. Williamstown, 1 Cush. 452, 48 Am. Dec. 613; Voss v. Bolzenius, 147 Mo. App. 375; Kurpgeweit v. Kirby, 88 Neb. 72.

³³ Prentiss v. Shaw, 56 Me. 427, 96 Am. Dec. 475; Wadsworth v. Treat, 43 Me. 163; Smith v. Holcomb, 99 Mass. 552; Birmingham R. & E. Co. v. Ward, *supra*; Levindow v. Starin, 77 Conn. 600; Fleming v. Loughren, 139 Iowa, 517; Parriconi v. Greco, 115 La. 558 (it is an aggravating circumstance that a man assaulted a woman); Robinson v. Stimer, 154 Mich. 244; Johnson v. Daily, 136 Mo. App. 534; Stewart v. Watson, 133 id. 44.

In Warner v. Talbot, 112 La. 817, 66 L.R.A. 336, 104 Am. St. 460, the court said: To the mental anguish, terror and distress plaintiff suffered whilst the defendants held him in custody, there is to be added some physical suffering, beyond which there is to be added the sense of humiliation and disgrace with which he must ever in the future remember that with a rope around his neck or fastened upon his arm, he was for hours led about, rather like a dog than even a criminal, with

of mind is an element of damage when an assault has been maliciously made,³⁴ though no actual physical harm was done.³⁵ Thus, according to some courts and for good reasons, one who assaults a woman with criminal intent, "though her body be not touched, except by his foul breath and speech, should respond in damages for an outrage to her feelings which proceeds so directly from his concurrent criminal purpose and act."³⁶ In an action of tort for a wilful injury to the person the manner and manifest motive of the act may be given in evidence as affecting the question of damages, for when the mere physical injury is the same it may be more aggravated in its effects upon the mind if it is done in wanton disregard of the rights and feelings of the plaintiff than if it is the result of mere carelessness.³⁷ This may also be the case when a ticket is converted.³⁸ Mental suffering is an element of damage in suits for malicious prosecution, independent of other injury,³⁹ for false imprisonment,⁴⁰ and in some jurisdictions for the malicious issuance of an attachment against property.⁴¹ A husband may recover exemplary damages for injury to his feelings in an action

occasional demonstrations of hanging or actual hanging, as suited the humor of his captors. No amount of money could fully compensate a self-respecting man for such treatment, but \$5,000 will perhaps come nearer doing so than \$500, and we fix the damages at the former sum.

³⁴ *McKinley v. C. & N. W. R. Co.*, 44 Iowa 314, 24 Am. Rep. 748.

³⁵ *Ford v. Jones*, 62 Barb. 484; *Goddard v. Grand Trunk R.*, 57 Me. 202, 8 Am. Neg. Cas. 316; *Beach v. Hancock*, 27 N. H. 223, 59 Am. Dec. 373; *Craker v. Chicago & N. R. Co.*, 36 Wis. 657, 8 Am. Neg. Cas. 665, 17 Am. Rep. 504; *Cooper v. Hopkins*, 70 N. H. 271; *Henderson v. Agon*, 148 Mich. 252; *Carmody v. St. Louis T. Co.*, 122 Mo. App. 338.

³⁶ *Leach v. Leach*, 11 Tex. Civ. App. 699; *Pye v. Gillis*, 9 Ga. App.

725. *Contra*, *Reed v. Maley*, 115 Ky. 816, 62 L.R.A. 900; *Davis v. Richardson*, 76 Ark. 348.

³⁷ *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383; *Henderson v. Agon*, *supra*.

³⁸ *Harris v. Delaware, etc. R. Co.*, 77 N. J. L. 278.

³⁹ *Parkhurst v. Masteller*, 57 Iowa 474; *Fisher v. Hamilton*, 49 Ind. 341.

⁴⁰ *Stewart v. Maddox*, 63 Ind. 51; *Gibney v. Lewis*, 68 Conn. 392; *Davidson v. Lee* (Tex. Civ. App.), 139 S. W. 904.

⁴¹ *Byrne v. Gardner*, 33 La. Ann. 6; *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Ahearn v. Connell*, 72 N. H. 238. *Contra*, *McGill v. Fuller*, 45 Wash. 615; *Tisdale v. Major*, 106 Iowa 1, 68 Am. St. 263; *Travick v. Martin-B. Co.*, 79 Tex. 640.

against one who has had, or attempted to have while committing a trespass, criminal conversation with his wife.⁴² His right grows out of the marital relation and is independent of her rights to recover damages for the same wrong in an action by her.⁴³ A parent may recover for mental suffering resulting from the abduction,⁴⁴ seduction,⁴⁵ or the harboring and secreting of a minor daughter.⁴⁶ These actions are brought upon the legal principle or fiction which imports the loss of service as the ground upon which a recovery is had. The damages awarded in them, however, are largely given as compensation for wounds inflicted on the mind. Such actions are distinguishable from another class in which mental distress is an element of damage because the facts out of which they arise affect the social and business standing of the parties plaintiff, and in many ways tend to harass and annoy and even degrade them in the eyes of the community. To some extent this is the effect of various indignities, and because of it a passenger who is wrongfully and publicly ejected from a train may recover for the effect of the insult and indignity to his feelings though the case does not warrant the imposition of punitive damages,⁴⁷ as

⁴² *Powell v. Strickland*, 163 N. C. 393, 79 S. E. 872. See §§ 392, 1285.

⁴³ *Johnston v. Disbrow*, 47 Mich. 59, *Stark v. Johnson*, 43 Colo. 243, 16 L.R.A.(N.S.) 674, 127 Am. St. 114; *Brame v. Clark*, 148 N. C. 364, 19 L.R.A.(N.S.) 1033.

⁴⁴ *Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341.

⁴⁵ *Lunt v. Philbrick*, 59 N. H. 59; *Barbour v. Stephenson*, 32 Fed. 66; *Stevenson v. Belknap*, 6 Iowa, 97.

⁴⁶ *Stowe v. Haywood*, 7 Allen, 118.

⁴⁷ *Gillespie v. Brooklyn Heights R. Co.*, 178 N. Y. 347, 66 L.R.A. 618, 102 Am. St. 503; *Smith v. Pittsburgh*, etc. R. Co., 23 Ohio St. 10, 8 Am. Neg. Cas. 572; *Lake Erie*, etc. R. Co. v. *Fix*, 88 Ind. 381, 8 Am. Neg. Cas. 224, 45 Am. Rep. 464; *Harrison v. Pennsylvania R.*

Co., 118 N. Y. Supp. 1022; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 8 Am. Neg. Cas. 501, 21 Am. Rep. 757; *Hays v. Houston*, etc. R. Co., 46 Tex. 272; *Smith v. Leo*, 92 Hun, 242; *Mabry v. City E. R. Co.*, 116 Ga. 624, 59 L.R.A. 590; *Curtis v. Sioux City*, etc. R. Co., 87 Iowa, 622.

In the last case a girl was ejected in the presence of her schoolmates and other acquaintances without malice or unnecessary rudeness, notwithstanding there was both indignity and insult in the sense that the wrong was done in a humiliating and offensive manner; the mental pain resulting was an element of compensatory damages. *Contra*, *Illinois R. Co. v. Sutton*, 53 Ill. 397, in the absence of wilfulness or malice. See § 943.

may persons ejected from public or semi-public places if they have qualified themselves for admission thereto.⁴⁸ It is otherwise where admission to a public place of entertainment is refused; the sum paid may be recovered, but there may not be a recovery for disappointment or humiliation.⁴⁹ Where contracts made for the purpose of securing exemption from worry, anxiety and disappointment are broken there may be a recovery of compensation for these results if they proximately follow.⁵⁰ In Texas mental suffering is an element of damage where it results from the breach of a carrier's contract.⁵¹ The authorities generally do not go so far as to allow damages for the disappointment, annoyance and vexation which result from the breach of such a contract.⁵² There cannot be a recovery for mental suffering resulting from the eviction of a tenant, the action being on the lease,⁵³ but it is otherwise if the eviction was accompanied by the conversion of the tenant's goods.⁵⁴ Such element of damage is not involved in an action for fraud.⁵⁵ A bank

⁴⁸ *Aaron v. Ward*, 203 N. Y. 351, 38 L.R.A.(N.S.) 204, 136 App. Div. (N. Y.) 818; *Smith v. Leo*, 92 Hun 243; *Davis v. Tacoma R. & P. Co.*, 35 Wash. 203, 66 L.R.A. 82.

⁴⁹ *People v. Flynn*, 189 N. Y. 180; *Purcell v. Daly*, 19 Abb. N. C. 301; *Luxemburg v. Keith & P. Am. Co.*, 64 N. Y. Misc. 69; *Taylor v. Cohn*, 47 Ore. 538; *Horney v. Nixon*, 213 Pa. 20, 1 L.R.A.(N.S.) 1184n; *Buenzle v. Newport Am. Ass'n*, 29 R. I. 23, 14 L.R.A.(N.S.) 1242, and cases cited.

⁵⁰ § 92.

⁵¹ *St. Louis, etc. R. v. Berry*, 15 S. W. 48. The extra expense incurred by the plaintiff on account of his delay and the failure to receive his baggage was \$90; a verdict for \$500 was sustained. See §§ 943, 953.

⁵² *Walsh v. Chicago, etc. R. Co.*, 42 Wis. 23, 24 Am. Rep. 376; *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408; *Smith v. Pullman Co.*, 138 Mo. App. 238. See ch. 21.

Mental suffering is not to be considered in an action for the mere negligent breach of a carrier's contract in transporting a corpse beyond the point to which it was to be delivered to a connecting carrier, thus causing delay in the arrangements for the funeral. *Beaulieu v. Great Northern R. Co.*, 103 Minn. 47, 19 L.R.A.(N.S.) 564. Compare *Louisville & N. R. Co. v. Wilson*, 123 Ga. 62, where other damages were alleged, and it is intimated that such suffering might be recovered for.

⁵³ *Harris v. Cleghorn*, 121 Ga. 314; *Shelton v. Bornt*, 77 Kan. 1. In the last case a recovery for humiliation, fright and disgrace was denied though the tenant's goods were removed, no injury thereto or to his person being shown.

⁵⁴ *Mathews v. Livingston*, 86 Conn. 263.

⁵⁵ *Walsh v. Meyer*, 40 Wash. 650.

which maliciously and wilfully refuses to honor its depositor's checks is liable, in addition to actual money damages, for "such substantial damages for the impairment of his credit and for his feelings and mental anxiety over the matter as directly and proximately resulted from" its acts.⁵⁶

Injured feelings are not to be regarded in awarding damages for wrongs done to property through gross carelessness, no act or word of insult or contumely or any intentional violation of the plaintiff's rights being shown.⁵⁷ Thus, in an action growing out of negligence in blasting rocks and throwing them upon the plaintiff's land and buildings, his mental anxiety concerning his personal safety or that of his family, no harm being done to his or their persons, is not an element of damage. The court was unable to find any case which held that mental suffering alone, caused by simple actionable negligence, can sustain an action.⁵⁸ But if property is injured in wilful disregard of the rights of its owner or the person in possession injuries to his feelings may be compensated;⁵⁹ as where the remains of a deceased child are removed from a burial lot in which they are rightfully interred,⁶⁰ or the right to inter a dead body is denied after all preparations for the burial have been made,⁶¹ or the corpse of a relative is wilfully mutilated before burial,⁶² or where such mutilation results from negligence,⁶³ or there has been

⁵⁶ *Davis v. Standard Nat. Bank*, 50 App. Div. (N. Y.) 210. *Contra*, *Smith v. Sanborn State Bank*, 147 Iowa 640, 30 L.R.A.(N.S.) 517.

This class of cases has always been regarded as exceptional. *Addis v. Gramophone Co.*, [1909] App. Cas. 488.

⁵⁷ *White v. Dresser*, 135 Mass. 150, 46 Am. Rep. 454; *Mattingly v. Houston*, 167 Ala. 167, citing the text; *Applegate v. Franklin*, 109 Mo. App. 293; *Henderson v. Weidman*, 88 Neb. 813; *Buchanan v. Stout*, 123 App. Div. (N. Y.) 648; *Wheeler v. Aberdeen*, 45 Wash. 63. See § 943, and *Orr v. Dayton & M. T. Co.* 178 Ind. 40, 48 L.R.A.(N.S.) 474.

⁵⁸ *Wyman v. Leavitt*, 71 Me. 227; *Trigg v. St. Louis, etc. R. Co.*, 74 Mo. 147; *Ewing v. Pittsburgh, etc. R. Co.*, 147 Pa. 40, 14 L.R.A. 666.

⁵⁹ *Mattingly v. Houston*, *supra*; *McClure v. Campbell*, 42 Wash. 252.

⁶⁰ *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Jacobus v. Children of Israel*, 107 Ga. 522, 73 Am. St. 141.

⁶¹ *Wright v. Hollywood Cem. Co.*, 112 Ga. 884, 52 L.R.A. 621. See § 943.

⁶² *Koerber v. Patek*, 123 Wis. 453, 68 L.R.A. 956; *Wilson v. St. Louis etc. R. Co.*, 160 Mo. App. 649. See § 1095.

⁶³ *Kyles v. Southern R. Co.*, 147 N. C. 394, 16 L.R.A.(N.S.) 405.

a wrongful and improper burial of the dead,⁶⁴ or a home has been maliciously entered for the purpose of searching for stolen property.⁶⁵ Where a trespasser acts under color of process the sureties on his official bond must answer for the mental suffering of the person whose home has been entered and goods levied upon.⁶⁶ Mental pain cannot be compensated for in an action for forcible entry and detainer,⁶⁷ nor in an action to recover for adding to the height of a division fence and refusing to remove it.⁶⁸ Inconvenience, unaccompanied by pecuniary loss, is not an element of damage for being deprived of the use of property.⁶⁹ Annoyance and vexation, though accompanied by the expenditure of money in consequence of the wrongful issue of a distress warrant, are not ground for compensatory damages;⁷⁰ and so where they result from the invasion of a privilege, though such invasion was accompanied by pecuniary loss.⁷¹ A person who refuses to correct a mistake which leads to the discharge of an employee must compensate him for the perplexity of mind concerning the course to be pursued to vindicate his rights and to prevent the impending loss of his situation.⁷²

§ 96. *Same subject.* In some jurisdictions mental suffering which occurs independently of physical harm, as the result of mere negligence, is too remote to be the ground of an action.⁷³

⁶⁴ *Wright v. Beardsley*, 46 Wash. 16.

⁶⁵ *Krehbiel v. Henkle*, 152 Iowa, 604.

⁶⁶ *People v. Schwartz*, 151 Ill. App. 190.

⁶⁷ *Anderson v. Taylor*, 56 Cal. 131, 38 Am. Rep. 52.

⁶⁸ *Wolf v. Stewart*, 48 La. Ann. 1431.

⁶⁹ *Detroit G. Co. v. Moreton T. & S. Co.*, 111 Mich. 401; *Williams v. Yoe*, 19 Tex. Civ. App. 281.

⁷⁰ *Smith v. Jones*, 11 Tex. Civ. App. 18.

⁷¹ *Mason v. Dewis*, (Ky.) 71 S. W. 434.

⁷² *Lopes v. Connolly*, 210 Mass. 487, 88 L.R.A. (N.S.) 986.

⁷³ *Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 38 L.R.A. 512, 5 Am. Neg. Rep. 367, 60 Am. St. 393; *White v. Sander*, 168 Mass. 296, 2 Am. Neg. Rep. 573, 60 Am. St. 390 (the last case was one of a wilful attempt to injure property, and the claim for damages for mental suffering grew out of such attempt); *Gulf, etc. R. Co. v. Trott*, 86 Tex. 412, 40 Am. St. 866; *Lynch v. Knight*, 9 H. of L. Cas. 577; *Ewing v. Pittsburgh, etc. R. Co.*, 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. 709; *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 34 L.R.A. 783, 56 Am. St. 605; *Washington & G. R. Co. v. Dashiell*, 7 D. C. App. Cas. 507; *Rock v. Denis*, 4 Montreal L. R.

And this rule has been applied where the wrongdoer acted affirmatively,⁷⁴ and even wantonly.⁷⁵ The rule extends to sickness resulting from the purely internal operation of fright the latter being caused by gross negligence and the defendant ought to have known that the result which ensued would follow. The question whether, if the result was actually foreseen and intended, the rule would be otherwise, was left undecided.⁷⁶ The rule of non-liability has been applied where the defendant, without malice or evil intent, dressed himself in a woman's clothes and went at dusk to the plaintiff's home with the result that she was frightened and, later, had a miscarriage;⁷⁷ and where the defendant, the landlord of the plaintiff's sister, went to the house to collect rent, found the door ajar, opened it, walked up stairs, went inside the bedroom door, saw plaintiff in the room, asked what she was doing, waved his arms and in a loud and apparently angry voice said: "I forbid you moving. If you attempt to move I will have a constable here in five minutes. I refuse to take possession of these premises." As a result of the plaintiff's excitement and fright St. Vitus dance was produced. The opinion contains this language: Under

(Super. Ct.) 356; *Russell v. Western U. Tel. Co.*, 3 Dak. 315; *Dorrah v. Illinois Cent. R. Co.*, 65 Miss. 14, 7 Am. St. 629; *Salina v. Trosper*, 27 Kan. 544; *West v. Western U. Tel. Co.*, 39 id. 93, 7 Am. St. 530; *Canning v. Williamstown*, 1 Cush. 452; *Johnson v. Wells, etc. Co.*, 6 Nev. 224, 3 Am. Rep. 245; *The Queen*, 40 Fed. 694; *Chicago, etc. R. Co. v. Moss*, 89 Ark. 187; *Cole v. Gray*, 70 Kan. 705; *Pullman Co. v. Kelly*, 86 Miss. 87; *Heiberger v. Missouri & K. Tel. Co.*, 133 Mo. App. 452; *Porter v. Delaware, etc. R. Co.*, 73 N. J. L. 405. See §§ 21-23a.

In *Georgia R. & E. Co. v. Baker*, 1 Ga. App. 832, it is said: We think that the peace of mind, the feelings and the happiness of every one should be guarded by giving recov-

ery of damages for mental anguish or suffering produced either intentionally or negligently. A recovery was denied in deference to *Chapman v. Western U. Tel. Co.*, 88 Ga. 763, 17 L.R.A. 430. See also, *Central of Georgia Ry. Co. v. Wallace*, 141 Ga. 51, 51 L.R.A.(N.S.) 429.

⁷⁴*Green v. Shoemaker*, 111 Md. 69, 23 L.R.A.(N.S.) 667.

⁷⁵*St. Louis, etc. R. Co. v. Taylor*, 84 Ark. 42, 13 L.R.A.(N.S.) 159.

⁷⁶*Smith v. Postal Tel.-C. Co.*, 174 Mass. 576, 7 Am. Neg. Rep. 54, 75 Am. St. 374, 47 L.R.A. 323; *Atchison, etc. R. Co. v. McGinnis*, 46 Kan. 109; *Kagy v. Western U. Tel. Co.*, 37 Ind. App. 73. But see §§ 21 *et seq.* and *Green v. Shoemaker, supra*.

⁷⁷*Nelson v. Crawford*, 122 Mich. 466, 80 Am. St. 577.

the pleadings mere words and gestures are sought to be made actionable because of the nervous temperament of the plaintiff, without which such words and gestures would not be actionable. This would introduce and incorporate in the law a new element of damage—a new cause of action—by which a recovery might be had for an injury resulting to one of a peculiarly nervous temperament, while no injury would result to another in identically the same position. Of such a cause of action and liability for damage a dangerous use could be made. No such recovery is authorized under the common law and no statute gives it.⁷⁸ A different view has been taken where the defendant, knowing that one of the plaintiffs was well advanced in pregnancy, came to their house and in their yard, in the presence of such plaintiff, assaulted two negroes in a boisterous and violent manner, using profane language, the assault being accompanied by the drawing of blood and causing the fright of the female plaintiff which was followed by a miscarriage and impairment of health. These facts gave the plaintiffs a cause of action, though it was recognized that the case was a novel one.⁷⁹

It is not necessary that a wrongful act, if inhuman and done wilfully, should directly result in physical injury in order that the sufferer may recover for mental pain.⁸⁰ A wanton insult and humiliation is ground for the recovery of compensation for such pain.⁸¹ Under some civil damage statutes the mortification, shame and disgrace sustained by a wife in consequence of the intoxication of her husband may be recovered for.⁸² The invasion of the right of privacy by unauthorizedly displaying a photograph, contrary to statute, in connection with a catch-penny scheme has been classed as a willful tort which sustains an award for mental distress, humiliation and mortification.⁸³ The needless invasion of the room of a female guest

⁷⁸ *Braun v. Craven*, 175 Ill. 401, 42 L.R.A. 199, 5 Am. Neg. Rep. 15.

⁷⁹ *Hill v. Kimball*, 76 Tex. 210, 7 L.R.A. 618.

⁸⁰ *Harless v. Southwest Missouri E. R. Co.*, 123 Mo. App. 22, citing local cases.

⁸¹ *Smith v. Atchison, etc. R. Co.*, 122 Mo. App. 85.

⁸² *Friend v. Dunks*, 37 Mich. 25. See *Spray v. Ayotte*, 161 Mich. 593.

⁸³ *Rhodes v. Sperry*, 120 App. Div. (N. Y.) 467.

by the servants of the proprietor of a hotel is a breach of his duty for which he must answer for her injured feelings and humiliation.⁸⁴ A woman decoyed from home by fraud and deceit under circumstances which unfavorably affected her reputation, the defendant using language derogatory thereto, and interfering with her liberty, may recover for mental suffering.⁸⁵ The illegal expulsion of a member of a voluntary unincorporated association, in connection with the loss of the use and enjoyment of the society's property and the privileges of membership, is cause for the recovery of compensation for mental anguish.⁸⁶ Under the Georgia code exemplary damages are recoverable as compensation for wounded feelings or to deter the wrongdoer from repeating the wrong; hence there cannot be a recovery, in addition thereto, for wounded feelings.⁸⁷

On many questions respecting the recovery of damages for mental suffering the law is in a very unsatisfactory state, it being impossible to harmonize the decisions or formulate any rule based on them. Many of the objections to recovery are devoid of real weight, assuming that the suffering is the natural and proximate result of the wrong done, as it clearly was in some of the cases noted in this section—notably the Michigan case and the Illinois case. The objection that an action for such a purpose is without precedent might have been urged to defeat many causes of action which are now recognized; such an objection, generally acquiesced in, would have prevented the development of the law and denied protection to many of the most valued rights which are now protected. Occasionally a court asserts that the recognition of the right of recovery in cases of this class would crowd calendars and open the door to fraud. It may not be asserted with much confidence that such results have been experienced in jurisdictions in which the right is recognized. But if the first result should follow, it may be pertinent to inquire what are the reasons for establishing and

⁸⁴ *De Wolf v. Ford*, 193 N. Y. 397,
21 L.R.A.(N.S.) 860, 127 Am. St.
969.

⁸⁵ *Kurpgeweit v. Kirby*, 88 Neb.
72, 33 L.R.A.(N.S.) 98.

⁸⁶ *Lahiff v. St. Joseph's T. A. Soc.*,
76 Conn. 648, 100 Am. St. 1012, 65
L.R.A. 92.

⁸⁷ *Southern R. Co. v. Jordan*, 129
Ga. 665.

maintaining the judicial establishments? Are they not intended to protect the rights of citizens and to redress their wrongs? And citizens of all classes have the right to resort to them for such purposes. There is as good reason for denying redress to a citizen with a weak body which has been tortiously injured as there is in denying it to one with a weak nervous organization whose rights have been disregarded. The effects of physical injury on different persons, though the injury may be the same so far as external appearances go, vary greatly. But no court has refused redress for that reason. Mental suffering is an element of damages in many classes of actions, and it has not been seriously contended that the common sense of jurors has erred grievously, if at all, in awarding compensation for it. The field of uncertainty is not wider in cases of this class than in some others, and the corrective control which the courts exercise over verdicts can be relied upon to prevent the fraud concerning which such serious apprehensions are seemingly entertained in some tribunals.⁸⁸

The courts are almost agreed in denying redress for sympathetic mental suffering.⁸⁹ Thus, a father cannot recover for grief and anxiety on account of mere physical injuries sustained by a child,⁹⁰ nor because of solicitude for his own and his child's personal safety or welfare.⁹¹ An injured woman may not recover for the suffering caused by the loss of her child because it was born prematurely.⁹² Without proof of substantial harm, incapacity to pursue his ordinary employment or some expense incurred, a seaman thrown from a boat into the

⁸⁸ See *Underwood v. Gulf Ref. Co.*, 128 La. 968, quoting much of this section; *Bowers v. Tel. Co.*, 135 N. C. 504.

⁸⁹ *Adams v. Brosius*, 69 Ore. 513, 51 L.R.A.(N.S.) 36; *Woodstock I. Works v. Stockdale*, 143 Ala. 550. See §§ 21-24.

⁹⁰ *Flemington v. Smithers*, 2 C. & P. 292; *Black v. Carrollton R. Co.*, 10 La. Ann. 33; *Pennsylvania R. Co. v. Kelly*, 31 Pa. 372, 12 Am. Neg. Cas. 534, 72 Am. Dec. 745;

Cowden v. Wright, 24 Wend. 429, 35 Am. Dec. 633. *Contra*, *Trimble v. Spiller*, 7 Mon. (Ky.) 394, 18 Am. Dec. 189. See *Owen v. Brockschmidt*, 54 Mo. 285.

⁹¹ *Ferebee v. Norfolk Southern R. Co.*, 163 N. C. 351; *Wyman v. Leavitt*, 71 Me. 227; *Keyes v. Minneapolis, etc. R. Co.*, 36 Minn. 290; *Texas Mexican R. Co. v. Douglass*, 69 Tex. 694.

⁹² *Morris v. St. Paul City R. Co.*, 105 Minn. 276, 17 L.R.A.(N.S.) 598.

water in case of a collision can recover no damages for the resulting fright.⁹³ As long ago as 1808 Lord Ellenborough charged a jury in an action brought by a husband to recover for the loss of the comfort, fellowship and assistance of his wife and the grief, vexation and anguish of mind he had undergone by reason of her injuries and subsequent death that they could only take into consideration the bruises which he had himself sustained, the loss of his wife's society and the distress of mind he suffered on her account from the time of the accident till the moment of her dissolution.⁹⁴ In an action brought by a husband to recover for mental suffering resulting from surgical malpractice upon his wife the difficulties in the way of the rule suggested were considered by Christiancy, J.⁹⁵ The chief cause of plaintiff's distress of mind must have been the death of his wife in which the injury resulted rather than the pain she suffered during the operation and prior to her death; and it would be very difficult for a jury to apportion his mental agony or to determine how much of it was attributable to one of these causes and how much to the other. If the plaintiff has a right of action on account of his wife's suffering, why may not another of her relatives who may have sustained as much mental agony on the same account as the husband? These considerations, it is said, show the propriety and good sense of the rule which restricts the right of action for mental suffering to the person who has received the physical injury. Had the wife survived, this right of action would have been hers, and neither the husband in his own right nor any other person could have sustained an action for it; her death does not transfer it to him. Damages for such suffering in actions for malpractice are not favored; when allowed they are to be based upon a consideration by the jury of all the facts and circumstances and not upon statements made by witnesses as to their amount.⁹⁶

The rule in England and in most of the American courts is that only compensation for the pecuniary loss which has been sustained by the death of a husband, father, child, or other rel-

⁹³ *The Queen*, 40 Fed. 694.

⁹⁴ *Baker v. Bolton*, 1 Camp. 493.

⁹⁵ *Hyatt v. Adams*, 16 Mich. 180.

⁹⁶ *Stone v. Evans*, 32 Minn. 243.

ative can be recovered against the wrong-doer.⁹⁷ The Scotch law allows a recovery for wounded feelings.⁹⁸ In some states, owing to the language of the statutes, other than pecuniary loss may be recovered for, as where it is expressed that the jury may award such damages "as to it may seem fair and just."⁹⁹ The mental and physical pain of the deceased is not to be considered by the jury in finding the injury which results from his death to the family.¹ But it is otherwise where the right of action of the person who dies survives to his representatives.² There must, however, be proof that mental suffering was endured by the deceased.³

A review of the decisions of the last decade leads to the conclusion that there has been a marked advance in the direction of the recognition of the right of the individual to protection from mental disturbance, especially if that is caused by a wilful act or default. The courts are coming to recognize that peace of mind is as much a legal right as freedom from physical interference. Hence, as has been seen, contracts entered into to secure exemption from annoyance and discomfort are being enforced by imposing upon the parties who breach them liability for the inconvenience, humiliation and discomfort which result, with the required certainty, from their breach. And the progress along this line has extended in several courts to the rec-

⁹⁷ *Blake v. Midland R. Co.*, 18 Q. B. 93; *Railroad v. Wyrick*, 99 Tenn. 500, 511, quoting the text. See ch. 37.

A wife may not recover for the loss of her husband's *consortium* as the result of negligence, such loss being the indirect consequence of the wrong. *Stout v. Kansas City T. R. Co.*, 172 Mo. App. 113.

⁹⁸ *Paterson v. Wallace*, 1 Macq. 748.

⁹⁹ *Wigal v. City of Parkersburg*, 74 W. Va. 25, 52 L.R.A. (N.S.) 465; *Matthews v. Warner*, 29 Gratt. 570, 26 Am. Rep. 396; *Baltimore & O. R. Co. v. Noell*, 32 Gratt. 394; *Bee-son v. Green Mountain G. M. Co.*, 57 Cal. 20 (ruled by a divided court), 13 Am. Neg. Cas. 461; *Mc-*

Keever v. Market St. R. Co., 59 id. 294; *Cleary v. City R. Co.*, 76 id. 240. See *Munro v. Dredging, etc. Co.*, 84 Cal. 515, 525, 18 Am. St. 248.

¹ *Cotton Press Co. v. Bradley*, 52 Tex. 587, 601; *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa, 280, 14 Am. Neg. Cas. 609, 87 Am. Dec. 391.

² *Nashville & C. R. Co. v. Princee*, 2 Heisk. 580; *Same v. Smith*, 6 id. 174; *Collins v. East Tennessee, etc. R. Co.*, 9 id. 841.

³ *Kennedy v. Standard S. R.*, 125 Mass. 90, 15 Am. Neg. Cas. 660, 28 Am. Rep. 214; *Moran v. Hollings*, 125 Mass. 93, 15 Am. Neg. Cas. 660.

ognition of the right to compensation for the consequences of nervous shock or fright. In some courts the progress has been more marked than in others, and it is especially true of the courts which most strictly follow the English cases that they have not kept pace with others. While the English courts are not agreed upon many phases of the law bearing upon this topic the higher of them are not much inclined to move forward along the lines many of the state courts in this country have adopted. The colonial courts are also more inclined to take advanced ground than those of the mother country, especially the Privy Council, the decisions of which are not authority in the English courts, but are binding on the colonial courts. Because there is no uniform ground on which liability for wrongs of the kind referred to is rested or denied it has been necessary to state the cases in more detail than would otherwise be advisable; but in view of the importance of the subject and the discordant opinions concerning it this may be the best way of presenting it for practical purposes.

§ 97. **Same subject; liability of telegraph companies.** During the period between 1883 and 1893 there was a marked development of judicial sentiment in the direction of holding telegraph companies liable for mental suffering caused by negligent delay in delivering messages announcing the serious illness, death or burial of a near relative of the sender or addressee. Since 1893 the trend of judicial sentiment has changed, largely because the highest court of New York, the circuit courts of appeals of the United States and some other eminent courts have denied such liability. The courts (with the exception of that of Indiana) which declared the existence of the liability have adhered to that doctrine, if the rule has not been changed by statute, but most of those which have considered it for the first time in the last twenty years have ranged themselves in opposition to it. The Iowa court is an exception.⁴ According to the view of the courts holding in accordance with the latter if a message delivered to a telegraph company apprises the agent who receives it, or if he is otherwise informed, that it is of immediate

⁴Mentzer v. Western U. Tel. Co., 93 Iowa, 752, 57 Am. St. 294, 28 L.R.A. 72.

importance to the party to whom it is addressed and relates to the illness, death, or burial of some near member of his family the negligent failure to deliver it makes the company liable to him for such mental distress as he may sustain in consequence, or to the sender as may be endured by him if the person who is summoned by it fails to duly arrive by reason of neglect to deliver it to him. A husband may recover for such suffering as he bears as the result of the non-delivery of a message summoning a physician to attend his sick wife;⁵ and there may be a recovery for the increased physical and mental suffering the wife endures on account of the non-attendance of a physician,⁶ or the absence of her husband;⁷ and for the husband's disappointment and suffering in being kept away from the bedside of his sick wife;⁸ for a sister's grief at being prevented from attending a brother in his last illness and arranging for his burial.⁹ Formerly, in Indiana, a husband who telegraphed his brother-in-law that his wife was not expected to live could recover for his mental suffering arising from the fact that the person to whom the message was sent failed to come.¹⁰ Other cases in harmony with those considered are cited in the note,¹¹ as also some which are opposed.¹² If anxiety or distress exists because of knowledge of the illness of a relative, its continuance as the result of the negligent failure to deliver a message which would remove or alleviate it is not, in some courts, an element of damage.¹³ Nei-

⁵ *Western U. Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. 148.

⁶ *Western U. Tel. Co. v. Cooper*, 71 Tex. 507, 1 L.R.A. 728, 10 Am. St. 772.

⁷ *Thompson v. Western U. Tel. Co.*, 107 N. C. 449.

⁸ *Beasley v. Western U. Tel. Co.*, 39 Fed. 181; *Young v. Same*, 107 N. C. 370, 9 L.R.A. 669, 22 Am. St. 883.

⁹ *Wadsworth v. Western U. Tel. Co.*, 86 Tenn. 695, 8 Am. St. 864.

¹⁰ *Reese v. Western U. Tel. Co.*, 123 Ind. 294, 7 L.R.A. 583; overruled in *Western U. Tel. Co. v. Ferguson*, 157 Ind. 64, 54 L.R.A. 846. See § 977.

¹¹ *So Reele v. Western U. Tel. Co.*, 55 Tex. 310, 40 Am. Rep. 805; *Stuart v. Same*, 66 Tex. 580, 59 Am. Rep. 623; *Gulf, etc. R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; *Western U. Tel. Co. v. Wilson*, 69 Tex. 739; *Same v. Adams*, 75 id. 531, 16 Am. St. 920, 6 L.R.A. 844; *Same v. Feegles*, 75 Tex. 537; *Chapman v. Western U. Tel. Co.*, 90 Ky. 265; *Western U. Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. 843. See ch. 22.

¹² *West v. Western U. Tel. Co.*, 39 Kan. 93, 7 Am. St. 530; *Russell v. Same*, 3 Dak. 315. See ch. 22.

¹³ *Rowell v. Western U. Tel. Co.*, 75 Tex. 26, 2 Am. Neg. Rep. 807.

ther is mental distress which has its origin in alarm at and sympathy for another's sufferings.¹⁴ If a telegraph company undertakes to transmit money, with knowledge that a failure to do so with promptness will cause mental distress, it is liable for its neglect to be prompt.¹⁵

In order that a company shall be liable for mental suffering occasioned by negligent failure to transmit or deliver the announcement of the illness or death of the person who may be named therein it must be shown that the message disclosed, or that the operator was informed of, the relation of the parties or the importance of promptness in its delivery.¹⁶ It is enough to establish such liability if the language of the message is reasonably sufficient to put the company upon inquiry as to the relationship, and inform it that its object is to afford the person to whom it is addressed an opportunity to attend upon his relative in his last sickness, or to be present at the funeral in case of death.¹⁷ A different view was taken in Indiana. The message delivered read "my wife is very ill, not expected to live."

¹⁴ *Western U. Tel. Co. v. Wells*, 50 Fla. 474, 2 L.R.A.(N.S.) 1072, 111 Am. St. 129; *Same v. Cooper*, 71 Tex. 507, 1 L.R.A. 728, 10 Am. St. 772.

¹⁵ *Barnes v. Western U. Tel. Co.*, 27 Nev. 438, 65 L.R.A. 666, 103 Am. St. 776; *Western U. Tel. Co. v. Simpson*, 73 Tex. 422.

A telegram was received at G., Texas, by the agent of a woman who sent it from L., California, informing him that her husband had died at L., and that she would leave there the next day, and requesting him to send her \$200. When received at G. the message purported to have been sent from S. It was not repeated. The woman's agent expressed to the company's agent his belief that the message was sent from L., but after being assured that there was no mistake in this respect applied for the transfer of

the money to S., which was done, without any effort on defendant's part to ascertain whether an error had been made. The money did not reach the applicant. The company was liable for her mental suffering.

Where the company knew the financial circumstances of a traveler to whom it was directed to pay money it was liable for the bodily and mental suffering he endured in going without food while traveling. *Western U. Tel. Co. v. Wells*, *supra*.

¹⁶ *Russell v. Western U. Tel. Co.*, 3 Dak. 315; *Western U. Tel. Co. v. Brown*, 71 Tex. 723, 2 L.R.A. 766; *Same v. Kirkpatrick*, 76 Tex. 217, 18 Am. St. 37.

¹⁷ *Western U. Tel. Co. v. Moore*, 76 Tex. 66, 18 Am. St. 25; *Same v. Adams*, 75 Tex. 531, 16 Am. St. 920, 6 L.R.A. 844; *Same v. Feegles*, 75 Tex. 537.

In an action by the sender to recover for mental suffering it was ruled that the language was not a hindrance thereto.¹⁸

§ 98. **Right to compensation not affected by motive.** So far as pecuniary elements of damage and full compensation for injury are concerned, either in actions of tort or for breach of contract, the right of recovery is wholly independent of the motive which induced the act or omission which constitutes the cause of action.¹⁹ In tort the motive may increase the injury and give a right to greater compensation; but in actions upon contract this can seldom occur because contracts are not often made for such objects that a breach can be committed in such manner as to involve other than pecuniary consequences.²⁰ In cases of tort, if the defendant's motive does not enhance the actual injury, it cannot necessitate the allowance of larger damages to compensate it; though, by possibility, it may afford cause for imposing exemplary damages.

§ 99. **Distinction made for bad motive; contracts.** Important distinctions, however, are made against parties who break their contracts as well as against wrong-doers where the cause of action originates in a bad motive.²¹ On executory contracts for the sale of land the vendor who wilfully breaks his contract or is unable to fulfill for causes known to him when he entered into it will be subject to damages for the loss of the bargain;²²

¹⁸ *Reese v. Western U. Tel. Co.*, 123 Ind. 294, 300, 7 L.R.A. 583.

¹⁹ *Sparks v. McCreary*, 156 Ala. 382, 22 L.R.A. (N.S.) 1224; *O'Meallie v. Moreau*, 116 La. 1020; *Krom v. Schoonmaker*, 3 Barb. 647; *Bridgewater G. Co. v. Home G. F. Co.*, 7 C. C. A. 652, 59 Fed. 40; *Bromfield v. Jones*, 4 B. & C. 380. See § 43.

²⁰ *Kniekerbocker I. Co. v. Gardiner D. Co.*, 107 Md. 556, 16 L.R.A. (N.S.) 746; *Magnolia M. Co. v. Gale*, 189 Mass. 124.

In *Enders v. Skannal*, 35 La. Ann. 1000, it is ruled that if a breach of contract is made in a way and accompanied by acts which con-

stitute an offense against the law the damages are not limited to the actual pecuniary loss. See §§ 77, 390 and note.

²¹ *Champlain S. & S. Co. v. State*, 66 N. Y. Misc. 434, quoting the text, and applying it to a case in which land was leased after condemnation proceedings against it were instituted.

²² *Underwood T. Co. v. Century R. Co.*, 165 Mo. App. 131; *Pumpelly v. Phelps*, 40 N. Y. 59; *Bush v. Cole*, 28 id. 261, 84 Am. Dec. 343; *Drake v. Baker*, 34 N. J. L. 358; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Stephenson v. Harrison*, 3 Litt. 170; *Hammond v.*

while a vendor who, in good faith and without fault, finds himself unexpectedly unable to fulfill is only liable to refund the consideration with interest and expenses.²³ The general rule undoubtedly is that in actions upon contracts the motives which induce breaches of them cannot be considered in awarding damages.²⁴ In addition to the cases above stated and those indicated in the next paragraph of this section, as coming within the exception to this rule, actions for breach of marriage promise may be added.²⁵ There is a probability that, owing to the complete obliteration of the distinction formerly existing as to the forms of actions, some misunderstanding may arise on this question. The rule prevails in some states that where the injuries complained of grew out of a contract, though a tort was connected with it, if the claims for both wrongs are so related that they may be conveniently and appropriately tried together, this may be done.²⁶ An action so tried cannot be said, with any regard to legal accuracy, to be an action upon contract. It is an action brought upon the theory that legal rights growing out of a contract have been violated or legal duties resting thereon neglected.

Hannin, 21 Mich. 374, 4 Am. Rep. 490; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *Engel v. Fitch*, 9 B. & S. 85, 10 id. 738. See § 581.

²³ *Flureau v. Thornhill*, 2 W. Bl. 1078; *Walker v. Moore*, 10 B. & C. 416; *Sikes v. Wild*, 1 B. & S. 587, 4 id. 421; *Bain v. Fothergill*, L. R. 6 Ex. 59, L. R. 7 H. of L. 158; *McNair v. Compton*, 35 Pa. 23; *Conger v. Weaver*, 20 N. Y. 140. See § 578.

²⁴ *Carbondale I. Co. v. Burdick*, 67 Kan. 329.

²⁵ *Duche v. Wilson*, 37 Hun, 519; *Houston, etc. R. Co. v. Shirley*, 54 Tex. 125, 142, 148. See *Addis v. Gramophone Co.*, [1909] App. Cas. 488.

The standard writer on the law of damages in England says: "With the single exception of actions for breach of promise of marriage I am not aware of any cases in which it

has been held in England that the motives or conduct of a party breaking a contract, or any injurious circumstance not flowing from the breach itself, could be considered in damages where the action is on the contract." *Mayne's Dam.* (8th ed.) p. 49. See *Jenkins v. Kirtley*, 70 Kan. 801.

In such an action motive does not affect compensatory damages. *Fisher v. Barber* (Tex. Civ. App.), 130 S. W. 871.

²⁶ *Houston, etc. R. Co. v. Shirley*, 54 Tex. 125, 148; *Ball v. Britton*, 58 id. 57; *G., C. & S. F. R. Co. v. Levy*, 59 id. 542, 46 Am. Rep. 269; *New Orleans, etc. R. Co. v. Hurst*, 36 Miss. 660, 8 Am. Neg. Cas. 456; *Wadsworth v. Western U. Tel. Co.*, 86 Tenn. 695, 6 Am. St. 864; *Mentzer v. Same*, 93 Iowa 752, 57 Am. St. 294, 28 L.R.A. 72.

As applied to a carrier the contract it makes with a passenger gives him the right to be carried safely and put down at the place he has designated; the failure to do either is a tort. The carrier is engaged in an employment which devolves a duty upon him; an action on the case will lie for a breach of that duty although it may consist in doing something contrary to an agreement made in the course of such employment by the party upon whom the duty is cast.²⁷ A distinction may very properly be made as to the measure of damages for the breach of a contract where the manner of the party in the wrong is offensive or such as to cause reasonable apprehension of danger to the other.²⁸

A *quantum meruit* claim for services rendered in part performance of a special contract has been made in some jurisdictions to depend on the motive of the servant or contractor in his abandonment of the contract; and compensation for such performance has been allowed only to the laborer or contractor who has acted in good faith; has broken his contract through inability or mistake, and has been denied to the party who has wilfully and selfishly abandoned it.²⁹ Other cases may be cited

²⁷ *Jarvis, C. J.*, in *Courtenay v. Earle*, 10 C. B. 73, 83, interpreting *Brown v. Boorman*, 11 Cl. & F. 1; *Trout v. Watkins L. & U. Co.*, 148 Mo. App. 621, citing the text; *Mahoning Valley R. Co. v. De Pascale*, 70 Ohio, 179, 65 L.R.A. 860.

²⁸ *Enders v. Skannal*, 35 La. Ann. 1000. See *Beaulieu v. Great Northern R. Co.*, 103 Minn. 47, 19 L.R.A. (N.S.) 564.

²⁹ *Yeats v. Ballentine*, 56 Mo. 530; *Kelly v. Bradford*, 33 Vt. 35; *Austin v. Austin*, 47 Vt. 311; *Britton v. Turner*, 6 N. H. 495; *Sinclair v. Tallmadge*, 35 Barb. 602; *Hayward v. Leonard*, 7 Pick. 181; *Atkins v. Barnstable*, 97 Mass. 428; *Snow v. Ware*, 13 Mete. (Mass.) 42; *McKinney v. Springer*, 3 Ind. 59; *Porter v. Woods*, 3 Humph. 56, 39 Am. Dec. 153; *McDonald v. Monta-*

gue, 30 Vt. 357; *Cullen v. Sears*, 112 Mass. 299; *Cardell v. Bridge*, 9 Allen 355; *Walker v. Orange*, 16 Gray 193; *Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564; *Veazie v. Bangor*, 51 Me. 509; *Laton v. King*, 19 N. H. 280; *Bertrand v. Byrd*, 5 Ark. 651; *Wilson v. Wagar*, 26 Mich. 452; *Horn v. Batchelder*, 41 N. H. 86; *Tait v. Sherman*, 10 Iowa, 60; *Baltimore & O. R. Co. v. Lafferty*, 2 W. Va. 104; *Gleason v. Smith*, 9 Cush. 484, 57 Am. Dec. 62; *Thornton v. Place*, 1 M. & R. 218; *Newman v. McGregor*, 5 Ohio, 349, 24 Am. Dec. 293; *Carroll v. Welch*, 26 Tex. 147; *Hillyard v. Crabtree*, 11 Tex. 264, 62 Am. Dec. 475; *Dermott v. Jones*, 23 How. 220, 16 L. ed. 442; *Norris v. School Dist.*, 12 Me. 293, 28 Am. Dec. 182.

where a more liberal scope is allowed in estimating damages for a fraudulent or wanton violation of contract than is ordinarily given in the absence of the element of fraud.³⁰ Thus, the arbitrary refusal to furnish water for land on which crops have been planted is cause for the recovery of the value of the crops at the time of the breach, with the right to irrigate them from then until the end of the season, less their value without such right.³¹ And, besides, less certainty of proof may be sufficient where there is a wilful breach.³²

§ 100. Motives in tort actions. The motive with which a wrong is done in some cases affects the rule by which compensation is measured or losses estimated. Where there is fraud or other intentional wrong compensatory damages are given with a more liberal hand by juries, and their verdicts in such cases are less closely scanned by courts than in cases where that element is absent. There is a tendency, too, to be less strict in the exclusion of remote and uncertain damages, though for this there is doubtful warrant.³³ Where the damages are certain, as for the taking or destruction of property having a well-known and provable value, the rule of compensation is generally the same, whether the loss is by tort or by breach of contract,³⁴ and whether the wrong was wilful or not. But there is a more liberal allowance of damages where the tort is an aggressive one and the entire damages or some part of them are not capable of measurement by some standard of value or definite rule.³⁵ This

³⁰ *Isherwood v. Salene*, 61 Ore. 572, 40 L.R.A.(N.S.) 299; *Dewint v. Wiltse*, 9 Wend. 325; *Jeffrey v. Bigelow*, 13 id. 518, 28 Am. Dec. 476; *Sondes v. Fletcher*, 5 B. & Ald. 835; *Rose v. Beattie*, 2 Nott & McC. 538; *Nurse v. Barns*, T. Raym. 77; *Stuart v. Wilkins*, 1 Doug. 18; *Williamson v. Allison*, 2 East, 446; *Ferrand v. Bouchell*, Harp. 83; *Mullett v. Mason*, L. R. 1 C. P. 559; *Smith v. Thompson*, 8 C. B. 44. See § 77.

³¹ *Peden v. Platte Valley F. & Co.*, 93 Neb. 141; *Chalupa v. Tri-State L. Co.*, 92 Neb. 477.

³² *Chalupa v. L. Co. supra*.

³³ See §§ 43, 96. If mental disturbance or nervous shock results from a spiteful, revengful, wrongful and malicious act and that condition produces injury to health and happiness there may be a recovery for these elements of damage though the person of the plaintiff was not touched. *Shellabarger v. Morris*, 115 Mo. App. 566.

³⁴ *Skinner v. Gibson*, 86 Kan. 431, citing the text.

³⁵ *Krehbiel v. Henkle*, 152 Iowa, 604. So where election officers wilfully refuse to permit a challenged

is justified not only on the ground that the wrong was wilful or malicious, but on certain considerations which emphasize the distinction between uncertain damages caused by torts and by breaches of contracts generally. Contracts are made only by the mutual consent of the respective parties; and each party for a consideration thereby consents that the other shall have certain rights as against him which he would not otherwise possess. In entering into the contract the parties are supposed to understand its legal effect, and consequently the limitations which the law for the sake of certainty has fixed for the recovery of damages for its breach. If not satisfied with the risk which these rules impose the parties may decline to contract or may fix their own rule of damages, when in their nature the amount must be uncertain. Hence when suit is brought upon such contract and it is found that the entire damages actually sustained cannot be recovered without a violation of such rules the deficiency is a loss the risk of which the party voluntarily assumed on entering into the contract for the chance of benefit or advantage which it would have given him in case of performance. His position is one in which he has voluntarily placed himself and in which, but for his own consent, he could not have been placed by the wrongful act of the opposite party alone. Again, in a majority of cases upon contract there is little difficulty from the nature of the subject in finding a rule by which substantial compensation may be readily estimated; and it is only in those cases where this cannot be done and where, from the nature of the stipulations or the subject-matter, the actual damages resulting from a breach are more or less uncertain in their nature or difficult to be shown with accuracy by the evidence under any definite rule that there can be any great failure of justice by adhering to such rule as will most nearly approximate to the desired result. And it is precisely in these classes of cases that the parties have it in their power to protect themselves

elector to qualify. *Lane v. Mitchell*, 153 Iowa, 139. Another instance is furnished where an intermeddler breaks up the relations existing between a man and his wife as com-

pared with an honest interference by the parents of either of them with a proper motive. *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791. See ch. 38.

against any loss to arise from such uncertainty by estimating their own damages in the contract itself and providing for themselves the rules by which the amount shall be measured in case of a breach; and if they neglect this they may be presumed to have assented to such damages as may be measured by the rules which the law, for the sake of certainty, has adopted. None of these considerations have any bearing in an action purely of tort. The injured party has consented to enter into no relation to the wrong-doer by which any hazard of loss should be incurred; nor has he received any consideration or chance of benefit or advantage for the assumption of such hazard; nor has the wrong-doer given any consideration or assumed any risk in consequence of any act or consent of his. The injured party has had no opportunity to protect himself by contract against any uncertainty in the estimate of damages; no act of his has contributed to the injury; he has yielded nothing by consent; and, least of all, has he consented that the wrong-doer might take or injure his property or deprive him of his right for such sum as, by the strict rules which the law has established for the measurement of damages in actions upon contract, he may be able to show with certainty he has sustained by such taking or injury. Especially would it be unjust to presume such consent and to hold him to the recovery of such damages only as may be measured with certainty by fixed and definite rules when the case is one which, from its very nature, affords no elements of certainty by which the loss he has actually suffered can be shown with accuracy by any evidence of which the case is susceptible. Nor is he to blame because the case happens to be one of this character. He has had no choice, no selection. The nature of the case is such as the wrong-doer has chosen to make it; and upon every consideration of justice he is the party who should sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case and the difficulty of accurately estimating the results of his own wrongful act.³⁶ Motive is material where liability for double dam-

³⁶ Per Christiancy, J., in *Allison v. Chandler*, 11 Mich. 552; *Sharon v. Mosher*, 17 Barb. 518; *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec.

234; *Cate v. Cate*, 50 N. H. 144, 9 Am. Rep. 179. See *Wyeman v. Dedy*, 79 Conn. 414.

ages is involved, it resting on the intent with which the act is done.³⁷

§ 101. How motive affects consequences of confusion of goods.

In case of a wrongful confusion of goods, that is, where one fraudulently or wrongfully intermixes his money, corn or hay with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the law, to guard against fraud, allowed no remedy in such case according to the older authorities, but gave the entire property without any account to him whose original domain was invaded.³⁸ There is a tendency in the later adjudications, however, to confine the forfeiture to cases where otherwise the innocent owner of property so mixed cannot be adequately protected. It accords with the preceding views to charge the party whose fraudulent or tortious act caused the confusion with the duty of separating and identifying his own and with any loss resulting from his inability to do so.³⁹ And greater loss cannot properly be charged to him for the purpose of compensation. A person is not damnified by mixing his property in a mass if from it he can withdraw what will be substantially and to all intents and purposes identical with it; and where a man can obtain all that he is entitled to, in order to be in full enjoyment of his own, the law should not bestow on him the property of another.⁴⁰ A reasonable rule, which has much authority to support it, is that one who has confused his own

³⁷ *Long v. Cummings*, 156 Ala. 577; *St. Louis, etc. R. Co. v. Batesville & W. Tel. Co.*, 80 Ark. 499.

³⁸ 2 Black. Com. 404; *Warde v. Eyre*, 2 Bulst. 323; *Ryder v. Hathaway*, 21 Pick. 298; *Willard v. Rice*, 11 Mete. (Mass.) 493, 45 Am. Dec. 296; *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627; *Stephenson v. Little*, 10 Mich. 433; *Claffin v. Continental J. Works*, 85 Ga. 27; *First Nat. Bank v. Schween*, 127 Ill. 573, 11 Am. St. 174; *Franklin v. Gumersell*, 9 Mo. App. 84.

³⁹ *Ayre v. Hixson*, 53 Ore. 19, 133 Am. St. 819; *Lightner M. Co. v. Lane*, 161 Cal. 689; *Holloway S.*

Co. v. City Nat. Bank, 92 Tex. 187.

⁴⁰ Per *Campbell, J.*, in *Stephenson v. Little*, 10 Mich. 433; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Roth v. Wells*, 29 N. Y. 486; *Nowlen v. Colt*, 6 Hill 461, 41 Am. Dec. 756; *Samson v. Rose*, 65 N. Y. 411; *Brackenridge v. Holland*, 2 Blackf. 377, 20 Am. Dec. 123; *Ringgold v. Ringgold*, 1 Har. & Gill 11, 18 Am. Dec. 250; *Bryant v. Ware*, 30 Me. 295; *Stearns v. Raymond*, 26 Wis. 74; *Single v. Barnard*, 29 id. 463; *Schulenburg v. Harriman*, 2 Dill. 398, 21 Wall. 44, 22 L. ed. 551; *The Distilled Spirits*, 11 Wall. 356, 20

property with that of other persons shall lose it when there is a concurrence of these two things; first, that he has fraudulently caused the confusion; and second, that the rights of the other party after the confusion are not capable otherwise of complete protection.⁴¹ But the principle of forfeiture, except when necessary to save the rights of the innocent owner, if there has been a fraudulent admixture, cannot be said to be eliminated from our jurisprudence.⁴² The purpose of the doctrine is to

L. ed. 167; *Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233; *Stuart v. Phelps*, 39 Iowa, 14; *Moore v. Bowman*, 47 N. H. 494; *Goodenow v. Snyder*, 3 G. Greene, 599; *Wood v. Fales*, 24 Pa. 246, 64 Am. Dec. 655; *Wooley v. Campbell*, 37 N. J. L. 163; *Bond v. Ward*, 7 Mass. 123, 5 Am. Dec. 28; *Smith v. Sanborn*, 6 Gray, 134; *Armstrong v. McAlpin*, 18 Ohio St. 184; *Holbrook v. Hyde*, 1 Vt. 286; *Treat v. Barber*, 7 Conn. 274; *Tufts v. McClintock*, 28 Me. 424, 48 Am. Dec. 501; *Colwill v. Reeves*, 2 Camp. 575; *Albee v. Webster*, 16 N. H. 362; *Weil v. Silverstone*, 6 Bush, 698; *Wellington v. Sedgwick*, 12 Cal. 469; *Shumway v. Rutter*, 8 Pick. 443, 19 Am. Dec. 340; *Ames v. Mississippi B. Co.*, 8 Minn. 467; *Bartlett v. Hamilton*, 46 Me. 435; *Leonard v. Belknap*, 47 Vt. 602; *Wyly v. Burnett*, 43 Ga. 438; *Griffith v. Bogardus*, 14 Cal. 410; *Frey v. Demarest*, 16 N. J. Eq. 236; *Elmer v. Loper*, 25 id. 475; *Alley v. Adams*, 44 Ala. 609; *Adams v. Wildes*, 107 Mass. 123; *Cochran v. Flint*, 57 N. H. 514; *Gray v. Parker*, 38 Mo. 160; *Fowler v. Hoffman*, 31 Mich. 215; *Fellows v. Mitchel*, 1 P. Wms. 81; *Taylor v. Plumer*, 3 M. & S. 562; *Reed v. King*, 11 Ky. L. Rep. 615; *Stone v. Quaal*, 36 Minn. 46; *Osborne v. Cargill E. Co.*, 62 Minn. 400; *Blodgett v. Seals*, 78 Miss. 522; *Clark v.*

Monroe Co., 127 Mich. 300; *Elliott v. Hawley*, 34 Wash. 585; *St. Paul B. Co. v. Kemp*, 125 Wis. 138; *McClendon v. McKissack*, 143 Ala. 188; *Nashville L. Co. v. Barefield*, 93 Ark. 353.

⁴¹ *Id.*; *Wright v. Skinner*, 34 Fla. 453; *Claffin v. Beaver*, 55 Fed. 576; *Mugge v. Jackson*, 53 Fla. 323; *Stone v. Marshall O. Co.*, 208 Pa. 85, 65 L.R.A. 218, quoting the text; *Johnson v. Emery*, 31 Utah, 126; *Lamb v. Kincaid*, 38 Can. Sup. Ct. 516; *Union Naval S. Co. v. United States*, 202 Fed. 491, (C. C. A.).

⁴² *Lance v. Butler*, 135 N. C. 419; *Mengal B. Co. v. Moore*, 114 Tenn. 596; *Rabe v. Jourdan*, 46 Tex. Civ. App. 456; *Osborne v. Cargill E. Co.*; *Holloway S. Co. v. City Nat. Bank*, *supra*; *Ryder v. Hathaway*, 21 Pick. 298; *The Idaho*, 93 U. S. 575, 23 L. ed. 978; *Jenkins v. Steanka*, 19 Wis. 126, 18 Am. Dec. 675; *Root v. Bonnema*, 22 Wis. 539; *Stephenson v. Little*, 10 Mich. 433; *Johnson v. Ballou*, 25 Mich. 460; *Willard v. Rice*, 11 Mete. (Mass.) 493, 45 Am. Dec. 226; *Lupton v. White*, 15 Ves. 442; *Wingate v. Smith*, 20 Me. 287; *Dole v. Olmstead*, 36 Ill. 150, 85 Am. Dec. 397; *Loomis v. Greer*, 7 Me. 386; *McDowell v. Rissell*, 37 Pa. 164; *Beach v. Schmultz*, 20 Ill. 185; *Jewett v. Dringer*, 30 N. J. Eq. 291; *Wooley v. Campbell*, 37 N. J. L. 163; *Cl-*

prevent fraud.⁴³ The rule favoring the innocent in case of confusion of property so that it cannot be separated according to ownership should not be applied to the prejudice of the rights of third parties if full protection can be given to the innocent person whose goods have been thus wrongfully used.⁴⁴

§ 102. Where property sued for improved by wrong-doer.

In another class of cases, closely analogous to those relating to confusion of goods, where a tortious taker of property has by his labor enhanced its value, the owner's title not being divested, the latter may retake the same, subject to certain limitations, in its improved condition.⁴⁵ He is precluded from exercising this right when property so taken has lost its identity. But the change which will be deemed to destroy identity where the wrong-doer took the property in good faith, supposing it to be his own or through some other mistake or inadvertence, will not so destroy it as to determine the owner's title and put him to his action for damages if the taking was an intentional wrong. While the authorities are in great confusion on this subject, there is a manifest discrimination against the wilful wrongdoer. By the civil law and the common law alike the owner of the original materials is precluded from following and reclaiming the property after it has undergone a transmutation which converts it into an article substantially different⁴⁶ as by making wine out of another's grapes, oil from his olives, or bread from his wheat; but the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted.⁴⁷ And a very large increase in the value of

flin v. Continental J. Works, 85 Ga. 27; *First Nat. Bank v. Schween*, 127 Ill. 573, 11 Am. St. Rep. 174; *Franklin v. Gumersell*, 9 Mo. App. 84.

⁴³ *Wooley v. Campbell*, *supra*.

⁴⁴ *National Park Bank v. Goddard*, 9 N. Y. Misc. 626. See *Hall v. Hargadine-McK. D. G. Co.*, 23 Tex. Civ. App. 149.

⁴⁵ *Final v. Backus*, 18 Mich. 218; *Brown v. Sax*, 7 Cow. 95; *Bennett v. Thompson*, 13 Ired. 146; *Smith v. Gonder*, 22 Ga. 353; *Curtis v.*

Groat, 6 Johns. 168; *Halleck v. Mixer*, 16 Cal. 574, 76 Am. Dec. 551; *Moody v. Whitney*, 34 Me. 563; *Chandler v. Edson*, 9 Johns. 362; *Riddle v. Driver*, 12 Ala. 590; *Hyde v. Cookson*, 21 Barb. 92; *Dunn v. Oneal*, 1 Sneed. 106, 60 Am. Dec. 140; *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 753.

⁴⁶ 2 Bl. Com. 404.

⁴⁷ *Id.*; *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653; *Forsyth*

the property by labor has been held to have the same effect in favor of such an involuntary wrong-doer.⁴⁸ The law allows him in such cases to make title by his own wrong, it not being wilful, to prevent his suffering the loss of his labor, and not because of the supposed impossibility of tracing the original materials into the more valuable property made therefrom. The authorities, however, are so much in conflict that no test can be deduced from them by which it can be determined what change will suffice to destroy the identity of property so as to prevent the owner from retaking it. It is not enough that trees are converted into saw-logs or timber,⁴⁹ into rails or posts,⁵⁰ into railroad ties, staves, fire wood,⁵¹ or shingles;⁵² that saw-logs are made into boards,⁵³ fire wood,⁵⁴ or coal.⁵⁵

§ 103. **Same subject.** There is not the same difficulty under the authorities in determining when the identity of the property is lost where the tortious taking and conversion were fraudulent. In such a case it is well settled in New York that the wrong-doer is not permitted to acquire property in the goods of another by any change wrought in them by his labor or skill, however great the change may be, provided it can be proven that the improved article was made from the original material.⁵⁶ The action was trover in which this doctrine was first held, and the

v. Wells, 41 Pa. 291, 80 Am. Dec. 617; Swift v. Barnum, 23 Conn. 523.

⁴⁸ Wetherbee v. Green, *supra*. See § 1154.

⁴⁹ Pierrepont v. Barnard, 5 Barb. 364; Symes v. Oliver, 13 Mich. 9; Grant v. Smith, 26 id. 201; Gates v. Rifle B. Co., 70 id. 309; Arpin v. Burch, 68 Wis. 619.

⁵⁰ Snyder v. Vaux, 2 Rawle, 423, 21 Am. Dec. 466; Millar v. Humphries, 2 A. K. Marsh. 446.

⁵¹ Smith v. Gonder, 22 Ga. 353; Heard v. James, 49 Miss. 236; Brewer v. Fleming, 51 Pa. 102; Moody v. Whitney, 34 Me. 563.

⁵² Betts v. Lee, 5 Johns. 348; Chandler v. Edson, 9 id. 362.

⁵³ Brown v. Sax, 7 Cow. 95;

Baker v. Wheeler, 8 Wend. 505; Davis v. Easley, 13 Ill. 192.

⁵⁴ Eastman v. Harris, 4 La. Ann. 193.

⁵⁵ Riddle v. Driver, 12 Ala. 590; Curtis v. Groat, 6 Johns. 168.

In *Silbury v. McCoon* and *Wetherbee v. Green*, *supra*, the means of identifying improved property is discussed. See also *Herdie v. Young*, 55 Pa. 176, 93 Am. Dec. 739; *Single v. Schneider*, 30 Wis. 570.

⁵⁶ *Silbury v. McCoon*, *supra*; *Baker v. Hart*, 52 Hun, 363; *Guckenheimer v. Angevine*, 81 N. Y. 394. See *Silbury v. McCoon*, 6 Hill, 425, 41 Am. Dec. 753, 4 Denio, 332; *Hyde v. Cookson*, 21 Barb. 92.

value of whisky was recovered by the owner of the corn from which it was made. There is a general inclination elsewhere to find some middle ground upon which the rights of the owner may be maintained and yet moderate the unjust consequences of even a wilful trespass more nearly to the standard of compensation, especially where there is not an actual taking of the property and the owner by choice or otherwise seeks to recover the value in damages.⁵⁷ And if an actual retaking is impossible or does not take place and the question is one of mere compensation for the property the law is not quite settled that the improved value may be recovered even of the party who intentionally converted it.⁵⁸ In such actions the question whether the property has so changed as to be no longer capable of identification is not important. The wrong-doer who has taken and converted another's property through mistake is chargeable with its value at the time of conversion; and the wilful wrong-doer by that standard, or the value at same intermediate point, or the final value of the improved article, according to the views of the particular court.⁵⁹ The liability of the innocent purchaser of property from a wilful trespasser whose labor has improved it is the value of the property when it was taken from the original owner. The defendant in such a case is not the proper

⁵⁷ See *Single v. Schneider*, 24 Wis. 301, 30 Wis. 570; *Weymouth v. Chicago & N. R. Co.*, 17 Wis. 550, 84 Am. Dec. 763; *Silsbury v. McCoon*, 4 Denio 332; *Herdie v. Young*, *supra*.

⁵⁸ *Id.*; *Moody v. Whitney*, 34 Me. 563; *Reid v. Fairbanks*, 14 C. B. 729; *Cushing v. Longfellow*, 26 Me. 306.

If the owner brings trespass or trover instead of replevin he elects to take damages according to the measure awarded in such actions—a just and fair compensation for his property as it was before the trespass. *Gates v. Rifle B. Co.*, 70 Mich. 309.

⁵⁹ *Martin v. Porter*, 5 M. & W. 351; *Morgan v. Powell*, 3 Q. B. 278;

Llynvi Co. v. Brogden, L. R. 11 Eq. 188; *Maye v. Tappan*, 23 Cal. 306; *Goller v. Fett*, 30 Cal. 481; *Nesbitt v. St. Paul L. Co.*, 21 Minn. 491; *Foote v. Merrill*, 54 N. H. 490, 20 Am. Rep. 151; *Adams v. Blodgett*, 47 N. H. 219; *Dresser Mfg. Co. v. Waterston*, 3 Mete. (Mass.) 9; *Stockbridge I. Co. v. Cone I. Works*, 102 Mass. 80; *Winchester v. Craig*, 33 Mich. 205; *Bennett v. Thompson*, 13 Ired. 146; *Smith v. Gonder*, 22 Ga. 353; *Wood v. Morewood*, 3 Q. B. 440, note; *Hyde v. Cookson*, 21 Barb. 92; *Heard v. James*, 49 Miss. 239; *Riddle v. Driver*, 12 Ala. 590; *Greeley v. Stilson*, 27 Mich. 153. See *Isle Royale M. C. Co. v. Horton*, 37 Mich. 332.

subject of punishment; the plaintiff's loss is no greater than it would have been if the trespasser had been free from intentional wrong; nor is the defendant's culpability increased thereby.⁶⁰ To allow the owner of the original materials to recover the value increased by the subsequent labor of the wrong-doer is to antagonize two fundamental rights; the right of property, and the right to due compensation for injury. The law gives its sanction to the former by allowing the owner to retake his property by his own act or by the legal process of replevin if it still exists and can be found. Certain changes made in it or its annexation to something else which the law regards as the principal, as to certain wrong-doers at least, have been accepted as putting an end to the owner's right to retake the property though it may in fact exist, or what was obtained from or for it is still in the hands of the wrong-doer and ascertainable by testimony. There is no more necessity for severe consequences to discourage trespass or tortious conversion of property which the wrong-doer improves than where he destroys it or retains it in the same condition. The owner is entitled to no greater measure of reparation in the one case than in the other. The wrong-doer is no more culpable when he improves the property than when he does not. Therefore, since there is a recognized though indefinite limit to the owner's right to reclaim his property with

⁶⁰ Railroad Co. v. Hutchins, 37 Ohio St. 282, 32 id. 571.

And if he purchases part only of the property converted his liability is limited to the value of such part. Moody v. Whitney, 34 Me. 563.

Where minerals are mined fraudulently the trespasser is liable for their value after they are severed from the earth without any deduction for the expense of mining. Martin v. Porter, 5 M. & W. 351; Barton C. Co. v. Cox, 39 Md. 1, 17 Am. Rep. 525; Coleman's App., 62 Pa. 252; Ege v. Kille, 84 id. 333; the last two cases are distinguished and limited in Fulmer's App. 128 id. 24, 15 Am. St. 662. If the mining is done inadvertently or un-

der a *bona fide* belief of right the damages are the fair value of the mineral as if the mine had been purchased. Wood v. Morewood, 3 Q. B. 440, note; Hilton v. Woods, L. R. 4 Eq. 433; Forsyth v. Wells, 41 Pa. 291, 80 Am. Dec. 617. In an action between tenants in common, plaintiff being out of, and defendant in, possession, the damages for working an opened and developed mine are the fair marketable value of the mineral in place—the royalty due for the privilege of removing and manufacturing it in view of all the special circumstances. Fulmer's App., *supra*; Neel's App., 3 Penny. (Pa.) 66.

any accession, and this limit is short of the ultimate point to which testimony would enable him to trace it, there is no more violation of the fundamental right of property by fixing that limit at the point of the first change than at any subsequent one. But when the redress which is given to the owner in his suit is the value or damages to compensate him for the wrong of depriving him of his property the question is not one of allowing him to retake it, but solely of compensation for the loss of it. What is due compensation in such a case is to be ascertained on the same principles as in all other cases: the injured party is to be made good for the loss he has sustained. If his corn has been taken he is to be compensated for corn; he is no more entitled to have its value estimated by the amount of whisky which has been, than by the amount of whisky that can be, made from it, with no deduction for the manufacture, or than the amount the defendant has subsequently sold it for in consequence of the general appreciation of the commodity.⁶¹

§ 104. **Distinctions in the matter of proof.** In cases of tort the principles governing the measurement of compensation are not, as a general thing, different from those which apply in actions upon contract if the tort be not wilful; there are, as we have just seen, some exceptions; and in certain cases within the influence of considerations mentioned in a preceding section,⁶² where the injury is of such a nature or committed under such circumstances that the damages, or some part of them, cannot be ascertained by any definite or certain proof the investigation is conducted by such rules in respect to the quantity, quality and burden of proof that the injured party may suffer no irreparable loss from the stealth, secrecy or complexity of the wrong. The purpose of the law is thus facilitated. Lord Brongham interrogatively expressed it:⁶³ "When did a court of justice, whether administered according to the rules of equity or law, ever listen to a wrong-doer's argument to stay the arm of

⁶¹ *Railroad Co. v. Hutchins*, 37 Ohio St. 282, 294. See the opinion of Bronson, C. J., in the reversed case in *New York (Silsbury v. McCoon)*, 4 Denio 336, 337).

⁶² § 100. See *Chicago, etc. R. Co. v. Word* (Tex. Civ. App.), 158 S. W. 561.

⁶³ In *Docker v. Somes*, 2 Myl. & K. 674.

justice grounded on the steps he himself had successfully taken to prevent his iniquity from being traced? Rather, let me ask, when did any wrong-doer ever yet possess the hardihood to plead in aid of his escape from justice the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying, you had better not make the attempt, for you will find I have made the search very troublesome. The answer is, 'the court will try.'” The intrinsic nature of many wrongs precludes any estimate by witnesses of damages upon the items which a jury may consider, such as bodily or mental pain, disfigurement or impaired faculties; but the jury in many cases involving elements of this nature may be aided by proof of extrinsic facts showing the *status* of the injured party. Either a tort or a breach of contract which destroys or injures anything of a lawful nature belonging to another is a wrong and injury for which, in some reasonable and practicable manner, the law will enable the injured party to measure and recover adequate compensation. Any such act which directly and injuriously affects an established business, as by destruction of the building in which it is conducted, obstructing the approaches necessary to it, fraudulently diverting custom where there was a duty to maintain the good will, by enticing away servants, or by slander or the breach of any agreement of which the profits of a business are the consideration or inducement may require the estimate of a very uncertain loss; but the party whose misconduct or default has necessitated the inquiry cannot object to it on the ground of the uncertainty, though a court will, in such a case, proceed with caution and will not award damages upon mere conjecture.⁶⁴

§ 105. Value of property. The value of property constitutes the measure or an element of damages in a great variety of cases both of tort and of contract, and where there are no such aggravations as call for or justify exemplary damages, in actions in which such damages are recoverable, the value is ascertained and adopted as the measure of compensation for being deprived of the property the same in actions of tort as in those upon contract. In both cases the value is the legal and fixed measure

⁶⁴ Shoemaker v. Acker, 116 Cal. 239.

of damages and there is no discretion with the jury. It is so between vendor and vendee on the failure of either to fulfill a contract of sale and purchase; between employer and employee on a contract for the manufacture of specific articles; where there is a departure from instructions by an agent or a loss through his negligence or misconduct, or that of a bailee or trustee,⁶⁵ as well as where there is a tortious taking or conversion by one standing in no contract relation to the owner. And, moreover, the value is fixed in each instance on similar considerations at the time when, by the defendant's fault, the loss culminates.⁶⁶ And a party who is entitled to recover and

⁶⁵ Where securities have been diverted by a trustee his liability is based on the assumption that they would have been sold at the best price obtainable. If the wrong was done by one whose duty it was to deliver them pursuant to contract his liability is measured by the selling price of the securities when delivery was due. *McNeil v. Fultz*, 38 Can. Sup. Ct. 198.

A trustee may be liable at the option of the *cestui que trust* for the amount lost or the amount of profit made by the breach. *Proprietors of Eastern New Jersey v. Foree*, 72 N. J. Eq. 56.

Under a special contract to return property in as good condition as when it was received a bailee may show the effect of repairs made upon it. *Smith v. Stratton*, 34 Tex. Civ. App. 171.

⁶⁶ *Watson v. Loughran*, 112 Ga. 837, 6 Am. Neg. Rep. 484; *Western Union C. S. Co. v. Ermeling*, 73 Ill. App. 394; *Sanderson v. Read*, 75 id. 190, quoting the text; *Bank v. Reese*, 26 Pa. 143; *Owen v. Routh*, 14 C. B. 327; *Day v. Perkins*, 2 Sandf. Ch. 359; *Shaw v. Holland*, 15 M. & W. 136; *Rand v. White Mts. R. Co.*, 40 N. H. 79; *Pinkerton v. Manchester & L. R.*

Co., 42 N. H. 424; *Bull v. Douglass*, 4 Munf. 303, 6 Am. Dec. 518; *Enders v. Board of Public Works*, 1 Gratt. 364; *Dana v. Fiedler*, 12 N. Y. 48, 62 Am. Dec. 130; *Clement & H. Mfg. Co. v. Meserole*, 107 Mass. 362; *Danforth v. Walker*, 37 Vt. 239; *Girard v. Taggart*, 5 S. & R. 19, 539, 9 Am. Dec. 327; *Ganson v. Madigan*, 13 Wis. 67; *Hale v. Trout*, 35 Cal. 229; *Springer v. Berry*, 47 Me. 330; *Dustan v. McAndrew*, 44 N. Y. 72; *Marshall v. Piles*, 3 Bush, 249; *Camp v. Hamlin*, 55 Ga. 259; *Bozeman v. Rose*, 40 Ala. 212; *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. ed. 71; *Underhill v. Gaff*, 48 Ill. 198; *Bicknall v. Waterman*, 5 R. I. 43; *West v. Pritchard*, 19 Conn. 212; *Gregg v. Fitzhugh*, 36 Tex. 127; *Bush v. Holmes*, 53 Me. 417; *Rider v. Kelley*, 32 Vt. 268, 76 Am. Dec. 176; *Kribs v. Jones*, 44 Md. 396; *Moorehead v. Hyde*, 38 Iowa, 382; *Whitesett v. Forehand*, 79 N. C. 230; *Bell v. Cunningham*, 3 Pet. 69; *Farwell v. Price*, 30 Mo. 587; *Schmertz v. Dwyer*, 53 Pa. 335; *Heinemann v. Heard*, 50 N. Y. 27; *Hancock v. Gomez*, id. 668; *Parsons v. Martin*, 11 Gray, 111; *Scott v. Rogers*, 31 N. Y. 676; *Stearine, etc. Co. v. Heintzmann*, 17 C. B. (N.

must accept its value in place of the property itself should always be allowed interest on that value from the date at which the property was lost or destroyed or converted. Whether he recovers the value for the failure of a vendor or bailee to deliver, or by reason of the destruction, asportation or conversion of the property by a wrong-doer interest is as necessary to complete indemnity as the value itself.⁶⁷ The injured party ought to be put in the same condition, so far as money can do it, in which he would have been if the contract had been fulfilled or the tort had not been committed, or the loss had been instantly repaired when compensation was due.⁶⁸

S.) 56; *Hutchings v. Ladd*, 16 Mich. 494; *Suydam v. Jenkins*, 3 Sandf. 641; *Kennedy v. Whitwell*, 4 Pick. 466; *Adams v. Sullivan*, 100 Ind. 8; *Hartgrove v. Southern C. O. Co.*, 72 Ark. 31, citing the text; *In re Lake*, [1903] 1 K. B. 439. See §§ 45, 1109 for an exception in case of conversion.

In *Ingram v. Rankin*, 47 Wis. 406, 32 Am. Rep. 762, the court say: "The rule fixing the measure of damages in actions for breaches of contract for the delivery of chattels, and in all actions for the wrongful and unlawful taking of chattels, whether such as would formerly have been denominated *trespass de bonis* or trover, at the value of the chattels at the time when delivery ought to have been made, or at the taking or conversion, with interest, is certainly founded upon principle. It harmonizes with the rule which restricts the plaintiff to compensation for his loss and is as just and equitable as any other general rule which the courts have been able to prescribe, and has greatly the ad-

Suth. Dam. Vol. I.—24.

vantage of certainty over all others."

A director and subscriber for shares who joins with other directors in voting that stock but partially paid for is fully paid is liable for the market value of the shares allotted him at the date they were allotted. *In re Manes T. Co.*, 18 Ont. L. R. 572 (court of appeal).

⁶⁷ *Keith v. Booth Fisheries Co.*, — Del. Super. Ct. —, 87 Atl. 715; *Hartgrove v. Southern C. O. Co.*, *supra*; *Young v. Extension D. Co.*, 13 Idaho 174, citing the text; *Boise Valley C. Co. v. Kroeger*, 17 id. 384, 28 L.R.A.(N.S.) 968; *Livesley v. Johnston*, 48 Ore. 40, citing the text; *Watson v. Loughran*, 112 Ga. 837, 6 Am. Neg. Rep. 484; *Sanderson v. Read*, 75 Ill. App. 190, quoting the text; *Chapman v. Chicago, etc. R. Co.*, 26 Wis. 295, 7 Am. Rep. 81; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; *Hamer v. Hathaway*, 33 Cal. 117; *Arpin v. Burch*, 68 Wis. 619.

⁶⁸ *Suydam v. Jenkins*, 3 Sandf. 620.

CHAPTER IV.

ENTIRETY OF CAUSES OF ACTION AND DAMAGES.

SECTION 1.

GENERAL PRINCIPLES.

- § 106. Cause of action not divisible.
- 107. Present and future damages.
- 108. What is an entire demand?
- 109. Entire demand may be severed.
- 110. Contracts to do several things successively or one thing continuously.
- 111. Items of account.
- 112. Continuing obligations.
- 113. Damages accruing subsequent to the action.
- 114-116. Damage to real property.
- 117. Contracts of indemnity.
- 118. Damage to property and injury to person, and injury to the person and damage to reputation by same act.
- 119. What is not a double remedy.
- 120. Prospective damages.
- 121. Certainty of proof of future damages.
- 122. Same subject; action for enticing away apprentice, servant or son, or procuring discharge of servant.
- 123. Future damages for personal injuries.
- 124. Only present worth of future damages given.
- 125. Continuous breach of contract or infraction of rights not an entirety.
- 126. Continuance of wrong not presumed.
- 127. Necessity and advantage of successive actions.

SECTION 2.

PARTIES TO SUE AND BE SUED.

- 128. Damages to parties jointly injured entire.
- 129. Actions under statutes.
- 130. Must be recovered by person in whom legal interest is vested.
- 131. Not joint when contract apportions the legal interests.
- 132. Implied *assumpsit* follows the consideration.
- 133. Effect of release by or death of one of several entitled to entire damages.
- 134. Misjoinder of plaintiffs, when a fatal objection.
- 135. Joinder of defendants; effect of non-joinder and misjoinder.
- 136. How joint liability extinguished or severed.

- 137. Principles on which joint right or liability for tort determined.
- 138. Tortious act not an entirety as to parties injured.
- 139. General and special owners.
- 140. Joint and several liability for torts.
- 141. Same subject.
- 142. Same subject; civil damage statutes; acts of members of partnership.

SECTION 1.

GENERAL PRINCIPLES

§ 106. **Cause of action not divisible.** A cause of action and the damages recoverable therefor are an entirety. The party injured must be plaintiff, and must demand all the damages he has suffered or which he will suffer from the injury, grievance or cause of action of which he complains. He cannot split a cause of action and bring successive suits for parts because he may not be able at first to prove all the items of the demand, or because all the damages have not been suffered. If he attempt to do so a recovery in the first suit, though for less than his whole demand, will be a bar to a second action.¹ The fail-

¹Willingham v. Buckeye Cotton Oil Co., 13 Ga. App. 253; McKnight v. Minneapolis St. Ry. Co., 127 Minn. 207; Lynch v. St. Louis, K. C. & C. Ry. Co., 180 Mo. App. 169; Atkins v. Trowbridge, 162 App. Div. (N. Y.) 161; Nixon v. Fidelity & D. Co., 80 C. C. A. 336, 150 Fed. 574; Watkins v. American Nat. Bank, 134 Fed. 36, 67 C. C. A. 110; Abbott v. 76 L. & W. Co., 161 Cal. 42, citing the text; Doherty v. Schipper, 250 Ill. 128, 34 L.R.A.(N.S.) 557; Chicago v. Duffy, 117 Ill. App. 261; Jackson v. Morgan, 167 Ind. 528; James v. Parsons, 70 Kan. 156; Burdge v. Keelner, 66 Kan. 642; McGaw v. O'Beirne, 126 La. 583; Whitcomb v. Waterville, 99 Me. 75; Sibley v. Nason, 196 Mass. 125, 12 L.R.A.(N.S.) 1173, 124 Am. St. 520; Almquist v. Wilcox, 115 Minn. 37; Bunker v. Hanson, 99 Minn. 426; Myrick v. Purcell, 99 Minn. 457; Yazoo, etc. R. Co. v. Payne, 92 Miss. 126; Birchler v. Boemler, 204 Mo.

554; Vanloon v. Vanloon, 159 Mo. App. 255; Kennedy v. New York, 196 N. Y. 19, 25 L.R.A.(N.S.) 847; Painter v. Norfolk & W. R. Co., 144 N. C. 436; Porter v. Scranton City, 36 Pa. Super. 218; McClure v. Campbell, 42 Wash. 252; Flinn v. Keefe, 37 Nova Scotia, 67; Binns v. Vitagraph Co., 147 App. Div. (N. Y.) 783; (violation of civil rights and libel); Pierce v. Tennessee C., I. & R. Co., 173 U. S. 1, 5 Am. Neg. Rep. 747, 43 L. ed. 591; Trabing v. California N. & I. Co., 121 Cal. 137; Sloane v. Southern California R. Co., 111 Cal. 685, 8 Am. Neg. Cas. 76, 32 L.R.A. 193; Kapischki v. Koch, 180 Ill. 44; Teel v. Miles, 51 Neb. 542; Wadleigh v. Buckingham, 80 Wis. 230; Wells v. National L. Ass'n, 53 L.R.A. 33, 39 C. C. A. 476, 99 Fed. 222; Alie v. Nadeau, 93 Me. 282, 74 Am. St. 346; Reynolds v. Jones, 63 Ark. 259; Thisler v. Miller, 53 Kan. 515, 42 Am. St. 302; Cockley

ure of a party to recover because he has mistaken his remedy does not preclude him from asserting his rights in a proper proceeding. Thus, the failure of a mortgagee of chattels to

v. Brucker, 54 Ohio St. 214; Porter v. Mack, 50 W. Va. 581, 592; North British & M. Ins. Co. v. Cohn, 17 Ohio C. C. 185; State v. Morrison, 60 Miss. 74; Walton v. Ruggles, 180 Mass. 24; Deering v. Johnson, 86 Minn. 172; Macdougall v. Knight, 25 Q. B. Div. 1; Commerce Exch. Nat. Bank v. Blye, 123 N. Y. 132; Bracken v. Atlantic T. Co., 167 N. Y. 510; Baird v. United States, 96 U. S. 430, 34 L. ed. 703; Zirker v. Hughes, 77 Cal. 235; Colvin v. Corwin, 15 Wend. 557; Wagner v. Jacoby, 26 Mo. 532; Smith v. Jones, 15 Johns. 229; Butler v. Wright, 2 Wend. 369; Cornell v. Cook, 7 Cow. 310; Ross v. Weber, 26 Ill. 221; Logan v. Caffrey, 30 Pa. 196; Mason v. Alabama I. Co., 73 Ala. 270; Howard College v. Turner, 71 id. 429, 46 Am. Rep. 326; Richardson v. Eagle Mach. Works, 78 Ind. 422, 41 Am. Rep. 584; North Vernon v. Voegler, 103 Ind. 314, quoting the text; Wichita & W. R. Co. v. Beebe, 39 Kan. 465; Van Meter v. Crews, (Ky.) 148 S. W. 40.

A statute providing that "successful actions may be maintained upon the contract or transaction whenever, after the former action, a new cause of action has arisen thereon," does not apply to actions for additional damages happening or discovered because of some particular breach of a contract. Russell v. Polk County A. Co., 87 Iowa, 233, 43 Am. St. 381.

Various tests have been suggested for determining whether the judgment recovered in one action is a bar to a subsequent action. "The principal consideration is whether it be precisely the same cause of action in both, appearing by proper aver-

ments in a plea, or by proper facts stated in a special verdict or a special case. And one great criterion of this identity is that the same evidence will maintain both actions." Kitchen v. Campbell, 2 W. Bl. 827; Martin v. Kennedy, 2 B. & P. 69, 71; Bruntsden v. Humphrey, 14 Q. B. Div. 141.

"The question is not whether the sum demanded might have been recovered in the former action, the only inquiry is whether the same cause of action has been litigated and considered in the former action." Seddon v. Tutop, 6 T. R. 607.

"Though a declaration contains counts under which the plaintiff's whole claim might have been recovered, yet if no attempt was made to give evidence upon some of the claims they might be recovered in another action." Thorpe v. Cooper, 5 Bing. 129.

"It is evident, therefore, that the application of the rule depends, not upon any technical consideration of the identity of the forms of action, but upon matter of substance." Bruntsden v. Humphrey, *supra*.

"It is not a test of the right of a plaintiff to maintain separate actions that all the claims might have been prosecuted in a single action." Perry v. Dickerson, 85 N. Y. 345, 350, 39 Am. Rep. 663.

If different allegations are required in the pleading and different evidence on the hearing, the cause of action is not split. Stark v. Starr, 94 U. S. 477, 485, 24 L. ed. 276, 278.

But as the rule against splitting causes of action exists merely for the defendant's benefit he waives all objections to such splitting by fail-

recover them by replevin from an officer by whom they were seized under execution, because the law provided a different remedy, does not bar a proper proceeding.² Nor is a judgment for the defendant in replevin, because of the statute of limitations, a bar to an action in trover not affected by that statute.³ Where a sheriff recovers the value of goods taken from him in replevin, because it was not the proper remedy, the owner may recover their value in trover.⁴ If one fails to replevy a chattel because the defendant is only a tenant in common that does not affect his title.⁵ A judgment against the plaintiff in replevin, rendered because he failed to prove a demand, does not bar a subsequent action of that kind.⁶ The obtaining of a judgment for the recovery of personal property and damages for its wrongful detention up to the verdict does not prevent the bringing of another action for further detention pending an unsuccessful appeal.⁷ One whose property has been wrongfully levied upon, as the property of another, is not, by the prosecution to judgment of an action to determine his right of property and acceptance of the benefits thereof, precluded from thereafter bringing an action against the officer for damages sustained on account of the wrongful levy.⁸ The principle forbidding the splitting of causes of action does not prevent one whose property is taken by a single trespass from maintaining replevin for so much of it as was his, and trover for the remainder, of which he was a joint owner,⁹ nor does it prevent the bringing of separate actions by a stockholder

ure to demur. *National Union Fire Ins. Co. v. Denver & R. G. R. Co.*, 44 Utah, 26.

A single action may be brought to recover for the same slander expressed to different persons at different times. *Fred v. Traylor*, 115 Ky. 94.

If injury arises out of a tort, as where it is inflicted through negligence, and there is subsequently a breach of contract toward the person injured in failing to afford him transportation to a hospital there may be a recovery for the whole

wrong in one action: the damages are not separable. *Harding v. Ostrander R. & T. Co.*, 64 Wash. 224.

² *Conn v. Bernheimer*, 67 Miss. 498.

³ *Johnson v. White*, 21 Miss. 584.

⁴ *Kittredge v. Holt*, 58 N. H. 191.

⁵ *Gaar v. Hurd*, 92 Ill. 315.

⁶ *Roberts v. Norris*, 67 Ind. 386.

⁷ *Chestnut v. Sales*, 49 Mont. 318, 52 L.R.A.(N.S.) 1199.

⁸ *Wright v. Cermak*, 186 Ill. App. 41.

⁹ *Huffman v. Knight*, 36 Ore. 581

against a corporation to compel, respectively, the transfer of stock on its books and the acceptance by it of the holder's subscription to new stock to which he would have been entitled to subscribe, as a holder of record, had he been properly registered,¹⁰ nor does it require a lienor, holding two coexistent but separate liens on the same property, to present them in the same suit.¹¹

§ 107. Present and future damages. If one party to a contract prevents the other from performing and thereby earning wages or realizing profits the latter in an action brought at once after the breach may recover damages which will compensate him for his loss.¹² Although by performance the benefits of the contract would accrue at a future time, yet, upon a breach by which such future advantages will be prevented, the injured party may immediately thereafter recover damages equivalent to the loss, so far as he can prove it. And to facilitate the proof the court will not oblige him to anticipate the future state of the market, but will give the plaintiff the benefit of market rates at the time of the breach. Thus, in the leading case in New York¹³ it was argued that inasmuch as the furnishing of the marble would run through a period of five years, of which only about one year and a half had expired at the time of the breach, the benefits which the contractor might have realized from the execution of the contract must be speculative and conjectural, the court and jury having no certain *data* upon which to make the estimate. The court say: "Where the contract . . . is broken before the arrival of the time for full performance and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to

¹⁰ *Bates v. United Shoe Machinery Co.*, 132 C. C. A. 216 Fed. 140.

¹¹ *Union Cent. Life Ins. Co. of Cincinnati, Ohio, v. Drake*, 131 C. C. A. 214 Fed. 536.

¹² *Standard O. Co. v. Denton*, 24 Ky. L. Rep. 906, quoting the text; *Webster v. Casein Co.*, 206 N. Y. 506; *Watson v. Columbia M. Co.*,

118 Ga. 603; *Crowell v. Northwestern Nat. L. Ins. Co.*, 99 Minn. 214; *Martin v. Seaboard A. L. R.*, 70 S. C. 8; *Parker v. McKannon*, 76 Vt. 96. See *Jamison v. Cullom*, 110 La. 781.

¹³ *Masterton v. Mayor*, 7 Hill, 61, 71.

be settled and ascertained according to the existing state of the market at the time the cause of action arose and not at the time fixed for full performance.”¹⁴ But the parties are entitled to the benefit of any facts transpiring subsequently to the bringing of the action which show more clearly the gains prevented by the breach of contract complained of, or the damages sustained from such a cause of action, or any other, the injurious effects of which extend into the future. This point will receive further elucidation when we come to speak of prospective damages.

§ 108. What is an entire demand? The reader's attention is now directed to what constitutes an entire demand or cause of action. Whether a contract be single and entire or apportionable, if there is a total abandonment or breach by one party the other has a single cause of action upon the entire contract if he think proper to act upon the breach as a total one; the better opinion is that he is obliged to do so. A party has a right to break his contract on condition of being liable for the damages which will accrue therefrom at the time he elects to do so. And it is the duty of the other party when notified thereof to exert himself to make the damages as light as possible.¹⁵ What default a party may treat as a total breach of a contract is not always an easy question, and its solution should be looked for in works upon contracts rather than damages, for it depends upon interpretation. Like most other questions of construction it rests upon the intention of the parties and must be discovered in each case by considering the language and the subject-matter

¹⁴ Wolcott v. Mount, 36 N. J. L. 262, 13 Am. Rep. 438; McAndrews v. Tippet, 39 N. J. L. 105; Burrell v. New York & S. S. S. Co., 14 Mich. 34; Roper v. Johnson, L. R. 8 C. P. 167; Frost v. Knight, L. R. 5 Ex. 325; Sutherland v. Wyer, 67 Me. 64; Dugan v. Anderson, 36 Md. 567, 11 Am. Rep. 509; Schell v. Plumb, 55 N. Y. 592; Sibley v. Rider, 54 Me. 463; Fales v. Hemenway, 64 Me. 373; Richmond v. Dubuque, etc. R. Co., 40 Iowa, 264; Tiffin v. Ward, 5 Ore. 450; Howard v. Daly, 61 N. Y. 363, 19 Am. Rep. 285; Gif-

ford v. Waters, 67 N. Y. 80; Crabtree v. Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324; James v. Allen County, 44 Ohio St. 226; Eastern Tennessee, etc. R. Co. v. Staub, 7 Lea 397; Litchenstein v. Brooks, 75 Tex. 196; Kahn v. Kahn, 24 Neb. 209. See McEvoy v. Bock, 37 Minn. 402.

¹⁵ Kalkhoff v. Nelson, 60 Minn. 284; Parker v. Russell, 133 Mass. 74; Dillon v. Anderson, 43 N. Y. 231; Hartland v. General Exch. Bank, 14 L. T. (N. S.) 863; Willoughby v. Thomas, 24 Gratt. 522.

of the contract.¹⁶ If it is single and entire, or to the extent that it is so, it can be the subject of but one action against the defaulting party and the plaintiff must have performed all precedent conditions to place the other in default.¹⁷ After the renunciation of a continuing agreement by one of the parties the other may consider himself absolved from its obligations and may sue for damages; his recovery will be based on what he would have lost by the continued breach down to such time as the contract would be fully performed, less any benefit resulting to the other party by advantages the plaintiff may reason-

¹⁶ *Sterling v. Gregory*, 149 Cal. 117; *Bamberger v. Burrows*, 145 Iowa, 441; *Canton L. Co. v. Liller*, 107 Md. 146; *Ganong v. Brown*, 88 Miss. 53, 117 Am. St. 731; *Clark v. West*, 137 App. Div. (N. Y.) 23; *Cully v. Isham*, 125 id. 97; *Berlin Mach. Works v. Miller*, 59 Wash. 572.

Demands resting on contracts with separate parties, though the party liable for part of them has assumed liability for the others, are not entire. *Gottlieb v. Wolf Co.*, 75 Md. 126.

When the consideration is single and entire the contract is so though the subject of it consists of two or more distinct and independent items. *Cockley v. Brucker*, 54 Ohio St. 214; *Miner v. Bradley*, 22 Pick. 457; *Fish v. Folley*, 6 Hill, 54.

¹⁷ *Menihan Co. v. Hopkins*, 129 Tenn. 24; *New York Nat. Exch. Bank v. Reed*, 232 Ill. 123; *Hancock v. White Hall T. W. Co.*, 102 Va. 239, citing the text; *Shinn v. Bodine*, 60 Pa. 182, 100 Am. Dec. 560; *Withers v. Reynolds*, 2 B. & Ad. 882; *Shaw v. Turnpike Co.*, 2 P. & W. 454; *Davis v. Maxwell*, 12 Mete. (Mass.) 286; *Harris v. Ligget*, 1 W. & S. 301; *Hopf v. Meyers*, 42 Barb. 270; *Crips v. Talvande*, 4 McCord 20; *Herriter v. Porter*, 23 Cal. 385; *Brown v. Smith*, 12 Cush. 366;

Messick v. Dawson, 2 Harr. 50; *Folsom v. Clemence*, 119 Mass. 473; *Brannenburgh v. Indianapolis, etc. R. Co.*, 13 Ind. 103, 74 Am. Dec. 250; *Hutchinson v. Wetmore*, 2 Cal. 310, 56 Am. Dec. 327; *Camp v. Morgan*, 21 Ill. 255; *Morgan v. McKee*, 77 Pa. 228; *Casselberry v. Forquer*, 27 Ill. 170; *Larkin v. Buck*, 11 Ohio St. 561; *Hall v. Clagett*, 2 Md. Ch. 151; *White v. Brown*, 2 Jones, 403; *Wagner v. Jacoby*, 26 Mo. 532; *Walter v. Richardson*, 11 Rich. 466; *Quigley v. De Haas*, 82 Pa. 267; *Sweeny v. Daugherty*, 23 Iowa, 291; *Stevens v. Lockwood*, 13 Wend. 644; *Blakeney v. Ferguson*, 18 Ark. 347; *Pinney v. Barnes*, 17 Conn. 420; *Farrington v. Payne*, 15 Johns. 432; *Phillips v. Berick*, 16 id. 136, 8 Am. Dec. 299; *Cunningham v. Jones*, 20 N. Y. 486; *James v. Lawrence*, 7 Harr. & J. 73; *Shaffer v. Lee*, 8 Barb. 412; *Campbell v. Hatchett*, 55 Ala. 548; *Parker v. Russell*, 133 Mass. 74; *Norris v. Harris*, 15 Cal. 226, 256, 76 Am. Dec. 480; *McGrath v. Cannon*, 55 Minn. 457; *Reynolds v. Jones*, 63 Ark. 259.

An action to recover money deposited to secure the performance of a contract and for damages for a breach thereof cannot be severed. *Royal Live Fish Co. v. Central Fish Co.*, 159 App. Div. (N. Y.) 151.

ably enjoy by reason of his release from performance. The latter may defer his action for the breach until the expiration of the time for the full performance of the contract.¹⁸

§ 109. **Entire demand may be severed.** A contract originally entire may be severed afterwards by the parties so as to give a right of action for a part performance.¹⁹ This was the case where there was an entire contract for the delivery of logs, and on delivery of a part the purchaser paid therefor partly in money and gave notes for the residue delivered. It was held that the notes could be collected notwithstanding any default in the delivery of other logs to fulfill the contract, but subject to recoupment of the damages for such breach.²⁰ Under an agreement that if the creditor would forbear suing upon the whole of his demand and sue upon a part of it only, and in case of a recovery upon that part the debtor would pay the balance, such agreement was a waiver of the rule in his favor concerning the division of actions, and the recovery upon the part sued upon was

¹⁸ Allen v. Field, 130 Fed. 641, 65 C. C. A. 19; Ford v. Lawson, 133 Ga. 237; O'Neill v. Supreme Council, 70 N. J. L. 410; Smith v. Lumber Co., 142 N. C. 26; Pennsylvania S. Co. v. New York City R. Co., 198 Fed. 721, 117 C. C. A. 503; Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953; following Hoehster v. De la Tour, 2 El. & Bl. 678. *Contra*, Clark v. National B. & C. Co., 67 Fed. 222; Daniels v. Newton, 44 Mass. 530, 19 Am. Rep. 384. The argument in the latter case is said to have been well and sufficiently answered by Judge Lowell in Dingley v. Oler, 11 Fed. 372, where the question is examined and cases cited. To the same effect as Roehm v. Horst, *supra*, are several cases in the federal courts earlier than the decision therein: Dingley v. Oler, *supra*; Foss-S. B. Co. v. Bullock, 8 C. C. A. 14, 59 Fed. 83; Edward Hines L. Co. v. Alley, 19 C. C. A. 599, 73 Fed. 603; Horst v. Roehm, 84 Fed. 565. Speirs v.

Union D. F. Co., 180 Mass. 87, 91, is in harmony with Roehm v. Horst.

¹⁹ O'Beirne v. Lloyd, 43 N. Y. 251; Lee v. Kendall, 56 Hun, 610; Fourth Nat. Bank v. Noonan, 88 Mo. 372; Ryall v. Princee, 82 Ala. 264. See Ebersole v. Supreme Council, 146 Ala. 506, 119 Am. St. 52; Dreyer v. McCormack Real Estate Co., 164 App. Div. (N. Y.) 41.

The defendant's consent to the splitting of a demand is presumed unless he raises the objection. Southern Pac. R. Co. v. United States, 186 Fed. 737, 108 C. C. A. 607.

A person who has been paid for the full performance of an entire contract which is easily severable and has been severed to his advantage may not avoid liability because the act of the other has prevented full performance. Williams v. Arnold, 139 Wis. 177.

²⁰ Fessler v. Love, 43 Pa. 313.

not a bar to an action upon the balance of the claim.²¹ So a *quantum meruit* claim may arise for a part performance on account of the benefit derived from it.²² A city splits up a demand against it by drawing warrants on account of it in different amounts, and cannot defend an action on one of them on the ground that it had previously been sued on another.²³ "In such cases the rights of the plaintiff as assignee serve as the consideration for the new contract, which becomes the ground of the action. The action is on the defendant's promise to the plaintiff, and not upon the assignment or upon any right growing out of it."²⁴ While a general assignment for the benefit of creditors does not usually effect a rescission or termination of an executory contract of the assignor²⁵ it may be otherwise where the subject-matter of the contract establishes a relation of confidence between the parties and the exercise of peculiar skill or knowledge is required. In such a case the plaintiff should not be compensated for what he cannot perform.²⁶

§ 110. Contracts to do several things successively or one thing continuously. A contract to do several things at different times is divisible in its nature and an action will lie upon each default.²⁷ The defendant, the keeper of an office for procuring crews of vessels, in consideration of the plaintiff's agreement to furnish such supplies and advances as might be necessary in the business promised to pay the latter a certain sum for each man shipped and to repay the advances; the undertaking was sev-

²¹ *Mills v. Garrison*, 3 Keyes, 40; *Mandeville v. Welch*, 5 Wheat. 277, 288, 5 L. ed. 87, 90; *Secor v. Sturgis*, 16 N. Y. 548. See *Bliss v. New York Cent. etc. R. Co.*, 160 Mass. 447.

²² See § 90.

²³ *Little v. Portland*, 26 Ore. 235; *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423; *National Exch. Bank v. McLoon*, 73 Me. 498, 40 Am. Rep. 388.

²⁴ *Little v. Portland*, *supra*; *Getchell v. Maney*, 69 Me. 442; *James v. Newton*, 142 Mass. 366, 56 Am. Rep. 692.

²⁵ *New England L. Co. v. Gilbert E. R. Co.*, 91 N. Y. 153; *Vandegrift v. Cowles E. Co.*, 161 N. Y. 435, 48 L.R.A. 685.

²⁶ *United Press v. Abell Co.*, 79 App. Div. (N. Y.) 550.

²⁷ *Puckett v. National A. Ass'n*, 134 Mo. App. 501; *Wheless v. Serano*, 121 id. 17; *Harstad v. Olson*, 57 Wash. 264; *Badger v. Titcomb*, 15 Pick. 409; *Basler v. Nichols*, 8 Ind. 260; *Terry v. Beatrice S. Co.*, 43 Neb. 866; *Coleman v. Hudson*, 2 Sneed, 465; *North Shore L. Co. v. South Side L. Co.*, 176 Ill. App. 96.

eral.²⁸ But when a party has distinct demands or existing causes of action growing out of the same contract or resting in matter of account, which may be joined and sued for in the same action, they must be joined; they constitute an entire cause of action or demand; and if they be split up and a suit brought for a part only and subsequently a second suit for the residue the first action, if determined on the merits, will be a bar.²⁹ This is not to be carried so far as to bar an action on the contract because judgment has been obtained against the party who failed to perform for a tort resulting from the breach. Claims for a wrongful dismissal from employment and to recover wages earned prior thereto are separate and distinct causes of action. The right to wages is the result of the contract; the right to damages grows out of the wrongful termination of it. The amount due under the contract was definite or ascertainable at the time of its breach, and was then payable; the damages were incapable of exact ascertainment until the period covered by the contract expired, as they might be mitigated by the acts of the plaintiff.³⁰ But if a servant performs no labor after his discharge he can maintain but one action for the breach of the contract.³¹ Where an employee who was permanently disabled

²⁸ *Badger v. Titcomb*, *supra*.

²⁹ *Smith v. Lumber Co.*, 142 N. C. 26, 5 L.R.A.(N.S.) 439; *Dock v. Pratt*, 30 Pa. Super. 598; *Hancock v. White Hall T. W. Co.*, 102 Va. 239; *Bendernagle v. Cocks*, 19 Wend. 207; *James v. Lawrence*, 7 Harr. & J. 73; *Atwood v. Norton*, 27 Barb. 638; *Casselberry v. Forquer*, 27 Ill. 170; *Geiser T. M. Co. v. Farmer*, 27 Minn. 428; *Bowe v. Minnesota M. Co.*, 44 Minn. 460; *Hodge v. Shaw*, 85 Iowa, 137, 29 Am. St. 290; *Gilbert v. Boak F. Co.*, 86 Minn. 365, 58 L.R.A. 735; *Olmstead v. Bach*, 78 Md. 132, 22 L.R.A. 74, 44 Am. St. 273. Compare *Williams v. Luckett*, 77 Miss. 394.

³⁰ *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663; *Smith Bros.*

v. Stern, — Misc. (N. Y.) —, 148 N. Y. Supp. 1.

Where a plantation overseer's compensation was to consist of a salary and a share of the crop to be grown, a judgment in an action for salary, after wrongful discharge, did not bar a subsequent action for his share of the crop, as the amount of the latter was only susceptible of definite proof after maturity of the crop. *Sharp v. McBride*, 134 La. 249.

³¹ *Ornstein v. Yahr & L. D. Co.*, 119 Wis. 429; *Waldron v. Hendrickson*, 40 App. Div. (N. Y.) 7; *Barnes v. Coal Co.*, 101 Tenn. 354; *Olmstead v. Bach*, 78 Md. 142, 44 Am. St. 273, 22 L.R.A. 74; *Wright v. Turner*, 1 Stew. 29, 18 Am. Dec. 35.

in the service of his employer compromised his claim for damages in consideration of an agreement that he should receive certain wages monthly and be furnished with specified supplies so long as his ability to work should continue and the plaintiff, on his part, was to do for the defendant such work as he was able to do and release the defendant from liability for damages, and the defendant denied its obligation to pay the stipulated wages and entirely abandoned the contract, the plaintiff was entitled to consider the contract as entirely broken and recover all that was due him when the action was brought and all that might become due under it, which would be its value to him at the time of the breach.³² A contract to issue or procure the issuance of an annual railroad pass to be renewed from year to year during the pleasure of the promisee is divisible.³³

In an action on a lease which contained distinct covenants to pay for manure and for work and labor the defendant pleaded in abatement that a prior action brought for the breach of certain of the covenants was still pending. The plaintiff replied that the covenants upon which that suit was brought were distinct and different from those involved in the pending action. The defendant's demurrer to this replication was sustained and he obtained judgment.³⁴ It is observed of this ruling that if it is subject to any criticism it is because of its application to the facts involved. It may be inferred from the opinion of Judge Cowen that all the covenants in the lease were for the payment of different amounts of money by the lessee to the lessor; and he seemed to regard it like the case of a contract to pay money in instalments, and in this way reached the conclusion that the

³² *Pierce v. Tennessee C. I. & R. Co.*, 173 U. S. 1, 43 L. ed. 591, 5 Am. Neg. Rep. 747; *Eastern Tennessee, etc. R. Co. v. Staub*, 7 Lea, 397.

³³ *Kansas, etc. R. Co. v. Curry*, 6 Kan. App. 561; *Curry v. Kansas, etc. R. Co.* 58 Kan. 6.

³⁴ *Bendernagle v. Cocks*, 19 Wend. 207. See *Badger v. Titcomb*, 15 Pick. 409; *McIntosh v. Lawn*, 47

Barb. 550; *Grand Valley I. Co. v. Fruita I. Co.*, 37 Colo. 483.

The recovery of past-due instalments of rent which accrued under a lease for a term at a fixed monthly rental does not bar another action for instalments which became due subsequently. *Barnes v. Coal Co.*, 101 Tenn. 354; *State v. Pittinger*, 37 Wash. 384.

different breaches constituted a single cause of action.³⁵ But it is now established in New York that the breach of an agreement to pay money in instalments is not a breach of the entire contract, and will not permit a recovery of all the damages in advance.³⁶ "There seems to be a distinction, whether well grounded in principle or not, between a contract for the payment of money in future instalments and a contract for the delivery of goods in future instalments³⁷ as well as a contract for future employment and service."³⁸ A contract which, for an entire consideration, stipulates for the performance of several acts for the benefit of the same person at the same time is entire.³⁹

The principle is settled beyond dispute that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only a part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim arising either upon a contract or from a wrong cannot be divided and made the subject of several suits;⁴⁰ and if several suits be brought for different parts of such a claim the pendency of the first may be pleaded in abatement of the others and a judgment upon the merits

³⁵ *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663.

³⁶ *Wharton v. Winch*, 140 N. Y. 287; *McCready v. Lindenborn*, 172 N. Y. 400, 408; *Davis v. Hibbs*, 73 Wash. 315; *Electrelle Co. v. Maguire*, 215 Mass. 550; *Jacoby v. Peck*, 23 Cal. App. 363.

Where the reputed father of a bastard child has contracted with its mother to pay her a stipulated sum each month for a period of years the mother may sue for each instalment as due or wait until the expiration of the period and sue for the entire amount. *Franklin v. Ford*, 13 Ga. App. 469.

See also, *Luce v. Minard*, 87 Vt. 177, holding that, contrary to the former rule, actions may be main-

tained on successive instalments of rent as they become due.

³⁷ *Nichols v. Seranton S. Co.*, 137 N. Y. 471.

³⁸ *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285.

³⁹ *Richards v. Ontai*, 20 Hawaii, 335; *Alling v. Trevor*, 25 N. Y. Misc. 390 (contract for publication of advertisement in designated newspapers at stated intervals for a gross sum); *Indianapolis, etc. R. Co. v. Koons*, 105 Ind. 507.

⁴⁰ *Chesapeake & O. Ry. Co. v. Blankenship*, 158 Ky. 270; *Eller v. Railroad*, 140 N. C. 140, 3 L.R.A. (N.S.) 225; *Standard O. Co. v. Denton*, 24 Ky. L. Rep. 966, quoting the text.

of either will be available as a bar in the others. But it is entire claims only which cannot be divided within this rule: those which are single and indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes, the prosecution of several actions upon distinct causes of action. The holder of a number of promissory notes may maintain an action on each; a party upon whose person or property successive and distinct trespasses have been committed may bring a separate suit for every trespass, and all demands of whatever nature arising out of independent transactions may be sued upon separately. It makes no difference that the causes of action might be united in a single suit; the right of the party in whose favor they exist to separate suits is not affected by that circumstance.⁴¹ The true distinction between demands or rights of action which are single and entire, and those which are several and distinct, is that the former immediately arise out of one and the same act or contract and the latter out of different acts or contracts.⁴²

⁴¹ *Secor v. Sturgis*, 16 N. Y. 554, overruling *Colvin v. Corwin*, 15 Wend. 557, and disapproving the reasoning in *Guernsey v. Carver*, 8 id. 492. See *Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663.

⁴² *Thisler v. Miller*, 53 Kan. 515; *Nixon v. Fidelity & D. Co.*, 150 Fed. 574, 80 C. C. A. 336, citing the text. See *Manley v. Park*, 68 Kan. 400, 66 L.R.A. 967.

Where the grade of a street has been established and the plaintiff has made improvements upon property abutting thereon in conformity with such grade, and subsequently the city provides by ordinance for changing the grade, and in fact alters it from curb to curb, and afterwards adapts the sidewalk to the grade as finally established, an action for changing the sidewalk cannot be maintained after recovery has been had for cutting down the

grade from curb to curb. *Hempstead v. Des Moines*, 63 Iowa, 36; *Stickford v. St. Louis*, 7 Mo. App. 217 (injury to fee of one lot and to leasehold interest with rent of adjoining lot).

If goods are sold on credit at various times each sale is separate and distinct and an independent cause of action arises on the expiration of the agreed period of credit and as the several amounts become due. *Zimmerman v. Erhard*, 83 N. Y. 74, 38 Am. Rep. 396.

Where property is purchased in several quantities at different times in the execution of a conspiracy the damage done to the vendor is the gist of the action; each purchase is a distinct and several fraud for which a separate action lies. *Lee v. Kendall*, 56 Hun, 610.

Where a train was in motion and a mare and colt were running on the

Perhaps as simple and safe a test as the subject admits of by which to determine whether the case belongs to one class or the other is by inquiring whether it rests upon one or several acts or agreements. In the case of torts each trespass, conversion or fraud gives a cause of action, and but a single one⁴³ in re-

track in front of it and the colt was struck and killed, and the train after running on five hundred feet struck and killed the mare, the killings were separate and independent acts; causes of action based upon them were necessarily composed of different elements, because, while the killing of the colt might have been prevented by the prompt exercise of ordinary care, the last killing was the result of gross negligence. *Missouri Pac. R. Co. v. Scammon*, 41 Kan. 521. See *Bricker v. Missouri Pac. R. Co.*, 83 Mo. 391; *Pucket v. St. Louis, etc. R. Co.*, 25 Mo. App. 650.

The seizure on the same day and under the same writ of two distinct lots of animals in different places, though they are owned by the same person, constitutes distinct trespasses. *Millikin v. Smoot*, 71 Tex. 759, 10 Am. St. 814.

⁴³ *Roberts v. Moss*, 127 Ky. 657, 17 L.R.A.(N.S.) 280 (trespass and conversion); *Werner v. Cincinnati*, 3 Ohio C. C. (N. S.) 276, affirmed by the supreme court without opinion; *Munro v. Pacific Coast D. & R. Co.*, 84 Cal. 515, 18 Am. St. 248; *Lee v. Kendall*, 56 Hun, 610; *Secor v. Sturgis*, 16 N. Y. 554; *Binieker v. Hannibal, etc. R. Co.*, 83 Mo. 660; *Steiglider v. Missouri Pac. R. Co.*, 38 Mo. App. 511; *Knowlton v. New York, etc. R. Co.*, 147 Mass. 606, 1 L.R.A. 625; *Brannenburg v. Indianapolis, etc. R. Co.*, 13 Ind. 103, 74 Am. Dec. 250; *Hicenbotham v. Lowenbein*, 6 Robert. 557; *Marble v. Keyes*, 9 Gray, 221; *Eastman v.*

Cooper, 15 Pick. 276; *Bennett v. Hood*, 1 Allen, 47, 79 Am. Dec. 705; *Trask v. Hartford, etc. R. Co.*, 2 Allen, 331; *Doty v. Brown*, 4 N. Y. 71.

But one cause of action arises from the conversion of various chattels at the same time; after judgment for the plaintiff for some of those converted an action cannot be maintained for the others, although he was unable to include them in the first action because of the defendant's fraudulent conduct (*McCaffrey v. Carter*, 125 Mass. 330); or because of the accidental failure to sue for them in the first action; *Folsom v. Clemence*, 119 Mass. 473; *Herri-ter v. Porter*, 23 Cal. 385; *Farrington v. Payne*, 15 Johns. 432; *Funk v. Funk*, 35 Mo. App. 246. See *Bowker F. Co. v. Cox*, 106 N. Y. 555. This is the rule although part of the property taken was held by the plaintiff as a trustee and part in his own right. *O'Neal v. Brown*, 21 Ala. 482. A tenant who sues for damage to his crops may recover for the whole injury done. *Texas & P. R. Co. v. Bayliss*, 62 Tex. 570. Injuries to distinct pieces of property owned by the same person, by a single act, must be sued for together. *Beronio v. Southern Pac. R. Co.*, 86 Cal. 415, 21 Am. St. 57.

If the plaintiff has interests in possession and reversion he may recover in the same action for an injury affecting both. *Irving v. Media*, 10 Pa. Super. 132, affirmed without opinion, 194 Pa. 648.

spect to contracts, express or implied, each affords one and only one cause of action.⁴⁴ The case of a contract containing several stipulations to be performed at different times is no exception; although an action may be maintained upon each stipulation as it is broken before the time for the performance of the others the ground of action is the stipulation which is in the nature of a several contract.⁴⁵ The same rule governs in torts arising from contracts and those which have their origin in official mis-

⁴⁴ *American S. Co. v. Fidelity T. Co.*, 103 C. C. A. 29, 179 Fed. 699, affirming 175 Fed. 200; *Abbott v. 76 L. & W. Co.*, 161 Cal. 42, citing the text; *Alderson v. Honston*, 154 Cal. 1; *Central Georgia B. Co. v. Carolina P. Co.*, 136 Ga. 693; *Epperson v. Epperson*, 108 Va. 471; *Shires v. O'Connor*, 4 Pa. Super. 465; *Huyett & S. Mfg. Co. v. Chicago Edison Co.*, 167 Ill. 233, 59 Am. St. 272, *Samuel v. Fidelity & C. Co.*, 76 Hun, 308; *Siebert v. Dunn*, 157 App. Div. (N. Y.) 387.

⁴⁵ *Alkire G. Co. v. Tagart*, 60 Mo. App. 389; *Gentles v. Finck*, 23 N. Y. Misc. 153; *Secor v. Sturgis*, 16 N. Y. 554; *Ryall v. Princee*, 82 Ala. 264; *Wilkinson v. Black*, 80 Ala. 329; *Strauss v. Meerteif*, 64 id. 299; *Wilcox v. Plummer*, 4 Pet. 172, 7 L. ed. 821; *Moore v. Juvenal*, 92 Pa. 484; *Reformed, etc. Church v. Brown*, 54 Barb. 191; *Campbell v. Hatchett*, 55 Ala. 548; *O'Beirne v. Lloyd*, 43 N. Y. 248; *Pinney v. Barnes*, 17 Conn. 420; *Rudder v. Price*, 1 H. Black. 550; *Cobb v. I. C. R.*, 38 Iowa, 601; *Clayes v. White*, 83 Ill. 540; *Blakeney v. Ferguson*, 18 Ark. 347; *Kendall v. Stokes*, 3 How. 87, 11 L. ed. 506. *Burgie v. Hicks*, 203 Fed. 340; *Gayton v. Day*, 101 C. C. A. 609, 178 Fed. 249; *Audubon B. Co. v. Andrews*, 111 C. C. A. 92, 187 Fed. 254; *Stauff v. Bingenheimer*, 94 Minn. 309; *Power v. Brown*, 2 Ohio C. C. (N. S.) 320; *Krebs H.*

Co. v. Livesley, 59 Ore. 574, quoting the text; *Bradford v. Montgomery F. Co.*, 115 Tenn. 610, 9 L.R.A. (N.S.) 979; *Hurxthal v. Boom Co.*, 53 W. Va. 87, 97 Am. St. 954. See *Willis v. Jarrett C. Co.*, 152 N. C. 100.

A contract for the delivery of several distinct articles separately priced, is separable. *Barlow Mfg. Co. v. Stone*, 200 Mass. 158.

In *McIntosh v. Lown*, 49 Barb. 550, it was held that the lease in question contained seven distinct and independent covenants, the third of which was to keep the buildings and fences in repair, and the seventh to build, during the continuance of the lease, one hundred and twenty-five rods of fence. It was held that a former action by the lessor upon the covenant for not building the fence was not a bar to an action subsequently brought upon the covenant to repair; that the two covenants were distinct and had no connection with each other, except that they were contained in the same instrument; that the former action must have been to recover for the same identical cause of action, or for some part thereof, as the plaintiff seeks to recover in the second in order to be a bar. See *Warner v. Bacon*, 8 Gray, 497, 69 Am. Dec. 253; *Clark v. Baker*, 5 Mete. (Mass.) 452.

The services of a regularly appointed or permanently employed

feasance. The cause of action arises when the breach of duty occurred, not on the discovery of the effects thereof.⁴⁶

§ 111. **Items of account.** Where there is an account for goods sold or labor performed, where money has been lent to or paid for the use of a party at different times, or several items of claim springing in any way from contract, whether one or separate rights of action exist will, in each case, depend on whether the case is covered by one or by several or separate contracts. The several items may have their origin in one contract, as an agreement to sell and deliver goods, perform work or advance money; and usually, in case of a running account, it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued either for a definite period or at the pleasure of one or both of the parties. But there must be either an express contract or the circumstances be such as to raise an implied contract embracing all the items to make them, where they arise at different times, a single or entire demand or cause of action.⁴⁷ The very fact that there is a running account imports that the parties have not been accustomed to treat every separate matter of charge as a distinct debt, but on the contrary to enter it in the account to become a part thereof and going to make up the debt which consists of the entire balance due.⁴⁸ A creditor cannot bring an action for an

attorney are usually rendered pursuant to some general contract and whatever is due therefor at the termination of the service or employment must be recovered in one action. *Hughes v. Dundee Mort. T. I. Co.*, 26 Fed. 831.

⁴⁶ *Owen v. Western Saving Fund*, 97 Pa. 47, 39 Am. Rep. 794.

⁴⁷ *Secor v. Sturgis*, 16 N. Y. 554; *Borngesser v. Harrison*, 12 Wis. 544; *Walter v. Richardson*, 11 Rich. 466; *Magruder v. Randolph*, 77 N. C. 79; *American B. & S. M. Co. v. Thornton*, 28 Minn. 418; *Oliver v. Holt*, 11 Ala. 574, 46 Am. Dec. 228; *Buck v. Wilson*, 113 Pa. 423; *Wren v. Winter*, 6 Ohio Dec. 176.

Suth. Dam. Vol. I.—25.

The Pennsylvania case cited holds that if several notes are given for the amount of an entire book account, without being taken as an extinguishment of the debt or as consideration for an extension of time, that a suit brought upon the account after some of the notes became due, in which judgment for the amount of those due was given, bars a subsequent suit upon the same account for the amount of the notes which became due after the suit was brought. *Contra*, *Badger v. Titcomb*, 15 Pick. 409, 26 Am. Dec. 611; *Cummington v. Wareham*, 8 Cush. 590.

⁴⁸ *Memmer v. Carey*, 30 Minn.

amount admittedly due upon an account resulting from a single contract, the whole debt being mature, enforce payment of that amount and maintain a second action for a sum alleged to be due on the same account in excess of that first sued for; the fact that the petition in the first case recited that the right to bring such second action was reserved was immaterial.⁴⁹ If bills are payable at the end of every month an action, brought after two months, to recover the sum due at the end of the first month does not bar an action to recover the amount due at the end of the second month.⁵⁰ The business of ship carpenters was carried on in one part of a building under the direction of two of the partners in a firm, and the business of ship chandlers in another part of the same building under the direction of the third partner. Separate books of account were kept by different clerks in the two branches of business, and the partners confined themselves respectively to the management of one of the branches without personally taking part in the other. Work was done and materials furnished from the carpentry branch in the repairing and equipping of a brig, upon the order of her captain, to the amount of \$139, and immediately thereafter goods and articles of ship chandlery to the value of \$521 were furnished to the same brig, on the order of the same captain, at different times through a period of a month. The two accounts did not constitute an entire claim.⁵¹ In an action for money had and received it appeared that the defendant, as steward of the plaintiff, had, between April and November, 1882, received large sums of money for timber sold and in December, 1821, 46*l.* for rents. In a former action a judgment had been taken by default for all that the plaintiff's agent thought the defendant could pay, but afterwards it was ascertained that the steward had received the said amount for rents. All the sums which the plaintiff knew the

458; *Borngesser v. Harrison*, 12 Wis. 544; *Avery v. Fitch*, 4 Conn. 362; *Lane v. Cook*, 3 Day, 255; *Keys v. Hoppe*, 85 Misc. (N. Y.) 364. See note to § 110.

The sale of goods at different times and upon different orders, payment for all being due, consti-

tutes a single demand. *Williams-A. E. Co. v. Model E. Co.*, 134 Iowa 665, 13 L.R.A. (N.S.) 529.

⁴⁹ *Atlanta E. Co. v. Fulton B. & C. Mills*, 106 Ga. 427; *Bolen C. Co. v. Whittaker B. Co.*, 52 Kan. 747.

⁵⁰ *Beck v. Devereaux*, 9 Neb. 109.

⁵¹ *Secor v. Sturgis*, 16 N. Y. 554.

defendant had received at the time when he commenced the former action were considered as included in and constituting one entire cause of action, and the recovery was confined in the last action to the 46L, though the defendant's actual receipts for timber were very much greater than the default judgment.⁵²

Where the captain of a steamboat hired a barge and executed to the owner a contract to pay \$10 per day until returned in good order as received, but fixed no time when it should be returned or the money paid, it was held that the barge was to be returned in a reasonable time considering the circumstances of the service for which it was hired, the stipulated rent or hire would then be payable, the contract was entire and not divisible, and an action brought thereon after the expiration of such reasonable time for the amount then due for the hire of the barge at the rate specified in the contract was a bar to a subsequent action on the same contract for hire accruing after the period embraced in the judgment recovered in the former action.⁵³ "If the barge were not returned upon demand in a reasonable time it would be a breach of the contract for the return. The right of the party in such a case is not to exact the \$10 a day perpetually, but to charge at that rate for a reasonable time and then to collect the value of the barge, and by suing . . . (in the former action) . . . he in effect averred that the reasonable time had expired and the whole became due."⁵⁴

§ 112. **Continuing obligations.** Where the defendant had covenanted, in 1822, that the plaintiff should have a continual supply of water for a mill from his dam and totally failed to perform after 1826, and in 1835 the plaintiff brought an action for the breach and recovered damages sustained by him up to that time, it was held a bar to a second action arising from a subsequent failure to perform.⁵⁵ "It is true the covenant stipulated for a continued supply of water to the plaintiff's mill, and in this respect it may be appropriately styled a continuing

⁵² Bagot v. Williams, 3 B. & C. 235; Risley v. Squire, 53 Barb. 280.

⁵³ Stein v. Steamboat Prairie Rose, 17 Ohio St. 472, 93 Am. Dec. 631.

⁵⁴ See Bradley v. Washington, etc. Co., 9 Pet. 107, 9 L. ed. 68.

⁵⁵ Fish v. Folley, 6 Hill, 54. See

Amerman v. Deane, 132 N. Y. 355,

28 Am. St. 584; Southern Bell Tel.

& T. Co. v. Earle, 118 Ga. 506.

contract. Yet, like any other entire contract, a total breach put an end to it and gave the plaintiff the right to sue for an equivalent in damages. He obtained that equivalent, or should have obtained it, in the former suit." The principle has been applied to an action to recover rent under a lease for a term of years where a suit was brought to recover the rent for one month which was due when another suit was instituted,⁵⁶ and to an action to recover the expense of supporting a non-resident pauper, such expense accruing after the recovery in a former suit of the amount due when the trial was had.⁵⁷ An agreement by one party to support another during life is a similar continuing, entire contract,⁵⁸ if it is unconditional.⁵⁹ A separate action may be maintained whenever there is a new cause of action whether it arises at the same time as another cause or at a different time; but it must exist and be complete before the action is brought.⁶⁰ The recovery on an express contract may not extend beyond what is due upon it when the action was begun.⁶¹ Where the contract is indefinite as to time and negative in character successive actions may be brought, as where one who has sold his interest in a business violates his contract not to re-engage in business in that place.⁶²

§ 113. Damages accruing subsequent to the action. It is not essential, however, that all the injurious effects of the act which

⁵⁶ *Burritt v. Belfy*, 47 Conn. 322; *Reynolds v. Jones*, 63 Ark. 259. See § 110, particularly the New York cases cited.

⁵⁷ *Marlborough v. Sisson*, 31 Conn. 332. See *Pinney v. Barnes*, 17 id. 420.

⁵⁸ *Barthelotte v. Melanson*, 35 New Bruns. 652; *Parker v. Russell*, 133 Mass. 74; *Amos v. Oakley*, 131 id. 413; *Schell v. Plumb*, 55 N. Y. 592; *Sibley v. Rider*, 54 Me. 466; *Fales v. Hemenway*, 64 Me. 373; *Miller v. Wilson*, 24 Pa. 114; *Carpenter v. Carpenter*, 66 Hun. 177; *Shover v. Myrick*, 4 Ind. App. 7. See *Ferguson v. Ferguson*, 2 N. Y. 360.

⁵⁹ *Fay v. Guynon*, 131 Mass. 31;

Howell v. Young, 5 B. & C. 267; *Warner v. Bacon*, 8 Gray, 397, 69 Am. Dec. 253; *Prince v. Moulton*, 1 Ld. Raym. 248; *Harbin v. Green*, Hob. 189; *Coggeshall v. Coggeshall*, 2 Strobb. 51. See *State Bank v. Fox*, 3 Blatchf. 431.

⁶⁰ *Rayburn v. Casualty Co.*, 141 N. C. 425.

Successive actions may be maintained for successive breaches by an irrigation company of its contract to furnish water for crops. *Old River Rice Irr. Co. v. Stubbs*, — Tex. Civ. App. —, 168 S. W. 28.

⁶¹ *McGinnis v. Hardgrove*, 163 Mo. App. 20.

⁶² *Just v. Greve*, 13 Ill. App. 302; *Pierce v. Woodward*, 6 Pick. 206.

constitutes the cause of action should have been developed and suffered before suit; it is immaterial to the right to recover for them when the effects manifest themselves with reference to the time of bringing the suit. But it is practically material to the plaintiff that the effects be so manifest, before and at the time of the trial, as to be susceptible of proof. The actual effects down to the time of the trial are provable; and whether those which may ensue later may be taken into account will depend on whether they are imminent and sufficiently certain.⁶³ Interest which is the accessory of the principal does not stop at the commencement of the action, but may always be computed down to the verdict.⁶⁴ But whether continuing damages may be computed after the commencement of the suit will depend on whether they proceed from the act complained of in that suit as the cause of action, or from some later act constituting a fresh cause of action.⁶⁵ A judgment creditor in lieu of her judgment agreed to accept the bond of another conditioned for her maintenance

⁶³ *Groh v. South*, 121 Md. 639; *Kearney v. Davin*, 162 Ill. App. 37; *Philadelphia, etc. R. Co. v. Karr*, 38 App. D. C. 193; *Wilson v. Oregon-W. R. & N. Co.*, 71 Wash. 102; *Hancock v. White Hall T. W. Co.*, 102 Va. 239, citing the text; *Holser v. Skae*, 169 Mich. 484; *Bryson v. McCone*, 121 Cal. 153; *Samuel v. Fidelity & C. Co.*, 76 Hun, 308; *Salzgeber v. Mickel*, 37 Ore. 216; *Conlon v. McGraw*, 66 Mich. 194; *Coles v. Thompson*, 7 Tex. Civ. App. 666; *Cook v. Redman*, 45 Mo. App. 397, citing the text; *Galveston, etc. R. Co. v. Borsky*, 2 Tex. Civ. App. 545; *Filer v. New York Cent. R. Co.*, 49 N. Y. 42, 5 Am. Neg. Cas. 147; *Hayden v. Albee*, 20 Minn. 159; *Hagan v. Riley*, 13 Gray, 515; *Spear v. Stacy*, 26 Vt. 61; *Fort v. Union Pac. R. Co.*, 2 Dill. 259; *Mobile & M. R. Co. v. Gilmer*, 85 Ala. 422; *Erie & P. R. Co. v. Douthet*, 88 Pa. 243, 32 Am. Rep. 451 (violation of contract to pass plaintiff and

family during their lives over defendant's road).

⁶⁴ *Robinson v. Bland*, 2 Burr, 1077; *Hovey v. Newton*, 11 Pick. 421; *Duncan v. Markeley*, Harp. 276.

⁶⁵ *American China D. Co. v. Boyd*, 148 Fed. 258; *Cooper v. Sillers*, 30 App. D. C. 567; *Stanton v. Lapp*, 113 Md. 324; *Dunham v. Hastings P. Co.*, 95 App. Div. (N. Y.) 360; *Henderson v. Coleman*, 19 Wyo. 183; *Mackay v. Blackston*, 6 New South Wales St. Rep. 248; *Eastern Tennessee, etc. R. Co. v. Staub*, 7 Lea 397; *Pierce v. Tennessee C. I. & R. Co.*, 173 U. S. 1, 43 L. ed. 591, 5 Am. Neg. Rep. 747; *Haskell County Bank v. Bank*, 51 Kan. 39; *Troy v. Cheshire R. Co.*, 23 N. H. 102; *Hicks v. Herring*, 16 Cal. 566; *Phillips v. Terry*, 3 Keyes 313; *Cosgriff v. Miller*, 10 Wyo. 190, quoting the text; *Phelps v. Cape Girardeau W. W. & E. L. Co.*, 165 Mo. App. 454.

during life or to pay her if she preferred it \$150 per annum; the bond to be secured by a mortgage on the land of the obligor. The defendant was employed to prepare the instrument and to have the mortgage entered of record; he withheld it from record until the property became otherwise incumbered by claims to an amount beyond its value and the debtor insolvent. In an action on the case the injured party recovered all that she had lost or was likely to lose; all that the mortgage if duly recorded would have been worth to her.⁶⁶ Where the defendant undertook with the plaintiff to be surety for another if the plaintiff would let to him a specified house at a rent stated and would execute an agreement to that effect, but did not, the defendant's undertaking was entire, not to pay the rent as it became due from time to time, but to execute an obligation to do so, and only one action could be brought on his contract.⁶⁷ A trustee *ex maleficio* cannot be held liable for profits beyond the date of the hearing.⁶⁸

Where a personal injury is committed by a single tortious act that act is a cause of action and all the consequences for which compensation may be recovered are an entirety; recovery therefor may be had once for all in one action and only in one, which may be brought any time after the act is committed.⁶⁹ So of any act done or default made which is a breach of any stipulation in a contract; it is a single and entire cause of action, embracing all ensuing consequences for which compensation is allowed; and however multifarious may be the stipula-

⁶⁶ *Miller v. Wilson*, 24 Pa. 114; *Howell v. Young*, 5 B. & C. 259. See *Walton v. Ruggles*, 180 Mass. 24; *Paro v. St. Martin*, *id.* 29.

⁶⁷ *Waterbury v. Graham*, 4 Sandf. 215.

⁶⁸ *Augusta N. S. Co. v. Forlaw*, 133 Ga. 138.

⁶⁹ *Jenkins v. Atlantic C. L. R. Co.*, 179 Fed. 535; *Smith v. St. Louis T. Co.*, 133 Mo. App. 202, citing the text; *Bower v. The Water Witch*, 19 How. Pr. 241; *Curtis v. Rochester, etc. R. Co.*, 18 N. Y. 534, 9 Am. Neg. Cas. 606; *Drew v. Sixth Ave. R. Co.*,

26 N. Y. 49, 5 Am. Neg. Cas. 78; *Fetter v. Beale*, 1 Salk. 11; *Hochster v. De la Tour*, 2 El. & B. 678; *Miller v. Wilson*, 24 Pa. 114; *Veghte v. Hoagland*, 29 N. J. L. 125; *Thompson v. Ellsworth*, 39 Mich. 719; *Dailey v. Dismal Swamp C. Co.*, 2 Ired. 222; *Chicago & E. R. Co. v. Kern*, 9 Ind. App. 505. See ch. 36.

Proof may be made of the performance of a second surgical operation on the plaintiff though it was performed after suit brought. *Gibson v. Murray*, 120 Ill. App. 296.

tions in it any act which amounts to a total breach constitutes but a single cause of action;⁷⁰ unless perhaps where the stipulations are so distinct and relate to subjects so disconnected as to have no relation or unity but such as results from being made at the same time or contained in one instrument.⁷¹ Nor can an entire claim be severed by partial assignments so as to become the foundation of several suits instead of one unless the debtor consents thereto.⁷²

§ 114. Damage to real property. Actions for single and continuing nuisances and acts which are wrongful only when they result in damage may be successively brought; the damages recoverable are ordinarily confined to those which accrued prior to the time each action was begun.⁷³ In an action for damages occasioned by flooding land a recovery was allowed for killing growing trees though they did not die until after the action was commenced.⁷⁴ In an equity suit to obtain damages for acts done and to restrain their continuance if a temporary in-

⁷⁰ *Russell v. Excelsior S. & Mfg. Co.*, 120 Ill. App. 23; *Wilkinson v. Dunbar*, 149 N. C. 20; *Pacific B. Co. v. United States F. & G. Co.*, 33 Wash. 47; *Jacobs v. Davis*, 34 Md. 204; *Waterbury v. Graham*, 4 Sandf. 215; *Baneroft v. Winspear*, 44 Barb. 209; *Spear v. Stacy*, 26 Vt. 61. See § 623 as to several suits for breach of a covenant against incumbrances.

⁷¹ *McIntosh v. Lown*, 47 Barb. 550.

⁷² *Hancock v. White Hall T. W. Co.*, 102 Va. 239, quoting the three preceding propositions; *Chicago, etc. R. Co. v. Nichols*, 57 Ill. 464; *Fourth Nat. Bank v. Noonan*, 88 Mo. 372; *Loomis v. Robinson*, 76 id. 488; *Chicago & A. R. Co. v. Maher*, 91 Ill. 312.

⁷³ *City of Ottumwa v. Nicholson*, 161 Iowa, 473; *Hayes v. St. Louis & S. F. R. Co.*, 177 Mo. App. 201; *P. Ballantine & Sons v. Public Service Corp.*, 86 N. J. L. 331, L.R.A. 1915A, 369; *Gulf & C. R. Co. v. Hart-*

ley, 88 Miss. 674; *Lewis v. Pennsylvania R. Co.*, 76 N. J. L. 220; *Salmon v. Blasier Mfg. Co.*, 123 App. Div. (N. Y.) 171; *McHenry v. Parkersburg*, 66 W. Va. 533, 29 L.R.A. (N.S.) 860, citing the text; *Blunt v. McCormick*, 3 Denio 283; *Cumberland & O. C. Co. v. Hitchings*, 65 Me. 140; *Thayer v. Brooks*, 17 Ohio, 489; *Loweth v. Smith*, 12 M. & W. 582; *Beach v. Crain*, 2 N. Y. 86; *St. Louis, etc. R. Co. v. Biggs*, 52 Ark. 240, 6 L.R.A. 804; *Cobb v. Smith*, 38 Wis. 21; *Hazeltine v. Case*, 46 id. 301, 32 Am. Rep. 715; *Burnett v. Nicholson*, 86 N. C. 99; *McConnel v. Kibbe*, 29 Ill. 482, 33 id. 175, 85 Am. Dec. 265; *Holmes v. Wilson*, 10 A. & E. 503; *Kinnaird v. Standard O. Co.*, 89 Ky. 468, 25 Am. St. 545, 7 L.R.A. 451; *Illinois Cent. R. Co. v. Wilbourn*, 74 Miss. 284; *Lamm v. Chicago, etc. R. Co.*, 45 Minn. 71, 10 L.R.A. 268.

⁷⁴ *Kellogg v. Kirksville*, 132 Mo. App. 519; *Hayden v. Albee*, 20

junction is disregarded a supplemental bill will lie to recover damages accruing after the bringing of the original bill;⁷⁵ and such damages may be recovered without a supplemental pleading.⁷⁶ In Minnesota the abatement of a nuisance and recovery of damages predicated thereon and incident thereto constitute but one cause of action; and where suit was brought to abate the judgment therein barred a subsequent proceeding for damages based upon the same facts, notwithstanding the pleading in that case would not sustain an award of damages and none were recovered.⁷⁷ Injury to trees on noncontiguous tracts of land by the same act gives but one cause of action, though the trees are valuable for different uses.⁷⁸

Until recently it has been regarded as established by the English decisions that, where injuries to the land of one person result from digging, mining or building upon the property of another, all the damages, past and prospective, were recoverable in one suit brought upon the original cause of action.⁷⁹ Late adjudications have established another rule. In 1861 the house of lords passed upon a question based upon the following facts: A. B. was the owner of a house; C. D. was the owner of a mine under the house and under the surrounding land; C. D. worked the mine and in so doing left insufficient support to the house, which was not damaged nor the enjoyment of it prejudiced until sometime after the workings had ceased. The question submitted was: "Can A. B. bring an action at any time within six years after the mischief happened, or must he bring it within six years after the working rendered the support insufficient?" The opinion was that the action was not barred if brought within six years from the time the mischief was done.⁸⁰ In an

Minn. 159; *Clark v. Nevada L. & M. Co.*, 6 Nev. 202; *Baltimore v. Merryman*, 86 Md. 584. See *Crabtree v. Hagenbaugh*, 25 Ill. 214, 76 Am. Dec. 793.

⁷⁵ *Waterman v. Buck*, 63 Vt. 544.

⁷⁶ *Karns v. Allen*, 135 Wis. 48.

⁷⁷ *Gilbert v. Boak F. Co.*, 86 Minn. 365, 58 L.R.A. 735. See *Murray v. Butte*, 35 Mont. 161.

⁷⁸ *Doak v. Mammoth C. M. Co.*, 192 Fed. 748.

⁷⁹ *Mayne's Dam*, 138.

⁸⁰ *Backhouse v. Bonomi*, 9 H. of L. Cas. 503; *Bonomi v. Backhouse*, El. B. & E. 622, 654.

The surface owner's cause of action does not accrue until the subsidence has happened. If a partial subsidence has occurred, depreciation

earlier case⁸¹ an excavation had been made and a subsidence had resulted, the injury from which had been satisfied. Subsequently another subsidence from the same excavation caused additional injury. In an action to recover for the latter the defense was that the cause of action in respect to the subsidence had been satisfied. The plaintiff pleaded that he was not suing for that cause of action, but for a new and different cause, the subsequent subsidence. The defendant contended that the pleading was bad because it was only a new assignment of damage which was the result of the former cause of action; with this contention the court agreed. In another case⁸² the trustees of a turnpike road made a covered drain by the side of the highway; it was so made that it collected water in it and the water was caused to flow into the plaintiff's mines, and could not go elsewhere. It was answered that the action was barred; but it appeared that the plaintiff had been injured within the time constituting the limitation. The court said the *causa causans* of the injury to the property was a continuing cause; but that cause alone gave to the mine-owner no right of action; it was a cause which if thereby any damage was occasioned to the mine-owner's property would immediately give him a cause of action; it had given him a cause of action sometime ago, but since that the trustees continued it; they might have stopped it; the continuing *causa causans* remained and remained in the power of the trustees, and that caused a new injury to the mine-owner's property, that was a new right of action because it was an injury to his property in each case. In a case⁸³ later than any referred to it was held by a majority of the court, Cockburn, C. J., dissenting, that, where land and buildings are injured by the removal of lateral support through mining operations carried on by the defendant on his own land future damages are recoverable. Up to this point it seems clear that these cases are in conflict; Whitehouse v. Fellowes not being harmonizable with Nick-

in value, because of the risk of future subsidence, cannot be regarded. West Leigh C. Co. v. Tunncliffe, [1908] App. Cas. 27.

⁸¹ Nicklin v. Williams, 10 Ex. 259.

⁸² Whitehouse v. Fellowes, 10 C. B. (N. S.) 765.

⁸³ Lamb v. Walker, 3 Q. B. Div. 389.

lin v. Williams, and the latter being in antagonism with Backhouse v. Bonomi. This is the view of the court of appeal in a case decided in 1884⁸⁴ and in which the conclusion of the dissenting member of the court in Lamb v. Walker was adopted as a correct exposition of the law and as being in harmony with the decision of the house of lords in Backhouse v. Bonomi. As stated by the master of the rolls in Mitchell v. Darley Main Colliery Co. the views of the chief justice in Lamb v. Walker were that where an excavation had been made and a subsidence had taken place, it may be true that for all the effects, both existing and prospective, of that subsidence, the person injured ought to sue at once. But what is to be done as to a new subsidence? The mine-owner has excavated in his own property; he knows that he has caused a subsidence to his neighbor's property, and he knows that that neighbor is entitled to damages for it; will he run the risk of allowing that excavation to continue, the effects of which he may obviate by immediately putting in a wall or propping up his own property? There is nothing to prevent him; will he allow that to continue or will he not? If he does nothing, he is not counteracting the effects on his neighbor's property of something which he has done on his own; he is not counteracting that mischief to his neighbor by doing something on his own property; and if there is a new subsidence that will give his neighbor a new cause of action. It is difficult to conceive that the jury which is to give damages for the first subsidence that is existing ought to give damages for a prospective new subsidence which the defendant has the option and right to prevent; so that, although before the verdict of the first jury is given, or although at the time that that verdict is given, the mine-owner is doing that which will prevent any future damage, nevertheless the jury in the first action ought to take into consideration the prospective injury which might be thought likely to occur at the time when the action was brought. Expressing his own views, the master of the rolls continued: "That seems to me a proposition which, when it is well sifted out and examined, cannot stand, and therefore the chief justice's reason-

⁸⁴ Mitchell v. Darley Main C. Co., West Leigh C. Co., [1906] 2 Ch. 14 Q. B. Div. 125; Tunnicliffe v. 22.

ing, of itself, and without reference to Backhouse v. Bonomi, is conclusive to show that each subsidence is a fresh cause of action. Besides that, it seems to me to be in accordance with what was decided in Backhouse v. Bonomi, and to be the logical result of Backhouse v. Bonomi. . . . Therefore, I agree with the lord chief justice's view that each subsidence is a new cause of action, although the *causa causans* of each subsidence may be the same. It may be argued that the *causa causans* is not the same. The *causa causans* of the first is the excavation, the *causa causans* of the second is, as a matter of fact, the excavation unremedied, or the combining of the excavation and of its remaining unremedied." A similar rule has been applied where the acts complained of were not continuous, as where temporary flash-boards were erected on a dam from time to time or the gates thereof were opened at intervals;⁸⁵ and where the water in a stream had been diverted by placing obstructions therein.⁸⁶ The cases in the state courts are generally in accord with the existing English doctrine.⁸⁷ In Pennsylvania the rule is otherwise.⁸⁸ In Massachusetts a trespass which results in maintaining a wall cannot be recovered for after the recovery and payment of substantial damages for its erection.⁸⁹

§ 115. Same subject. Where injuries result from a temporary trespass upon land all the damage done must be recovered in a single action. If there has been a recovery for the injury inflicted upon a special part of a tract a subsequent action cannot be maintained to recover for that done to another portion of

⁸⁵ Noyes v. Stillman, 24 Conn. 15.

⁸⁶ Beckwith v. Griswold, 29 Barb. 294; Wigle v. Gosfield South, 25 Ont. L. R. 646. See Williams v. Missouri F. Co., 13 Mo. App. 70.

⁸⁷ Cooper v. Sillers, 30 App. D. C. 567; Catlin C. Co. v. Lloyd, 109 Ill. App. 122; Schmoe v. Cotton, 167 Ind. 364; Kansas City N. R. Co. v. Schwake, 70 Kan. 141, 68 L.R.A. 673; Simon v. Nance, 45 Tex. Civ. App. 480; Smith v. Seattle, 18 Wash. 484; St. Louis, etc. R. Co. v. Biggs, 52 Ark. 240, 6 L.R.A. 804; Church of Holy Communion v. Pat-

erson E. R. Co., 66 N. J. L. 218, 55 L.R.A. 81; Bank v. Waterman, 26 Conn. 324.

⁸⁸ Beach v. Scranton, 25 Pa. Super. 430; Noonan v. Pardee, 200 Pa. 474, 55 L.R.A. 410, 86 Am. St. 722, approved in Guarantee T. & S. D. Co. v. Farmers' & M.'s Nat. Bank, 202 Pa. 94, 100. See Pantall v. Rochester & P. C. & I. Co., 18 Pa. Super. 341, 204 Pa. 158, to the same effect.

⁸⁹ Mansfield v. Tenney, 202 Mass. 312, 25 L.R.A.(N.S.) 731.

it at the same time and by the same act.⁹⁰ Where the trespass is continuing or is repeated each repetition or the continuation

⁹⁰ *Mast v. Sapp*, 140 N. C. 533, 5 L.R.A. (N.S.) 379, 111 Am. St. 864; *Pierro v. St. Paul, etc. R. Co.*, 39 Minn. 451, 12 Am. St. 673; *Child v. Boston & F. I. Works*, 19 Fed. 258; *Williams v. Pomeroy C. Co.*, 37 Ohio St. 583; *Jackson v. Emmons*, 19 D. C. App. Cas. 250; *Dick v. Webster*, 6 Wis. 481; *Marshall v. Ulleswater S. N. Co.*, L. R. 7 Q. B. 166; *Lord Oakley v. Kensington C. Co.*, 5 B. & Ald. 138; *Clegg v. Dearden*, 12 Q. B. 575; *Vedder v. Vedder*, 1 Denio, 257; *Beronio v. Southern Pac. R. Co.*, 86 Cal. 415, 21 Am. St. 57; *Hoffman v. Mill Creek C. Co.*, 16 Pa. Super. 631. See *Pantall v. Rochester & P. C. & I. Co.*, 18 id. 341, 204 Pa. 158.

Where damage was done to crops by animals which got access to them through a defective fence from June to December a recovery for the whole damage alleged in one count was proper. *Darby v. Missouri, etc. R. Co.*, 156 Mo. 391; *Cook v. Redman*, 45 Mo. App. 397.

A recovery by a cotenant for damage to land inclosed and used by him does not bar a subsequent action by another cotenant for damage done by the same act. *Gillum v. St. Louis, etc. R. Co.*, 4 Tex. Civ. App. 622.

In *Kansas Pac. R. Co. v. Muhlman*, 17 Kan. 224, *Brewer, J.*, discussed this question in an interesting way. It was there ruled that where A. enters upon the land of B. and digs a ditch thereon there is a direct invasion of the rights of B., a completed trespass, and the cause of action for all injuries resulting therefrom commences to run at the time of the trespass; the fact that A. does not re-enter B.'s land and fill

up the ditch does not make him a continuous wrong-doer and liable to repeated actions as long as the ditch remains unfilled; no one can be charged as a continuing wrong-doer who has not the right and who is not under the duty of terminating that which causes the injury; a party who has dug a ditch upon the land of another has no right to re-enter and fill it up; though unforeseen injury results from a completed act there does not arise a new cause of action for which a recovery may be had after the original wrong has been satisfied.

Clegg v. Dearden, 12 Q. B. 576, is interesting upon the same distinction. There the owner of a coal mine excavated as far as the boundary (which he was by custom entitled to do), and continued the excavation wrongfully into the neighboring mine, leaving an aperture in the coal of that mine, through which water passed into it and did damage. It was held that the party so excavating was liable in trespass for breaking into the neighboring mine, but not in an action on the case for omitting to close up the aperture on his neighbor's soil, though a continuing damage resulted from its being unclosed. It was also held that a new action could not be maintained for damages occasioned by the flow of water in consequence of the aperture remaining unclosed after an action on the case had already been brought for making the aperture and letting in the water, which action was referred to arbitration, and the plaintiff being made a party to the reference in respect of any injury to him by any of the matters alleged in the declaration

after suit brought is a fresh wrong and affords ground for a new action.⁹¹ So where the plaintiff was seized of an ancient house with lights therein and the defendant erected a building whereby the former's lights were obstructed, a recovery for the erection did not bar an action for its continuance.⁹² In another case there had been an action of trespass for placing stumps and stakes on the plaintiff's land, which action had been satisfied; a subsequent action for leaving them there was sustained on the ground that a new trespass was thereby committed.⁹³ In

in such action, had had damages awarded and paid for such injury, although the damage last complained of was subsequent to the award and payment. Lord Denman, C. J., said: "The gist of the action as stated in the declaration is the keeping open and unfilled of an aperture and excavation made by the defendant into the plaintiff's mine. By the custom the defendant was entitled to excavate up to the boundary of his mine without leaving any barrier; and the cause of action, therefore, is the not filling up of the excavation made by him on the plaintiff's side of the boundary and within his mine. It is not, as in the case of *Holmes v. Wilson*, 10 A. & E. 503, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiff; nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiff, as in the case of *Thompson v. Gibson*, 7 M. & W. 456. There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable to an action of trespass to compensate in damages for the loss sustained. The defendant having made an excavation and

aperture in the plaintiff's land was liable to an action of trespass; but no cause of action arises from his omitting to re-enter the plaintiff's land and fill up the excavation; such an omission is neither a continuation of a trespass nor of a nuisance; nor is it the breach of any legal duty." *Cumberland & O. C. Co. v. Hitchings*, 65 Me. 140.

Successive actions lie for the unlawful diversion of water. *Irving v. Media*, 10 Pa. Super. 132, affirmed, without opinion, 194 Pa. 648.

Damages sustained since the suit was begun may be recouped if they are set up by amendment to the plea. *Becker v. Donaldson*, 133 Ga. 864.

⁹¹ *Morrison v. American Tel. & T. Co.*, 115 App. Div. (N. Y.) 744. See *Southern R. Co. v. Cleveland*, 169 Ala. 22.

One action may suffice where a trespass to either real or personal property has been continued without intermission for longer than one day or has been repeated on a subsequent day. *Habig v. Parker*, 76 Neb. 102; *Folger v. Fields*, 12 Cush. 93.

⁹² *Rosewell v. Prior*, 2 Salk. 459.

⁹³ *Bowyer v. Cook*, 4 M. G. & S. 236. Compare *Kansas Pac. R. Co. v. Muhlman*, 17 Kan. 224.

Holmes v. Wilson⁹⁴ trespass was brought against a turnpike company for continuing buttresses on the plaintiff's land to support its road. He had recovered compensation in a former action. After refusing to remove the buttresses on request another action of trespass was brought. It was argued for the defendant that the damages given in the first action were to be regarded as full compensation for all injuries and were to be taken as the full estimated value of the land occupied by the buttresses; that the judgment operated as a purchase of the land. In reply Patterson, J., said: "How can you convert a recovery and payment of damages for the trespass into a purchase? A recovery of damages for a nuisance to land will not prevent another action for continuing it. As to the supposed effect of the judgment in changing the property of the land, the consequence of that doctrine would be that a person who wants his neighbor's land might always buy it against his will, paying only such purchase-money as a jury might assess for damages up to the time of the action. If the property was changed when did it pass? Suppose the plaintiff had brought ejectment for the part occupied by the defendant's buttresses, would the recovery of damages in trespass be a defense? There is no case to show that when land is vested in a party and fresh injuries are done upon it fresh actions will not lie." Where the defendant dug holes in and deepened the bed of a stream in order to increase its water supply, with the result that the water flowed more rapidly past the land of the plaintiff and was of less depth, so that such land was liable to be trespassed on by cattle, the plaintiff was entitled to bring successive actions for separate acts of trespass.⁹⁵ These cases may be distinguishable from the Kansas decision⁹⁶ on the ground that the request to remove the things complained of may be considered as a license to enter for that purpose; but otherwise it is difficult to harmonize them with it. It may be that the true ground of distinction is stated in a Maine case:⁹⁷ "When something has been unlawfully

⁹⁴ 10 A. & E. 503.

⁹⁵ Clarke v. Midland Great Western R. Co., [1895] 2 Irish, 294.

⁹⁶ Kansas Pac. R. Co. v. Muhlman, *supra*.

⁹⁷ Cumberland & O. C. Co. v. Hitchings, 65 Me. 140.

placed upon the land of another, which can and ought to be removed, then, inasmuch as successive actions may be maintained until the wrongdoer is compelled to remove it, the damages in such suit must be limited to the past and cannot embrace the future."

§ 116. **Same subject.** The authorities are not agreed as to the right to bring successive actions where the result of a tort to real property is to create a permanent appropriation of it to the public use, as for railroads, streets, sewers and the like, or to change its condition so as to adapt it to the grade of streets. Where property is taken for public use under the statutes which provide therefor prospective damages as well as others are assessed; they are an entirety and all such as proceed from the appropriation of it to the use for which it is taken are presumed to have been anticipated.⁹⁸ If land is damaged by a permanent structure lawfully erected, which, without any further act except to keep it in repair, must continue to cause the result which is complained of, the owner may recover in one action for damages sustained and those which will fall upon him. The judgment in the action first brought will bar another like action for subsequent injuries from the same cause.⁹⁹ A recovery of prospec-

⁹⁸ *White v. Chicago, etc. R. Co.*, 122 Ind. 317, 7 L.R.A. 257; *Perley v. B. C. & M. R. Co.*, 57 N. H. 212; *Sawyer v. Keene*, 47 id. 173; *Aldrich v. Cheshire R. Co.*, 21 id. 359, 53 Am. Dec. 212; *Fowle v. New Haven & N. Co.*, 107 Mass. 352, 112 id. 334, 17 Am. Rep. 106; *Van Schoick v. Delaware Canal*, 20 N. J. L. 249; *Water Co. v. Chambers*, 13 N. J. Eq. 199; *Waterman v. Connecticut R. Co.*, 30 Vt. 610, 73 Am. Dec. 326; *Chesapeake Canal v. Grove*, 11 Gill & J. 398; *Furniss v. Hudson River R. Co.*, 5 Sandf. 551; *Baltimore R. Co. v. Magruder*, 34 Md. 79, 6 Am. Rep. 310; *Missouri R. Co. v. Haines*, 10 Kan. 439; *LaFayette R. Co. v. New Albany*, 13 Ind. 90, 74 Am. Dec. 246; *Montmorency R. Co. v. Stockton*, 43 Ind. 328; *Evans v. Ilacfer*,

29 Mo. 141; *Baker v. Johnson*, 2 Hill, 342; *Call v. Middlesex*, 2 Gray, 232; *Veghte v. Hoagland*, 29 N. J. L. 125; *Galt v. Chicago, etc. R. Co.*, 157 Ill. 125, citing the text; *Long Island R. Co. v. State*, 157 App. Div. (N. Y.) 12. But see *Lancashire R. Co. v. Evans*, 15 Beav. 322.

It is said in *North Vernon v. Voegler*, 103 Ind. 314, that the construction of works of a public character by municipal officers is clearly analogous to the seizure of land under the right of eminent domain and that all the damages occasioned thereby must be assessed in one action. But this position is controverted by a case considered in the text of this section.

⁹⁹ *Vette v. Sanitary Dist. of Chicago*, 260 Ill. 432; *Shrout v. Chesa-*

tive damages in such a case will bar an action for subsequent damages though caused by an unusual event.¹ In some cases this principle has been extended to the unlawful entry upon land by railroads and the building of tracks or streets thereon,² and in others to the rightful improvement of a street, though the work was negligently done and the negligence was the cause of the action.³ These decisions are rested on the principle that the parties have elected to consider the trespass as permanent, and they apply the rule applicable in condemnation proceedings which requires a final adjustment of the liability of the party condemning. As will appear there are strong objections and weighty authorities in opposition. Some of the courts which entertain this view hold that if the gist of the complaint is not

peake & O. Ry. Co., 157 Ky. 1; Chesapeake & O. Ry. Co. v. Blankenship, 158 Ky. 270; Wasioto & B. M. R. Co. v. Blanton, 160 Ky. 134; Louisville & N. R. Co. v. Whitsell, 125 Ky. 433; Gartner v. Chicago, etc. R. Co., 71 Neb. 444; Tenney v. Cincinnati, 5 Ohio C. C. (N. S.) 459; Settegast v. Houston, etc. R. Co., 38 Tex. Civ. App. 623; Anctil v. Quebec, 33 Can. Sup. Ct. 347 (reservation of the right to further recourse is ineffectual); Fowle v. New Haven & N. Co., 107 Mass. 352; Troy v. Cheshire R. Co., 23 N. H. 83; Chicago & A. R. Co. v. Maher, 91 Ill. 312; Same v. Schaffer, 26 Ill. App. 280; Same v. Loeb, 118 Ill. 203; Swantz v. Muller, 27 Ill. App. 320; Elizabethtown, etc. R. Co. v. Combs, 10 Bush, 382, 19 Am. Rep. 67; Jeffersonville, etc. R. Co. v. Esterle, 13 Bush, 667; North Vernon v. Voegler, 103 Ind. 314; Philadelphia, etc. R. Co. v. Karr, 38 App. D. C. 193; Central Branch Union Pac. R. Co. v. Andrews, 26 Kan. 702; Ohio & M. R. Co. v. Wachter, 123 Ill. 440; Bizer v. Ottumwa H. Co., 70 Iowa 145; Powers v. Council Bluffs, 45 Iowa 652, 24

Am. Rep. 792; Indiana, etc. R. Co. v. Eberle, 110 Ind. 542, 59 Am. Rep. 225; Lafayette v. Nagle, 113 Ind. 425; Frankle v. Jackson, 33 Fed. 371.

But see, *Smith v. Sanitary Dist. of Chicago*, 260 Ill. 453, where subsequent damage was caused by turning additional water into a river previously dammed.

¹ *Fowle v. New Haven & N. Co.*, 112 Mass. 334, 17 Am. Rep. 106.

² *Williams v. Southern Pac. R. Co.*, 150 Cal. 624; *Pinney v. Winsted*, 83 Conn. 411; *Keyser v. Michigan S. R. Co.*, 142 Mich. 143; *Chesapeake & O. R. Co. v. Moats*, 20 Ky. L. Rep. 1757, 50 S. W. 31; *International, etc. R. Co. v. Gieselman*, 12 Tex. Civ. App. 123; *Frankle v. Jackson*, 33 Fed. 371; *Central Branch Union Pac. R. Co. v. Andrews*, 26 Kan. 702; *Indiana, etc. R. Co. v. Eberle*, *supra*; *Baldwin v. Chicago, etc. R. Co.*, 35 Minn. 354.

³ *North Vernon v. Voegler*, 103 Ind. 314; *Powers v. Council Bluffs*, *supra*; *Harper v. Lenoir*, 152 N. C. 723.

the unlawful entry and occupation, but the improper use, that the wrong may be redressed in successive actions.⁴

For damages resulting from the negligent erection or construction of a building or culvert which is erected or constructed pursuant to law, successive actions may be brought.⁵ Damage to crops by the annual overflow of water is susceptible of apportionment and compensation therefor may be recovered in successive actions.⁶ In a New York case, which was fully considered⁷ it is held that, if a railroad is constructed upon or over a highway in which or in the soil of which individuals have private rights, unless the public right is obtained and private rights are lawfully acquired the builders thereof are trespassers, and an adjacent owner may recover only the damages he has sustained up to the commencement of the action; for damages thereafter resulting successive actions may be brought.⁸ There is no presumption that the trespass will be continued, and title to land cannot be acquired otherwise than by purchase or condemnation proceedings.⁹ Criticising the rule held by some courts to the effect that where the character of the injury is permanent and the complaint recognizes the defendant's right to continue in the use of the property and to acquire as the result of the suit the owner's right thereto, in pursuance of which the damages are assessed on the basis of the permanent depreciation of the property and with special reference to a case which holds that damages may be so assessed for negligence in making a lawful improvement in a street,¹⁰ Earl, J., says that in his opinion

⁴ *Lindquest v. Union Pac. R. Co.*, 33 Fed. 372.

⁵ *Ohio & M. R. Co. v. Wachter*, 123 Ill. 440; *Chicago, etc. R. Co. v. Schaffer*, 26 Ill. App. 280, *aff'd* 124 Ill. 112.

⁶ *Oldfield v. Wabash, etc. R. Co.*, 22 Mo. App. 607; *Van Hoozier v. Hannibal, etc. R. Co.*, 70 Mo. 145; *Dickson v. Chicago, etc. R. Co.*, 71 id. 575.

⁷ *Uline v. New York, etc. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661.

⁸ This rule is well established in *Suth. Dam. Vol. I.*—26.

New York. New York Nat. Bank v. Metropolitan E. R. Co., 108 N. Y. 660; *Pond v. Same*, 112 N. Y. 186, 8 Am. St. 734. See *Lahr v. Same*, 104 N. Y. 270; *Henderson v. New York Cent. R. Co.*, 78 N. Y. 423; *Schell v. Plumb*, 55 id. 592.

⁹ *Carl v. Sheboygan, etc. R. Co.*, 46 Wis. 625; *Blesch v. Chicago, etc. R. Co.*, 43 Wis. 183; *Russell v. Brown*, 63 Me. 203; *Cumberland & O. C. Co. v. Hitchings*, 65 id. 140.

¹⁰ *North Vernon v. Voegler*, 103 Ind. 314.

that decision is clearly unsound as to the precise question adjudged. "What right was there to assume that the street would be left permanently in a negligent condition, and then hold that the plaintiff could recover damages upon the theory that the carelessness would forever continue?" The municipality "may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to its embankment, and this it may do after its carelessness and unskilfulness and the consequent damages have been established by a recovery in an action. The moment an action has been commenced, shall the defendant in such a case be precluded from remedying its wrong? Shall it be so precluded after a recovery against it? Does it establish the right to continue to be a wrong-doer forever by the payment of the recovery against it? Shall it have no benefit by discontinuing the wrong, and shall it not be left the option to discontinue it? And shall the plaintiff be obliged to anticipate his damages with prophetic ken and foresee them long before, it may be many years before, they actually occur, and recover them all in his first action? I think it is quite absurd and illogical to assume that a wrong of any kind will forever be continued and that the wrong-doer will not discontinue or remedy it, and that the convenient and just rule, sanctioned by all the authorities in this state, and by the great weight of authority elsewhere, is to permit recoveries in such cases by successive actions until the wrong or nuisance shall be terminated or abated.¹¹ In Pennsylvania if the damage from the taking and from the change of grade arises at the same time the compensation awarded or recovered for the taking embraces the damages resulting from

¹¹ The writer of the opinion cited *Rosewell v. Prior*, 2 Salk, 460; *Bowyer v. Cook*, 4 M., G. & S. 236; *Holmes v. Wilson*, 10 A. & E. 503; *Thompson v. Gibson*, 8 M. & W. 281; *Mitchell v. Darley Main C. Co.*, 14 Q. B. Div. 125; *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765; *Esty v. Baker*, 48 Me. 495; *Russell v. Brown*, 63 id. 203; *Cumberland & O. C. Co. v. Hitchings*, 65 id. 140; *Bare v. Hoffman*, 79 Pa. 71, 21 Am.

Rep. 42; *Thompson v. Morris C. & B. Co.*, 17 N. J. L. 480; *Thayer v. Brooks*, 17 Ohio, 489; *Anderson, etc. R. Co. v. Kernodle*, 54 Ind. 314; *Harrington v. St. Paul, etc. R. Co.*, 17 Minn. 215; *Adams v. Hastings & D. R. Co.*, 18 id. 260; *Ford v. Chicago & N. R. Co.*, 14 Wis. 609, 80 Am. Dec. 791; *Carl v. Sheboygan, etc. R. Co.*, 46 Wis. 625; *Blesch v. Chicago & N. R. Co.*, 43 Wis. 183; *Green v. New York, etc. R. Co.*, 65

the change of grade,¹² but if the latter is made subsequent to the taking, an action to recover the damages done thereby will lie.¹³

§ 117. **Contracts of indemnity.** Upon contracts of indemnity, if there has been a breach before suit brought, any actual damage subsequently resulting therefrom or payments made by the indemnified party covered by the agreement after as well as before the commencement of suit and down to the time of trial may be included in the recovery.¹⁴ So if the defendant's breach of any contract or his wrongful act has involved the injured party in a legal liability to pay money, or he has incurred indebtedness to a third person, or expenses to relieve against the effects of the act which constitutes the cause of action such liability, indebtedness or expenses, paid or not, constitutes an element of damage without regard to the time when it was actually incurred or discharged.¹⁵

§ 118. **Damage to property and injury to person, and injury to the person and damage to reputation by same act.** The question has arisen whether damage inflicted upon property and injury resulting to the person from one act of negligence will give cause for independent actions. Through the negligence of the defendant's servant the plaintiff's cab was damaged and his person injured. An action to recover for the damage done to the cab was successful. Subsequently an action to recover for the personal injuries was instituted. It was held that inasmuch as the damages therefor might have been claimed in the other action, the judgment recovered in it barred the second suit.¹⁶ It was considered that there was but one wrong though there were two consequences. The court of appeal reversed

How. Pr. 154; *Taylor v. Metropolitan E. R. Co.*, 50 N. Y. Super. 311; *Duryea v. Mayor, etc.*, 26 Hun 120, and other cases in New York.

¹² *Righter v. Philadelphia*, 161 Pa. 73.

¹³ *Clark v. Philadelphia*, 171 Pa. 30, 50 Am. St. 790; *Rodgers v. Philadelphia*, 181 Pa. 243.

¹⁴ *Brandrup v. Empire State S.*

Co., 111 Minn. 376, citing the text; *Allen v. Eneroth*, 111 Minn. 395; *Spear v. Stacy*, 26 Vt. 61.

¹⁵ *Spear v. Stacy*, *supra*; *Dixon v. Bell*, 1 Stark. 287; *Hagan v. Riley*, 13 Gray, 515; *Smith v. Howell*, 6 Ex. 730; *Kenyon v. Woodruff*, 33 Mich. 310.

¹⁶ *Brunsdon v. Humphrey*, 11 Q. B. Div. 712.

this judgment, Coleridge, C. J., dissenting. The majority of the court were of the opinion that "two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action in *one* sense may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action."¹⁷ This distinction impresses the writer as too metaphysical for practical purposes, and as out of harmony with the analogies of the law. Assent is compelled to the opposite view by the reason given by the chief justice in his dissenting opinion: "It appears to me that whether the negligence of the servant or the impact of the vehicle which the servant drove be the technical cause of action, equally the cause is one and the same; that the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different *rights*, i. e., his person and his goods, I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two if besides his arm and leg being injured his trousers which contains his leg and his coat sleeve which contains his arm have been torn." The rule which prevails in the state courts generally is in harmony with the views of the dissenting opinion quoted from.¹⁸ In New

¹⁷ *Id.*, 14 Q. B. Div. 141. See *Rose v. Buckett*, [1901] 2 K. B. 449.

¹⁸ *Birmingham S. R. Co. v. Lintner*, 141 Ala. 420; *Shoemaker v. Jackson*, 128 Iowa, 488, 1 L.R.A. (N.S.) 137; *Cole v. Illinois Cent. R. Co.*, 120 Ky. 686; *King v. Chicago, etc. R. Co.*, 80 Minn. 83, 50 L.R.A. 161, 81 Am. St. 238; *Kimball v. Louisville & N. R. Co.*, 94 Miss.

396 (the last case approves this language from the Minnesota case: The different injuries constituted separate items of damage, but only gave rise to one cause of action; that rule of construction should be adopted which will most speedily and economically bring litigation to an end, if at the same time it conserves the ends of justice. There is nothing to be gained in splitting

York, however, the English doctrine is favored. The ground upon which the court rested its ruling is that there is such an essential difference between an injury to the person and an injury to property that makes it impracticable, or, at least, very inconvenient in the administration of justice to blend the two. Different periods of limitation apply, and the law governing the assignment of the two causes of action varies.¹⁹ One of the Texas courts of civil appeals favors the English rule,²⁰ and also one of the courts of appeals of California.²¹

It seems quite consonant with the prevailing view as to the recovery of damages for injury to property and to the person by the same act that one who commits an assault and battery and at the same time makes, in the hearing of others, a slanderous accusations against the assaulted person should respond for both wrongs in the same action, the injury to reputation being pleaded as special damages.²² But in New York the language used may be proved only for the purpose of showing malice.²³

up the rights of an injured party, and much may be saved if one action is made to cover the subject); Hof v. St. Louis T. Co., 213 Mo. 445; Fernandez v. Valdes, 4 Porto Rico Fed. 48; Missonri, etc. R. Co. v. Lightfoot, 48 Tex. Civ. App. 120; Mullerleile v. Brandt, 64 Wash. 280; Pittsburgh, etc. R. Co. v. Carlson, 24 Ind. App. 559, 566, 7 Am. Neg. Rep. 310; Wesley v. Chicago, etc. R. Co., 84 Iowa, 441; Owensboro & H. G. R. Co. v. Coons, 20 Ky. L. Rep. 1678; Braithwaite v. Hall, 168 Mass. 38, 1 Am. Neg. Rep. 623; Bliss v. New York Cent. etc. R. Co., 160 Mass. 447, 455; Nokken v. Avery Mfg. Co., 11 N. D. 399; Von Fragstein v. Windler, 2 Mo. App. 598; Lamb v. St. Louis, etc. R. Co., 33 id. 489.

¹⁹ Reilly v. Sicilian A. P. Co., 170 N. Y. 40, 57 L.R.A. 176, 88 Am. St. 636.

²⁰ Watson v. Texas & P. R. Co., 8

Tex. Civ. App. 144. See Stickford v. St. Louis, 7 Mo. App. 317.

²¹ Schermerhorn v. Los Angeles Pac. R. Co., 18 Cal. App. 454. The code provides that the plaintiff may unite several causes of action where they arise out of "(6) injuries to person, (7) injuries to property," and "the causes of action so united must all belong to one only of these classes." A cause of action for damage to property, injury to character and impairment of health cannot be united. Lamb v. Harbaugh, 105 Cal. 680.

²² Birmingham R., L. & P. Co. v. Norris, 2 Ala. App. 610, citing Carriek v. Joachim, 126 La. 5, 28 L.R.A. (N.S.) 85; Kelley v. Kelley, 8 Ind. App. 606; Conklin v. Consolidated R. Co., 196 Mass. 302; Wadsworth v. Treat, 43 Me. 163.

²³ Galvin v. Starin, 132 App. Div. (N. Y.) 577.

§ 119. **What is not a double remedy.** In an attachment in equity against B. and A. the property of A. was taken as the property of B., and, being perishable, was sold under an order of the court, and afterwards the court decreed that the sheriff pay the proceeds of sale to A. The sheriff failing to pay, A. moved against him and his sureties and judgment was entered for the penalty of his bond, to be discharged by the payment of the proceeds, which they paid. Previous to the decision of the court in favor of A. he brought an action on the bond of the sheriff, against him and his sureties, for the trespass in taking his goods; the former judgment and its payment were set up in defense, but it was held that the action was not thereby barred; A. might recover the difference between the value of the goods at the time they were taken under the attachment and the amount of the proceeds of sale paid him.²⁴ If the master of a whaling vessel abandons the voyage and wrongfully sells the property of the owner on board, the subsequent collection of a part of the proceeds of such sale is no bar to an action against him for breaking up the voyage and disposing of the property, but it reduces the damage.²⁵ One whose goods were maliciously attached upon a writ against a third party and who recovered judgment in replevin against the attaching officer was not thereby barred of his action against the original plaintiff for wrongfully directing the levy. The original attachment was, on the part of the present defendant, a malicious abuse of legal process. Against the officer no malice or improper motive was charged. He could therefore be held to answer in damages only to the extent required to compensate the plaintiff in replevin for the actual pecuniary loss necessarily involved. The plaintiff in the attachment, on the other hand, may be liable for consequential, and, perhaps, for vindictive, damages. The causes of action were different and distinct.²⁶ If part of the goods seized under process have been disposed of, their owner may maintain an action for their conversion and replevin for those in the officer's possession.²⁷

²⁴ Sangster v. Commonwealth, 17 Gratt. 124.

²⁵ Brown v. Smith, 12 Cush. 366

²⁶ Vincent v. McNamara, 70 Conn. 332.

²⁷ Gehlert v. Quinn, 35 Mont. 451,

§ 120. **Prospective damages.** In the application of the rule that all the damages which pertain to a cause of action, without reference to the time when they actually accrue, are entire and cannot be recovered piecemeal by successive actions it is frequently necessary to take into consideration damages which have not been actually suffered either at the commencement of the suit or its trial; for otherwise there would be a very inconvenient postponement of that class of actions or a renunciation of a large part of the compensation due to the injured party. When a cause of action accrues there is a right, as of that date, to all the consequent damages which will ever ensue.²⁸ They are recoverable in one action if they can be proved, and only one can be maintained; it may be brought at any time after the accrual of the right. The question is a practical and legal one in each case whether the cause of action is of such a nature that the injurious consequences of the wrong complained of can reach into the future or whether any subsequent damages will be owing to a continuous fault which may be the foundation of a new action.²⁹ So is the question whether any offered evidence tends to prove future damages which are the legal result of the wrong which constitutes the cause of action, and whether the sum of the evidence in the particular case is sufficient for the consideration of the jury.

If a growing crop is destroyed it can, of course, never be shown with absolute certainty that but for its destruction it would have matured; nor that one party who is stopped by the

119 Am. St. 864, approving *Huffman v. Knight*, 36 Ore. 581.

²⁸ *Smith v. Minnesota-M. Co.*, 168 Fed. 777; *Alderson v. Houston*, 154 Cal. 1; *Griffing v. Winfield*, 53 Fla. 589, citing the text; *White v. Remick*, 198 Mass. 41; *Mast v. Shaw*, 140 N. C. 533, 5 L.R.A.(N.S.) 379, 111 Am. St. 864, citing the text; *Stumm v. Western U. Tel. Co.*, 140 Wis. 528; *Empie v. Empie*, 35 App. Div. (N. Y.) 51; *Morrison v. McAttee*, 23 Ore. 530; *Fales v. Hemenway*, 64 Me. 373; *Paige v. Barrett*, 151 Mass. 67; *Cook v. Redman*, 45

Mo. App. 397, citing the text; *Emis v. Buckeye Pub. Co.*, 44 Minn. 105; *Bowe v. Minnesota M. Co.*, 47 Minn. 460; *Eric & P. R. Co. v. Douthet*, 88 Pa. 243, 32 Am. Rep. 451; *Commerce Exch. Nat. Bank v. Blye*, 123 N. Y. 132; *Braeken v. Atlantic T. Co.*, 167 N. Y. 510, 82 Am. St. 731; *Armerman v. Deane*, 132 N. Y. 355. See *Drummond v. Crane*, 159 Mass. 577, 38 Am. St. 460, 23 L.R.A. 707.

²⁹ *Occidental C. M. Co. v. Comstock T. Co.*, 125 Fed. 244, quoting the text.

other in the performance of a special contract would otherwise have proceeded to a complete execution of it so as to entitle himself to its full benefits. Nor is it matter of law that the jury shall assume that the crop would have matured, or that the contract would have been fulfilled. The jury may estimate, with the aid of testimony, the value of the crop at the time of its destruction, in view of all the circumstances existing at any time before the trial favoring or rendering doubtful the conclusion that it would attain to a more valuable condition, and all the hazards and expenses incident to the process of supposed growth or appreciation,³⁰ and so of the increase of a flock of sheep and the growth of the wool thereof.³¹ The same uncertainties and a greater surface of them are encountered in actions upon warranties that seeds sold for planting are of particular varieties.³²

In actions upon contracts which contemplate a series of acts and a considerable period of time for performance, a party complaining of a total breach by the other sufficiently maintains his right to recover if he has performed without default up to the time of the breach and is ready to proceed, though his right to the value of the contract depends on his ability and inclination to prosecute the performance on his part to completion. He is entitled to recover the profits which he would have made,—the contract price less what he would have to do or expend to earn or otherwise entitle himself to it.³³ This

³⁰ *St. Louis, etc. R. Co. v. Hoshall*, 82 Ark. 387; *Yazoo, etc. R. Co. v. Hubbard*, 85 Miss. 480, quoting the text; *Shoemaker v. Acker*, 116 Cal. 239, citing the text; *Shoemaker v. Crawford*, 82 Mo. App. 487; *Railway Co. v. Yarborough*, 56 Ark. 612, 619, quoting the text; *Railway Co. v. Lyman*, 57 Ark. 512; *Taylor v. Bradley*, 39 N. Y. 129; *People's I. Co. v. Steamer Excelsior*, 44 Mich. 229; *Smith v. Chicago, etc. R. Co.*, 38 Iowa, 518; *Richardson v. Northrup*, 66 Barb. 85; *Folsom v. Apple River L. D. Co.*, 41 Wis. 602; *Texas Pac. R. Co. v. Bayliss*, 62 Tex. 570;

Chicago, etc. R. Co. v. Schaffer, 26 Ill. App. 280, *aff'd* 124 Ill. 112. ³

³¹ *Schrandt v. Young*, 2 Neb. (Unof.) 546, citing the text; *Rule v. McGregor*, 117 Iowa 419.

³² *Randall v. Raper*, El. B. & E. 84; *Passinger v. Thorburn*, 34 N. Y. 634; *White v. Miller*, 7 Hun, 427, 71 N. Y. 118, 27 Am. Rep. 13; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Ferris v. Comstock*, 33 Conn. 513.

³³ *Carolina P. C. Co. v. Columbia I. Co.*, 3 Ga. App. 483, quoting the text.

deduction may be the price of labor or the value of property at a future day. The action for damages recoverable for such a breach may be brought and tried before that day arrives. If so, the prices prevailing at the time of the breach may be acted upon as the test of values at the times mentioned in the contract;³⁴ but if the trial be delayed until the date fixed for performance the parties may show the prices actually prevailing then or any other conditions, favorable or otherwise, affecting the cost of fulfilling the contract.³⁵ The general rule has no application where the damages claimed are not recoverable because too speculative, as where there was a breach of contract to deliver lumber which might be manufactured while the defendant was operating his mill on orders, but which did not require that the mill should be operated.³⁶

§ 121. **Certainty of proof of future damages.** The conservatism pervading the law is opposed to allowing compensation for probable loss. It manifests itself more particularly in respect to those damages which might be proved with certainty if they were real, and, if not fanciful and imaginary, are past damages: not such as are contemplated to arise in the future from

³⁴ Alderson v. Honston, 154 Cal. 1; Masterton v. Mayor, 7 Hill, 61.

³⁵ Hagan v. Nashville T. Co., 124 Tenn. 93, citing the text; Burrell v. New York & S. S. Co., 14 Mich. 34; People's I. Co. v. Steamer Excelsior, 44 Mich. 229; Chicago v. Greer, 9 Wall. 726, 19 L. ed. 769; Hochster v. De la Tour, 2 El. & B. 678; Frost v. Knight, L. R. 5 Ex. 322, 7 id. 111; Taylor v. Bradley, 39 N. Y. 129; Howard v. Daly, 61 id. 362, 19 Am. Rep. 285; Richmond v. Dubnque, etc. R. Co., 40 Iowa 264; Jacobs v. Davis, 34 Md. 204; Grover v. Buck, 34 Mich. 519; Shoemaker v. Acker, 116 Cal. 239.

³⁶ Byrne M. Co. v. Robertson, 145 Ala. 273. It was said: This feature of the contract clearly differentiates this case from that class of cases where the recoverable damages in

an action for the breach of the contract before the time of its completion may be estimated and computed to the end of the contract period. Upon like principles in this suit only such damages can be recovered as existed at the time of the commencement of the action and resulting from the nondelivery of the lumber up to that time. It would be an anomaly to hold that damages which could not be recovered at the commencement of the suit because of being speculative might, nevertheless, by results transpiring subsequent to suit brought, become recoverable in the particular suit. Nor do we think in this case that the situation is relieved by the averment in this complaint that defendant notified plaintiff he would not perform the contract.

such causes as, according to general experience, produce them. The decided cases which relate to prospective damages warrant the statement that the injured party is entitled to recover compensation for such elements of damage as are likely to occur; the jury may proceed upon reasonable probabilities and accept as sufficiently proved those results which, under like circumstances, generally come to pass.³⁷ It is not, however, to be hence inferred that prospective damages may be recovered on every plausible anticipation, nor that no allowance is to be made for the uncertainties which affect all conclusions depending on future events; it is only intended that such uncertainties, where the damages are shown by evidence reasonably certain, do not exclude them wholly from consideration. The price of an average colt cannot be fixed by deducting the cost of its keep from the value of an average horse, for there is not a certainty of exemption from accidents and disease. All the damages from a single tortious act are an entirety, and must be assessed and recovered once for all.³⁸ Successive actions cannot be maintained for their recovery as they may accrue from time to time. The injured party is entitled to recover in one action compensation for all the damages resulting from the injury, whether present or prospective. And in respect to the latter, the rule is that he can recover for such as it is shown with reasonable certainty will result from the wrongful act complained of.³⁹

³⁷ *Rugg v. Rohrbach*, 110 Ill. App. 532; *James v. Kibler*, 94 Va. 165, citing the text; *Treat v. Hiles*, 81 Wis. 278; *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534 (disapproved in *Pellet v. Manufacturers' & M.'s Ins. Co.*, 43 C. C. A. 669, 104 Fed. 502); *Howell v. Young*, 5 B. & C. 259; *Maerae v. Clarke*, L. R. 1 C. P. 403; *Frye v. Maine Cent. R. Co.*, 67 Me. 414; *Richmond v. Dubuque*, etc. R. Co., 40 Iowa, 264; *Schell v. Plumb*, 55 N. Y. 592; *Missouri*, etc. R. Co. v. *Fort Scott*, 15 Kan. 435; *Roper v. Johnson*, L. R. 8 C. P. 167; *Peltz v. Eichele*, 62 Mo. 171; *Sutherland v.*

Wyer, 67 Me. 65; *Gifford v. Waters*, 67 N. Y. 80; *Richardson v. Mellish*, 2 Bing. 229; *Wilson v. Northampton*, etc. R. Co., L. R. 9 Ch. 279, quoted from in § 590. See ch. 36.

³⁸ § 120; *Galligan v. Sun P. & P. Ass'n*, 25 N. Y. Misc. 355.

³⁹ *Smith v. Minetto-M. Co.*, 168 Fed. 777; *Alderson v. Houston*, 154 Cal. 1, citing the text; *Filer v. New York Cent. R. Co.*, 49 N. Y. 42; *Miller v. Wilson*, 24 Pa. 114; *Fetter v. Beale*, 1 Salk. 11; *Hodsoll v. Stallebrass*, 11 A. & E. 301; *Short v. McCarthy*, 3 B. & Ald. 626; *Howell v. Young*, 5 B. & C. 259;

§ 122. Same subject; action for enticing away apprentice, servant or son, or procuring discharge of servant. In an action for enticing away an apprentice damages cannot include the loss of his services for the residue of his term, for he may return.⁴⁰ Where an action on the case was brought to recover for the defendant's enticement of the plaintiff's minor son from his service and inducing him to enlist in the army for three years the plaintiff could only recover damages for the loss of service up to the time of the commencement of the action, or at most up to the time of trial.⁴¹ But it is otherwise where the discharge of a servant is illegally brought about by a third

Ingram v. Lawson, 8 Scott, 471; Clegg v. Dearden, 12 Q. B. 576; Stroyan v. Knowles, 6 H. & N. 454; East Jersey W. Co. v. Bigelow, 60 N. J. L. 201; Smith v. Pittsburgh & W. R. Co., 90 Fed. 783; Grotenkemper v. Harris, 25 Ohio St. 514; Hamilton v. Great Falls St. R. Co., 17 Mont. 334, 352, 12 Am. Neg. Cas. 229, citing the text; Block v. Milwaukee St. R. Co., 89 Wis. 371, 27 L.R.A. 365, 46 Am. St. 849; Pittsburgh, etc. R. Co. v. Moore, 110 Ill. App. 304. See ch. 36.

⁴⁰ Fay v. Guynon, 131 Mass. 31; Hambleton v. Veere, 2 Saund. 170; Moore v. Love, 3 Jones, 215; Hodson v. Stallebrass, 11 A. & E. 301; Trigg v. Northcut, Litt. Sel. Cas. 414; Lewis v. Peachey, 1 H. & C. 518; Drew v. Sixth Ave. R. Co., 26 N. Y. 49, 5 Am. Neg. Cas. 78. See McKay v. Bryson, 5 Ired. 216.

⁴¹ Covert v. Gray, 34 How. Pr. 450.

In Moore v. Love, 3 Jones, 215, there is an interesting discussion of the question as to what causes of action are entire and what not. The case of McKay v. Bryson, 5 Ired. 216, is there noticed and a distinction taken between an action for conveying an apprentice out of the state and an action brought by the

master who knows that the apprentice is not far removed and where he is. In the former case damages may be recovered for the total loss of his services during the whole period of the apprenticeship, subject to a deduction on account of the plaintiff's chance of regaining the apprentice; in the latter case the continued detention of the apprentice was a succession of torts for which new action might be brought from time to time.

The true distinction is undoubtedly pointed out in the foregoing opinion, that the damages in an action cannot include those arising after suit is brought if a new action could be brought for them; but it may admit of a doubt if the case was properly disposed of upon that test. A trespasser who takes personal property and retains it may be said to commit a succession of torts while he retains the property; but in an action for such a taking the injured party would undoubtedly be obliged to make his full claim of damages. He would not be entitled to a succession of actions. In cases where apprentices have been enticed away, and the enticer has not, by the injury or otherwise, made it reasonably certain that the apprentice will

person, who has made it impossible for the servant to obtain other employment.⁴²

§ 123. **Future damages for personal injuries.** In ascertaining the amount of damages resulting from a personal injury the jury may consider the bodily pain and mental suffering which have occurred and are reasonably certain or likely to occur in the future in consequence thereof, as well as the loss of time, expense of medical and other attendance and the diminution of ability to earn money.⁴³ The inquiry cannot be extended to cover the merely possible consequences of the injury, as by the possible outbreak of a new disease or other sufferings having their cause in the original wrong done the plaintiff; in such a case there is a double speculation—one that the result may possibly occur, and the other that if it does it will be a product of the original injury instead of some other new and, perhaps, unknown cause.⁴⁴

not return, prospective damages are not denied because a new action may be brought for them but because they are not susceptible of proof; they are not certain. But if the defendant has control, and will have it in the future, he may be charged with depriving the master of the services of an apprentice for the whole term for the same reason that he might be charged with the full value of a horse tortiously taken. See *Herriter v. Porter*, 23 Cal. 385.

⁴² *Hanson v. Innis*, 211 Mass. 301.

⁴³ *Swift v. Raleigh*, 54 Ill. App. 44; *Griswold v. New York Cent. etc. R. Co.*, 115 N. Y. 61, 12 Am. St. 775; *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334, 353, 12 Am. Neg. Cas. 229, citing the text; *Ayres v. Delaware, etc. R. Co.*, 158 N. Y. 254; *Denver Con. T. Co. v. Riley*, 14 Colo. App. 132; *Bay Shore R. Co. v. Harris*, 67 Ala. 6, 2 Am. Neg. Cas. 1; *Curtiss v. Rochester, etc. R. Co.*, 20 Barb. 282, 9 Am. Neg. Cas. 696; *Achison v. King*, 9 Kan. 550; *Welch v. Ware*, 32 Mich. 77; *Birchard v.*

Booth, 4 Wis. 67; *Morely v. Dunbar*, 24 Wis. 183; *Wilson v. Young*, 31 Wis. 574; *Goodno v. Oshkosh*, 28 Wis. 300; *Spicer v. Chicago, etc. R. Co.*, 29 Wis. 580, 7 Am. Neg. Cas. 187; *Karasich v. Hasbrouck*, 28 Wis. 569; *Pennsylvania R. Co. v. Dale*, 76 Pa. 47; *Tomlinson v. Derby*, 43 Conn. 562; *Fulsome v. Concord*, 46 Vt. 135; *Nones v. Northouse*, id. 587; *Metcalf v. Baker*, 56 N. Y. 662; *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434, 12 Am. Neg. Cas. 243, 97 Am. Dec. 722; *Walker v. Erie R. Co.*, 63 Barb. 260, 9 Am. Neg. Cas. 666; *Bradshaw v. Lancashire R. Co.*, L. R. 10 C. P. 189; *Collins v. Council Bluffs*, 32 Iowa, 324; *Russ v. Steamboat War Eagle*, 14 Iowa, 363, 9 Am. Neg. Cas. 326; *Dixon v. Bell*, 1 Stark. 287; *McLain v. St. Louis & S. R. Co.*, 100 Mo. App. 374, citing the text. See ch. 36.

⁴⁴ *Strohm v. New York, etc. R. Co.*, 96 N. Y. 305; *Toser v. New York Cent. etc. R. Co.*, 105 N. Y. 659; *Turner v. Newburgh*, 109 N. Y. 301; *Ayres v. Delaware, etc. R. Co.*,

§ 124. Only present worth of future damages given. An award on account of prospective damages is like payment in advance and in fixing the same that fact may be considered and the amount reduced to its present worth.⁴⁵ The method of so reducing such damages will be governed by the rule of the forum though the cause of action arose in another jurisdiction.⁴⁶

§ 125. Continuous breach of contract or infraction of rights not an entirety. A continuous breach of a contract or infraction of a right is not an entirety. It is at any time severable for the purpose of redress in damages for the injury already suffered. This is the case whenever a continuous duty imposed by law or by contract is uninterruptedly neglected, whether such departure from the line of duty be by positive acts or by culpable inaction.⁴⁷ There is a legal obligation to discontinue a trespass or to remove a nuisance.⁴⁸ So a covenant to keep certain premises in repair for a specified period imposes a continuous duty and when neglected gives a continuous cause of action.⁴⁹ When an action is brought the injury to that time

158 N. Y. 254; *Lauth v. Chicago Union T. Co.*, 244 Ill. 244; *O'Keefe v. United R. Co.*, 124 Mo. App. 613, citing the text. See § 1251.

⁴⁵ *Wilkinson v. Dunbar*, 149 N. C. 20; *Poe v. Railroad*, 141 N. C. 525; *Kelly P. Co. v. London*, — Tex. Civ. App. —, 125 S. W. 974; *Boekeleamp v. Lackawanna, etc. R. Co.*, 232 Pa. 66; *Pickett v. Wilmington & W. R. Co.*, 117 N. C. 616, 53 Am. St. 611, 30 L.R.A. 257; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. 1, 50 Am. St. 787; *Morrissey v. Hughes*, 65 Vt. 553, 17 Am. Neg. Cas. 706; *Alabama G. S. R. Co. v. Carroll*, 28 C. C. A. 207, 84 Fed. 772; *Morrison v. McAttee*, 23 Ore. 530; *Fulsome v. Concord*, 46 Vt. 135; *Scientific American C. Department v. Gillespie*, 4 Ala. App. 590. See §§ 1251, 1265.

The rule for computing the present worth of money payable in

future is laid down in *Rivers v. Bay City T. & E. Co.*, 164 Mich. 696.

⁴⁶ *Georgia, etc. R. Co. v. Sasser*, 4 Ga. App. 276.

⁴⁷ *Kennedy v. New York*, 196 N. Y. 19, 25 L.R.A.(N.S.) 847; *Ruggles v. Wilson*, 162 Mo. App. 372; *Lake Shore, etc. R. Co. v. Richards*, 152 Ill. 59, 30 L.R.A. 33; *Van Keuren v. Miller*, 78 Hun, 173; *Connolly v. Coon*, 23 Ont. App. 37; *Powers v. Ware*, 4 Pick. 106; *Pierce v. Woodward*, 6 Pick. 206; *McConnell v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265. See *Drummond v. Crane*, 159 Mass. 577, 38 Am. St. 460, 23 L.R.A. 707; *Wilson v. Sullivan*, 17 Utah, 341.

⁴⁸ Per Lord Denman *Clegg v. Dearden*, 12 Q. B. 601; *Savannah, etc. R. Co. v. Davis*, 25 Fla. 917; *Adams v. Hastings & D. R. Co.*, 18 Minn. 260.

⁴⁹ *Cooke v. England*, 27 Md. 14;

is segregated and the recovery is confined to such damages as result from the breach or wrong continued to the commencement of the action.⁵⁰

§ 126. **Continuance of wrong not presumed.** The law will not presume the continuance of a wrong, nor allow a license to continue it, or a transfer of title to result from the recovery of damages for prospective misconduct.⁵¹ But in equity the owner of real property upon which a trespass has been committed may restrain the continuance of the wrong and thus prevent a multiplicity of actions at law to recover damages. In such an action the court may determine the amount of damages the owner would sustain if the trespass were permanently continued and decree that, upon their payment, the plaintiff shall give a deed or convey the right to the defendant.⁵²

§ 127. **Necessity and advantage of successive actions.** The necessity and advantage of successive actions to recover damages which proceed from a continuous and still operating cause are very obvious; for, besides the considerations which have already been mentioned, the injurious effects so blend together that in most instances it would be wholly impracticable to accurately apportion them. Therefore, the right to recover for

Beach v. Crain, 2 N. Y. 86; Bleecker v. Smith, 13 Wend. 530; Phelps v. New Haven, etc. Co., 43 Conn. 453; Keith v. Hinkston, 9 Bush, 283.

⁵⁰ Id.; Sackrider v. Beers, 10 Johns. 241; Shaw v. Etheridge, 3 Jones, 301; Brasfield v. Lee, 1 Ld. Raym. 329; Whitehouse v. Fellowes, 10 C. B. (N. S.) 765; Mahon v. New York Cent. R. Co., 24 N. Y. 658; Phillips v. Terry, 3 Keyes, 313; Hayden v. Albee, 20 Minn. 159; Thompson v. Gibson, 7 M. & W. 456; Beekwith v. Griswold, 29 Barb. 291; Bradley v. Amis, 2 Hayw. 390; Caruthers v. Tillman, 1 id. 501; Duncan v. Markley, Harp. 276; Moore v. Love, 3 Jones, 215; Cole v. Sprowl, 35 Me. 161, 56 Am. Dec. 696; Hudson v. Nicholson, 5 M. & W.

437; Park v. Hubbard, 134 App. Div. (N. Y.) 468.

⁵¹ Adams v. Hastings & D. R. Co., 18 Minn. 260; Ford v. Chicago, etc. R. Co., 14 Wis. 609, 80 Am. Dec. 791; Uline v. New York, etc. R. Co., 101 N. Y. 98, 54 Am. Rep. 661; Savannah & O. C. Co. v. Bourquin, 51 Ga. 378; Hanover W. Co. v. Ashland I. Co., 84 Pa. 279; Whitmore v. Bischoff, 5 Hun 176; Sherman v. Milwaukee, etc. R. Co., 40 Wis. 645; Russell v. Brown, 63 Me. 203; Bowyer v. Cook, 4 C. B. 236; Holmes v. Wilson, 10 A. & E. 503; Battishill v. Reed, 18 C. B. 696; Cumberland & O. C. Co. v. Hitchings, 65 Me. 140.

⁵² Pappenheim v. Metropolitan E. R. Co., 128 N. Y. 436, 13 L.R.A. 401; Amerman v. Deane, 132 N. Y. 355, 28 Am. St. 584.

all damages which have been suffered to the time of bringing the first action, in the next, all damages which have been suffered from that time to that of commencing such second action, and so on while the cause continues is the most convenient course for practical redress that can be devised.⁵³ In cases of contracts imposing a continuous duty or a duty the continued neglect of which is an uninterrupted breach, from which results a steady accretion of damage, the injured party may bring a succession of actions or treat defaults having that significance as a total breach,⁵⁴ and recover damages accordingly. Of this nature was the contract in *Crain v. Beach*,⁵⁵ where the plaintiff had granted to the defendants a perpetual right of way over his land and covenanted to erect a gate of a specified description at the terminus, to which the defendants covenanted in the same instrument to make all necessary repairs. The plaintiff erected the gate, which was subsequently removed by some unknown person. It was held that the defendants were bound to replace it; the covenant was continuing; an action brought thereon after the removal of the gate for damages occasioned by cattle coming on the plaintiff's land in consequence of there being no gate and a recovery therein were no bar to another action on the same covenant for damages accruing after the commencement of the first suit. The defendants' default was not a total breach, nor declared and recovered on as such, and hence they were not thereby relieved of the continuing obligation of the covenant. If it were an entire contract, however, any breach would be or might be treated as a total breach.⁵⁶ Covenants for support and maintenance during life are entire and any breach entitles the injured party to recover entire damages for a total breach,⁵⁷ but as they impose a continuous duty

⁵³ *Uline v. New York Cent. R. Co.*, 101 N. Y. 88, 54 Am. Rep. 661; *Mitchell v. Darley Main C. Co.*, 14 Q. B. Div. 125.

⁵⁴ *Grand Rapids, etc. R. Co. v. Van Dusen*, 29 Mich. 431; *Royalton v. Royalton & W. T. Co.* 14 Vt. 311; *Withers v. Reynolds*, 2 B. & Ad. 882; *Fish v. Folley*, 6 Hill, 54, ex-

plained in *Crain v. Beach*, 2 Barb. 124; *Keck v. Bieber*, 148 Pa. 645.

⁵⁵ 2 N. Y. 86, 2 Barb. 120.

⁵⁶ *Fish v. Folley*, 6 Hill, 54.

⁵⁷ *Schell v. Plumb*, 55 N. Y. 592; *Fales v. Hemenway*, 64 Me. 373; *Tippin v. Ward*, 5 Ore. 450; *Dresser v. Dresser*, 35 Barb. 573; *Shaffer v. Lee*, 8 id. 112; *Trustees of How-*

the injured party may have a succession of actions treating any acts of breach as partial only.⁵⁸

SECTION 2.

PARTIES TO SUE AND BE SUED.

§ 128. **Damages to parties jointly injured entire.** Before leaving the subject of the entirety of causes of action and damages it is proper to notice some points relative to parties. At common law all the parties who are jointly injured by a tort or breach of contract may sue jointly for damages; in actions *ex contractu* the rule is imperative. All the parties with whom the violated contract was made must join as plaintiffs unless their interests are severed in the contract, so that upon a breach a distinct cause of action accrues to each or less than all.⁵⁹ Actions for personal injuries to a married woman must be in the names of the husband and wife⁶⁰ except where statutes have so

ard College v. Turner, 71 Ala. 429, 46 Am. Rep. 326; Carpenter v. Carpenter, 66 Hun, 177; Empie v. Empie, 35 App. Div. (N. Y.) 51. See Wright v. Wright, 49 Mich. 624.

⁵⁸ Id.; Fiske v. Fiske, 20 Pick. 499; Berry v. Harris, 43 N. H. 376; Ferguson v. Ferguson, 2 N. Y. 360; Turner v. Hadden, 62 Barb. 480. Fay v. Guynon, 131 Mass. 31. See Parker v. Russell, 133 id. 74.

⁵⁹ Thomas v. Bola L. Co., 1 Cal. App. 335; International H. Co. v. Flynn, 238 Ill. 636; New York Nat. Exch. Bank v. Reed, 232 Ill. 123; National Hollow B. B. Co. v. Bakewell, 224 Mo. 203; Brinton v. Thomas, 138 Mo. App. 64; McGara v. Ake, 226 Pa. 228; Park v. Southern R., 78 S. C. 302; Phoenix Assur. Co. v. Fristoe, 53 W. Va. 361; Bigelow v. Reynolds, 68 Mich. 344; Hall v. Leigh, 8 Cranch, 50, 3 L. ed. 484; Fugure v. Mutual Soc. of St. Joseph, 46 Vt. 362; Cleaves v. Lord, 3 Gray, 66; Jewett v. Cunard, 3 Woodb. &

M. 277; Little v. Hobbs, 8 Jones, 179, 78 Am. Dec. 275; Gridley v. Starr, 1 Root, 281; Farmer v. Stewart, 2 N. H. 97; Eastman v. Ramsey, 3 Ind. 419; Millard v. Baldwin, 3 Gray, 484; Dow v. Clark, 7 Gray, 198; Weathers v. Ray, 4 Dana, 474; Frankem v. Trimble, 5 Pa. 520; Ross v. Milne, 12 Leigh, 204, 37 Am. Dec. 646; Thompson v. Page, 1 Mete. (Mass.) 566; The Ship Potomac, 2 Black 581, 17 L. ed. 263; Archer v. Bogue, 4 Ill. 526; Robertson v. Reed, 47 Pa. 115; Sawyer v. Steele, 4 Wash. 227; Newcomb v. Clark, 1 Denio 226; Law v. Cross, 1 Black 533, 17 L. ed. 185; Beetle v. Anderson, 98 Wis. 6; Dunn v. Smith (Tex. Civ. App.), 74 S. W. 576; Bacon v. Peoria & E. R. Co., 162 Ill. App. 162.

⁶⁰ Lamb v. Harbaugh, 105 Cal. 680; White v. Vicksburg, etc. R. Co., 42 La. Ann. 990; Gallagher v. Bowie, 66 Tex. 265, 10 Am. Neg. Cas. 254; Ezell v. Dodson, 60 Tex.

enlarged the property rights of married women as to enable them to maintain such actions in their own names.⁶¹ In an action for malicious prosecution of husband and wife each has a separate right of action, and they cannot join their causes of action; but the husband is a necessary co-plaintiff with the wife in her action.⁶² If the duty of supporting a child devolves upon the father and he is alive when the mother sues for an injury to the child she cannot maintain the action, notwithstanding she has been divorced and the care and custody of the child were awarded her.⁶³

§ 129. **Actions under statutes.** In actions brought under statutes which create a liability where none existed at common law, the parties who sue thereunder must bring themselves clearly within the language used by the legislature. Such statutes will not be extended or enlarged by construction.⁶⁴ The relief or remedy is not available to any person who is not included therein.⁶⁵ If the right to sue for an injury which has resulted in death is given to a "child," an illegitimate child cannot re-

331; *Tell v. Gibson*, 66 Cal. 247; *King v. Thompson*, 87 Pa. 365, 30 Am. Rep. 364; *Northern Cent. R. Co. v. Mills*, 61 Md. 355; *Blair v. Chicago & A. R. Co.*, 89 Mo. 384. Compare *Bennett v. Bennett*, 116 N. Y. 584, 6 L.R.A. 553.

⁶¹ *Chicago, etc. R. Co. v. Dunn*, 52 Ill. 260; *Musselman v. Gallagher*, 32 Iowa, 383; *Chadron v. Glover*, 43 Neb. 732.

A wife may maintain an action in her own name against a woman who has alienated from her the affection and deprived her of the society of her husband, although they live together as husband and wife. *Foot v. Card*, 58 Conn. 1, 18 Am. St. 258, 6 L.R.A. 829; *Bennett v. Bennett*, *supra*; *Humphrey v. Pope*, 122 Cal. 253. See ch. 38.

A wife may sue for injury to her person and her husband for the loss of her services and the expense to which he has been put. *Mageau v.*

Great Northern R. Co., 103 Minn. 290, 15 L.R.A.(N.S.) 511.

⁶² *Williams v. Casebeer*, 126 Cal. 77.

⁶³ *Keller v. St. Louis*, 152 Mo. 596, 47 L.R.A. 391.

⁶⁴ *Sutherland*, Const. of Stats., § 371.

⁶⁵ *Thompson v. Wabash R. Co.*, 184 Fed. 554; *De Paolo v. Laquin L. Co.*, 178 Fed. 877; *Brown v. Sunday Creek Co.*, 165 Fed. 504; *Vaugh v. Bunker Hill & S. M. & S. Co.*, 126 Fed. 895; *Walker v. Vicksburg, etc. R. Co.*, 110 La. 718; *Hammond v. Lewiston, etc. St. R. Co.*, 106 Me. 209, 30 L.R.A.(N.S.) 78; *Johnson v. Seattle E. Co.*, 39 Wash. 211; *West v. Leiphart*, 169 Mich. 354; *McNamara v. Slavens*, 76 Mo. 330; *Gibbs v. Hannibal*, 82 id. 143; *Warren v. Englehart*, 13 Neb. 283; *Woodward v. Chicago & N. R. Co.*, 23 Wis. 400; *Dickins v. New York Cent. R. Co.*, 23 N. Y. 158, 5 Am.

cover for its mother's death in England,⁶⁶ nor in Canada;⁶⁷ but it is otherwise under a statute which uses the words "next of kin."⁶⁸ Where an action is given for the benefit of the widow and next of kin it may be brought, though there be no widow, if there are next of kin, and *vice versa*.⁶⁹ Nor are the "next of kin" required to be so nearly related to the person whose death is sued for as to require any duty of sustenance, support or education.⁷⁰

§ 130. **Must be recovered by person in whom legal interest is vested.** The suit must be brought in the name of the party in whom is vested the legal interest though the equitable interest be in another person.⁷¹ The funds of a voluntary association were put under the control and management of trustees who took a note payable to themselves on lending the funds to other mem-

Neg. Cas. 61; Tennessee C., I. & R. Co. v. Herndon, 100 Ala. 451, 13 Am. Neg. Cas. 180; Woodward I. Co. v. Cook, 124 Ala. 349; Maule C. Co. v. Partenheimer, 155 Ind. 100, 109.

For failure of a public officer to collect and apportion taxes between a state and county the state and county may maintain separate actions. *Ex parte Hudgins*, — Ala. —, 65 So. 959.

If the right of action is given to two or more jointly, one person may not bring an action. *Clark v. Kansas City, etc. R. Co.*, 153 Mo. App. 689.

A husband may not join in an action with his child to recover the funeral expenses of his wife, the child suing to recover for his mother's death. *Johnson v. Seattle E. R. Co.*, 39 Wash. 211.

⁶⁶ *Dickinson v. Northeastern R. Co.*, 2 H. & C. 735.

⁶⁷ *Gibson v. Midland R. Co.*, 2 Ont. 658.

⁶⁸ *Muhl v. Michigan Southern R. Co.*, 10 Ohio, 272. See ch. 37.

In Louisiana separate actions

may be brought by the widow and minor children to recover for the decedent's death. *Eichorn v. New Orleans, etc. R., L. & P. Co.*, 112 La. 236, 104 Am. St. 437.

⁶⁹ *Sutherland, Const. of Stats.*, § 371, citing *McMahon v. Mayor*, 33 N. Y. 642, 647.

⁷⁰ *Tilley v. Hudson River R. Co.*, 24 N. Y. 474; *Galveston, etc. R. Co. v. Kutae*, 72 Tex. 643, 12 Am. Neg. Cas. 599; *Petrie v. Columbia, etc. R. Co.*, 29 S. C. 303; *Railroad Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591; *Baltimore, etc. R. Co. v. Hauer*, 60 Md. 449.

⁷¹ *Kansas City, etc. R. Co. v. Blaker*, 68 Kan. 244, 64 L.R.A. 81; *Conner v. Missouri Pac. R. Co.*, 181 Mo. 397; *Treat v. Stanton*, 14 Conn. 445; *Denton v. Denton*, 17 Md. 403; *Sunapee v. Eastman*, 32 N. H. 470; *Pike v. Pike*, 24 N. H. 384; *Phillips v. Pennywit*, 1 Ark. 59; *Lapham v. Green*, 9 Vt. 407; *Governor v. Ball, Hempst.* 541; *Lord v. Carnes*, 98 Mass. 308; *Hart v. Stone*, 30 Conn. 94; *Pierce v. Robie*, 39 Me. 205, 63 Am. Dec. 614; *Yeager v. Wallace*, 44 Pa. 94; *Morton*

bers. It was held that the trustees in their individual names were entitled to maintain an action on the note, as it was payable to them, though the defendants as well as themselves were members of the association beneficially interested in the collection.⁷² One who pays the consideration for a privilege or benefit which he may confer upon another may sue for the denial of it.⁷³ A trustee who has sold trust property without assigning a claim for damages resulting from a wrong done thereto prior to the sale may bring suit to recover therefor.⁷⁴ In an action by a firm the name of a dormant partner need not and ought not to be used,⁷⁵ unless he is one of the parties disclosed in the contract.⁷⁶ The parties to a contract are the persons in whom the legal interest in the subject of it is deemed to be vested, and who therefore must be the parties to the action which is instituted for the purpose of enforcing it or recovering damages for its violation.⁷⁷ An agent who has sold property on credit, pursuant to authority from and for his principal, may sue the purchaser in his own name if he is bound to account to the owner or if he has accounted to him for it.⁷⁸ An undisclosed principal may sue on a contract made for his benefit by an agent,⁷⁹ unless exclusive credit was given the agent.⁸⁰

An agreement to relinquish a business and not to carry it on thereafter in a designated place, no limit being specified as to time, and a bond conditioned for the observance thereof, are not

v. Webb, 7 Vt. 123; Boardman v. Keeler, 2 Vt. 65; Clarkson v. Carter, 3 Cow. 84; Mitchell v. Dall, 2 H. & G. 159; Lord v. Baldwin, 6 Pick. 352; Wilson v. Wallace, 8 S. & R. 55; Warner v. Griswold, 8 Wend. 666; Clark v. Miller, 4 id. 628.

⁷² Pierce v. Robie, 39 Me. 205, 63 Am. Dec. 614.

⁷³ Trustees of Howard College v. Turner, 71 Ala. 429, 46 Am. Rep. 326.

⁷⁴ Lancaster v. Connecticut Mut. L. Ins. Co., 92 Mo. 460, 1 Am. St. 739.

⁷⁵ Clark v. Miller, 4 Wend. 628.

⁷⁶ Clark v. Carter, 2 Cow. 84; Lord v. Baldwin, 6 Pick. 352.

⁷⁷ Treat v. Stanton, 14 Conn. 445; Daugherty v. American U. Tel. Co., 75 Ala. 168, 51 Am. Rep. 435; Osgood v. Skinner, 211 Ill. 229.

⁷⁸ Fuller v. Curtis, 100 Ind. 237, 50 Am. Rep. 786; Jackson v. Mott, 76 Iowa, 263.

⁷⁹ Wells v. Western U. Tel. Co., 144 Iowa, 605, 24 L.R.A.(N.S.) 1045, 138 Am. St. 317; Noel C. Co. v. Atlas P. C. Co., 103 Md. 209; Bell v. Lee, 78 Ala. 511, 56 Am. Rep. 52.

⁸⁰ Cowan v. Curran, 216 Ill. 598.

so personal to the obligee that he cannot sue thereon for a breach of the agreement after he has transferred the property and business for the benefit of his vendee. There seems no doubt, upon the authorities, that the agreement could be transferred with and as an incident of the property, the purchase being made with knowledge of the condition of the bond.⁸¹ The contrary doctrine is held in Oregon.⁸² The English cases referred to in the note are not considered in that case, and the California case cited is distinguished because the word "heirs" was used in the contract there passed upon while it was not employed in the one before the court. The breach of a covenant which runs with land gives the widow who occupies it as a homestead a right of action though she was not to pay for it.⁸³

§ 131. Not joint when contract apportions the legal interests.

Where the contract separates and apportions the legal interests the injury in case of a breach is correspondingly separate and distinct.⁸⁴ Thus a promise to pay the respective owners of land taken for a road such sums as a referee named shall award gives each a separate action for the amount awarded him.⁸⁵ A contract between a fruit company and a number of fruit growers to receive, dry, and market their crops, at specified rates per pound, that delivered by each person being weighed and dried separately and then weighed out to the owner and mingled with other fruit, a receipt being given each owner, is several.⁸⁶ Where the consideration furnished by the obligees is several their interests are *prima facie* several; and so where they may suffer separate and distinct unascertained injuries from the breach of a contract.⁸⁷

⁸¹ Webster v. Buss, 61 N. H. 40, 6 Am. Rep. 317; Gueraud v. Dandele, 32 Md. 562, 3 Am. Rep. 164; California S. N. Co. v. Wright, 6 Cal. 258, 8 id. 585; Pemberton v. Vaughan, 10 Q. B. 87; Hastings v. Whitley, 2 Ex. 611. It was held in the last case that a suit might be brought by the executors of the obligee for a breach arising after his death.

⁸² Hillman v. Shannahan, 4 Ore. 163, 18 Am. Rep. 281.

⁸³ St. L., I. M. & S. R. v. O'Baugh, 49 Ark. 418.

⁸⁴ Hackett v. Northern Pac. R. Co., 140 Fed. 717.

⁸⁵ National Bank v. Buckwalter, 214 Pa. 289; Farmer v. Stewart, 2 N. H. 97; Jewett v. Cunard, 3 Woodb. & M. 277; State Ins. Co. v. Belford, 2 Kan. App. 280.

⁸⁶ Arnold v. Producers' F. Co., 128 Cal. 637.

⁸⁷ Atlanta, etc. R. Co v. Thomas, 60 Fla. 412.

§ 132. **Implied assumpsit follows the consideration.** Where the *assumpsit* is implied it will follow the consideration.⁸⁸ A committee appointed by a school district to repair a schoolhouse took the job among themselves, each performing work and furnishing a separate portion of materials. Each had a distinct cause of action.⁸⁹ By the failure of I. to fulfill a promise made to G. and S. to enter satisfaction of a judgment against them the judgment was collected entirely out of the property of G.; he recovered in an action by himself alone for money paid.⁹⁰ If money is deposited with a stakeholder on the event of a wager by one who acts as an agent for several others each of the latter may bring a separate action to recover the money deposited for him, though the stakeholder was ignorant of the principals on whose account the deposit was made.⁹¹ Several plaintiffs claiming distinct rights cannot join in the same action.⁹²

§ 133. **Effect of release by or death of one of several entitled to entire damages.** Where a cause of action *ex contractu* accrues to several jointly it is an entirety; they must all join in an action upon it; no others can, except where assignments are sanctioned by statute as a transfer of the legal right of action or unless that right devolves upon others by operation of law, as in case of death or marriage. It cannot be severed by partial assignment,⁹³ nor by the giving of a release by one of several jointly entitled to sue. Such a release would operate to extinguish the right of action at law; for if, for such a reason, all to whom the right of action accrued cannot join in a suit upon it no action can be maintained.⁹⁴ But one of several joint creditors between whom no partnership exists cannot release the common debtor so as wholly to conclude his co-creditors who do not assent. He may defeat an action at law, but they will be

⁸⁸ Lee v. Gibbons, 14 S. & R. 110.

⁸⁹ Geer v. School Dist., 6 Vt. 76.

⁹⁰ Taylor v. Gould, 57 Pa. 152.

⁹¹ Yates v. Foot, 12 Johns. 1

⁹² Barry v. Rogers, 2 Bibb 314;
Hinchman v. Paterson R. Co., 17
N. J. Eq. 75, 86 Am. Dec. 252;
Chambers v. Hunt, 18 N. J. L. 339.

⁹³ Chicago, etc. R. Co. v. Nichols,
57 Ill. 464.

⁹⁴ Hall v. Gray, 54 Me. 230; Kimball v. Wilson, 3 N. H. 96; Myrick v. Dame, 9 Cush. 248, 69 Am. Dec. 284; Tuckerman v. Newhall, 17 Mass. 581; Eaton v. Lincoln, 13 Mass. 424. See Eisenhart v. Slaymaker, 14 S. & R. 154.

entitled to assert their rights in equity. It is a general rule that joint creditors cannot, by a division of their claim between themselves, acquire a separate right of action against their debtor, either at law or in equity; but when a debtor procures a release from a part of them he cannot object to the others proceeding against him in equity.⁹⁵ On the death of one of two persons who have a joint right of action upon contract it survives, and the survivor alone is entitled to sue. The personal representatives of the deceased cannot be joined with him.⁹⁶ By consent a joint demand may be severed so that several suits may be brought.⁹⁷ So an assignee of the whole or a part may sue in his own name if the debtor promise to pay him,⁹⁸ but not otherwise.⁹⁹

§ 134. **Misjoinder of plaintiffs, when a fatal objection.** In such action it is a fatal objection, available on the trial, that there is a misjoinder of plaintiffs.¹ It is equally so in actions *ex delicto*.² And in actions *ex contractu* the non-joinder of all the parties in whom the right of action is vested is fatal, and the objection may be taken on the trial.³ But in actions of tort the non-joinder of a party who ought to join as co-plaintiff can only be taken advantage of by plea in abatement or upon the trial by an apportionment of damages.⁴

⁹⁵ Upjohn v. Ewing, 2 Ohio St. 13; Hosack v. Rogers, 8 Paige, 229; Carrington v. Crocker, 37 N. Y. 336.

⁹⁶ Jackson v. People, 6 Mich. 154; Smith v. Franklin, 1 Mass. 480; Walker v. Maxwell, id. 113; Morrison v. Winn, Hardin, 480; Beebe v. Miller, Minor, 364; Brown v. King, 1 Bibb, 462; Clark v. Parish, id. 547; Chandler v. Hill, 2 Hen. & Mun. 124.

⁹⁷ Parker v. Bryant, 40 Vt. 291; Carrington v. Crocker, 37 N. Y. 336.

⁹⁸ Page v. Danforth, 53 Me. 174.

⁹⁹ Hay v. Green, 12 Cush. 282.

¹ Brent v. Tivebaugh, 12 B. Mon. 87; Blakey v. Blakey, 2 Dana, 460; Doremus v. Selden, 19 Johns. 213; Waldsmith v. Waldsmith, 2

Ohio, 333, 15 Am. Dec. 547; Robinson v. Scull, 3 N. J. L. 817.

² Glover v. Hunnewell, 6 Pick. 222; Ainsworth v. Allen, Kirby 145.

³ Dob v. Ralsey, 16 Johns. 34; Ehle v. Purdy, 6 Wend. 629; Hansel v. Morris, 1 Blackf. 307; McIntosh v. Long, 2 N. J. L. 274; Hilliker v. Loop, 5 Vt. 116, 26 Am. Dec. 286; Ellis v. McLemore, 1 Bailey, 13; Coffee v. Eastland, Cooke, 159; Sweigart v. Berk, 8 S. & R. 308; Morse v. Chase, 4 Watts, 456; Connolly v. Cottle, Breese, 364; Beach v. Hotchkiss, 2 Conn. 697; Baker v. Jewell, 6 Mass. 460, 4 Am. Dec. 162; Halliday v. Doggett, 6 Pick. 359; Gordon v. Goodwin, 2 N. & McC. 70, 10 Am. Dec. 573.

⁴ Waggoner v. Snody, 36 Tex. Civ.

§ 135. **Joinder of defendants; effect of non-joinder and misjoinder.** By the common law all joint promisors should be joined as defendants; and all should be sued, or only one, on a joint and several contract.⁵ On a joint and several promissory note made by a firm in the firm name and by another person in his individual character a suit may be maintained against the members of the firm without joining the other maker, they, for this purpose, being considered but one person, the non-joinder of the other being no ground of objection.⁶ Where, some weeks after the execution of a lease of real estate, a third person, by writing obligatory, became surety for the lessee they were not jointly liable and could not be joined as defendants.⁷ Two or more persons cannot be sued jointly unless a joint liability is proved.⁸ On the death of one joint promisor the liability survives at law against the remaining or surviving promisor, and the personal representative of the deceased cannot be joined as co-defendant.⁹ Many persons may join in one instrument without making themselves jointly bound. Whether they have done so or not is a question of intention to be determined by the construction of the entire contract. The undertaking of each may be several, as is usual in subscriptions for some common purpose, and sometimes in other promises to pay.¹⁰ Joining too many

App. 514, quoting the text; *Wright v. Bennett*, 2 Barb. 451; *White v. Webb*, 15 Conn. 302.

⁵ *Damron v. Sweetser*, 16 Ill. App. 339; *Deloach v. Dixon*, Hempst. 428; *Merrick v. Trustees of Bank*, 8 Gill, 59; *Minor v. Mechanics' Bank*, 1 Pet. 73; *Bangor Bank v. Treat*, 6 Me. 207, 19 Am. Dec. 210; *Fielden v. Lahens*, 9 Bosw. 436; *Claremont Bank v. Wood*, 12 Vt. 252; *Keller v. Blasdel*, 1 Nev. 491; *Merica v. Burget*, 36 Ind. App. 453; *Sundberg v. Goar*, 92 Minn. 143.

The voluntary discontinuance of an action against a defendant jointly and severally liable, for a reason not personal to him, is a discontinuance as to all. *Ashby B.*

Co. v. Ely D. G. Co., 151 Ala. 272.

⁶ *Van Tine v. Crane*, 1 Wend. 524.

⁷ *Tourtellott v. Junkin*, 4 Blackf. 483.

⁸ *Rowan v. Rowan*, 29 Pa. 181.

⁹ *Sigler v. Interest*, 3 N. J. L. 724; *Gillin v. Pence*, 4 T. B. Mon. 304; *Murphy v. Branch Bank*, 5 Ala. 421; *Poole v. McLeod*, 1 S. & M. 391; *Union Bank v. Mott*, 2 N. Y. 633; *Voorhis v. Childs*, 17 id. 354.

¹⁰ *Larkin v. Butterfield*, 29 Mich. 254; *State v. Henderson*, 120 Ga. 780; *Morgan v. Brach*, 104 Minn. 247; *Heinrich v. Missouri & I. C. Co.*, 102 Mo. App. 229; *Bolton v. Gifford*, 45 Tex. Civ. App. 140;

persons as defendants in an action upon contract is a fatal objection and may be taken advantage of on the trial;¹¹ but if less than all those jointly liable are sued the objection of the non-joinder of others can only be taken advantage of by plea in abatement unless it appears on the face of the declaration.¹²

§ 136. **How joint liability extinguished or severed.** If one jointly, or jointly and severally liable is released by a satisfaction all are discharged.¹³ So a specialty taken from one merges any simple contract liability, not only of the person giving the specialty, but of others jointly liable with him.¹⁴ Thus where a mercantile business was carried on in a single name and the

Davis v. Schmidt, 126 Wis. 461, 110 Am. St. 938.

¹¹ Tuttle v. Cooper, 10 Pick. 281; Walcott v. Canfield, 3 Conn. 194; Livingston v. Tremper, 11 Johns. 101; Erwin v. Devine, 2 T. B. Mon. 124; Jenkins v. Hart, 2 Rand. 446.

¹² Bragg v. Wetzell, 5 Blackf. 95; Burgess v. Abbott, 6 Hill, 135; Nash v. Skinner, 12 Vt. 219, 36 Am. Dec. 338; Hicks v. Cram, 17 Vt. 449; Means v. Milliken, 33 Pa. 517; Douglas v. Chapin, 26 Conn. 76.

¹³ McCoy v. L. & N. R. Co., 146 Ala. 333; Vandiver v. Pollak, 107 Ala. 547, 54 Am. St. 118; Jones v. Clism, 73 Ark. 14; Jones v. Allen, 38 Colo. 512; Allen v. Ruland, 79 Conn. 405, 118 Am. St. 146; Warthen v. Melton, 132 Ga. 113; Wallner Chicago Con. T. Co., 245 Ill. 148; Mooney v. Chicago, 239 Ill. 414; Cleveland, etc. R. Co. v. Hilligoss, 171 Ind. 417, 131 Am. St. 258; Horgan v. Boston E. R. Co., 208 Mass. 287; Corey v. Havener, 182 Mass. 250; Laughlin v. Excelsior P. Mfg. Co., 153 Mo. App. 508; Cleland v. Anderson, 66 Neb. 252, 5 L.R.A. (N.S.) 136; Peterson v. Wiggins, 230 Pa. 631; Chetwood v. California Nat. Bank, 113 Cal. 414; Donaldson v. Carmichael, 102 Ga. 40, 3 Am. Neg. Rep. 770; Lord

v. Tiffany, 98 N. Y. 412, 50 Am. Rep. 689; Ellis v. Esson, 50 Wis. 138, 36 Am. Rep. 830; Gross v. Pennsylvania, etc. R. Co., 65 Hun, 191; Blackman v. Simpson, 120 Mich. 377, 58 L.R.A. 410; State v. Watson, 44 Mo. 305; Heckman v. Manning, 4 Colo. 543; Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504; Line v. Nelson, 38 N. J. L. 358; Bonney v. Bonney, 29 Iowa, 448; Prince v. Lynch, 38 Cal. 528.

The rule extends to all who might have been held for the wrong. Breeden v. Frankford M., etc. Ins. Co., 220 Mo. 327.

Where judgment was rendered against two defendants upon a verdict which apportioned their liability, a motion to vacate it and dismiss the action as to one was denied on the ground that it might operate as a discharge of both. McCool v. Mahoney, 54 Cal. 491. See Minor v. Mechanics' Bank, 1 Pet. 46, 87.

A similar verdict was considered as being against one defendant and a finding in favor of the other against whom the smaller sum was charged. Clissold v. Machell, 25 Up. Can. Q. B. 80, 26 id. 422.

¹⁴ Ward v. Motter, 2 Rob. (Va.) 536.

merchant in whose name it was conducted bought goods and executed a specialty for the price the vendor, though ignorant at the time that such purchaser had a dormant partner, but who discovered that fact after the death of the purchaser who executed the specialty, was held not entitled to maintain *assumpsit* on the simple contract against the dormant partner because that contract was extinguished.¹⁵ According to some authorities the satisfaction and discharge of one who was not in fact liable to the person injured does not affect the rights of the latter against those who are liable;¹⁶ several courts take the opposing view.¹⁷ Joint tort-feasors may be sued jointly in the same action or in separate actions, and several judgments may be rendered in either action; these do not affect the liability of any of the parties unless satisfaction in some form is made,¹⁸ though the action is dismissed as to some before judgment.¹⁹ But the issue

¹⁵ *Id.*

¹⁶ *Ryan v. Becker*, 136 Iowa, 273; *Kentucky I. & B. Co. v. Hall*, 125 Ind. 220; *Missouri, etc. R. Co. v. McWherter*, 59 Kan. 345; citing *Turner v. Hitchcock*, 20 Iowa, 310; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Wilson v. Reed*, 3 Johns. 175; *Wardell v. McConnell*, 25 Neb. 558; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *Bell v. Perry*, 43 Iowa, 368; *Owen v. Brockschmidt*, 54 Mo. 285; *Pogel v. Meilke*, 60 Wis. 248.

¹⁷ *Laughlin v. Mfg. Co.*, *supra*; *Hubbard v. St. Louis, etc. R. Co.*, 173 Mo. 249; *Fitzgerald v. Union S. Co.*, 89 Neb. 393, 33 L.R.A. (N.S.) 983; *Leddy v. Barney*, 139 Mass. 394; *Leither v. Philadelphia T. Co.*, 125 Pa. 397, 4 L.R.A. 54; *Tompkins v. Clay St. R. Co.*, 66 Cal. 163, 11 Am. Neg. Cas. 181; *Miller v. Beck*, 108 Iowa, 575; *Butler v. Ashworth*, 110 Cal. 614.

¹⁸ *Lovelace v. Miller*, 150 Ala. 422, 11 L.R.A. (N.S.) 670; *Doyle v. Nesting*, 37 Colo. 522; *Cleveland, etc. R. Co. v. Hilligoss*, 171 Ind.

417, 131 Am. St. 258; *Grundel v. Union I. Works*, 127 Cal. 438, 78 Am. St. 75, 47 L.R.A. 467; *Vincent v. McNamara*, 70 Conn. 332; *Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129; *Norfolk L. Co. v. Simmons*, 2 Marvel, 317. See § 216.

If judgment is taken against two jointly or separately liable for sums agreed upon the payment by either of the sum named in the judgment discharges it. *Inntington v. Newport News & M. V. Co.*, 78 Conn. 35.

The rule that a judgment without satisfaction against one of two joint wrongdoers sued separately does not bar an action against the other does not apply if they are sued jointly. "The cause of action, being single, has been merged in the judgment and the form of the action changed. It cannot afterwards be divided into actions, one sounding in contract and the other in tort." *Cameron v. Kanrich*, 201 Mass. 451.

¹⁹ *Nordhaus v. Vandalia R. Co.*, 242 Ill. 166.

of an execution or the granting of an order for issuance seems to be considered a satisfaction in Indiana,²⁰ and so of the entry of judgment.²¹ The satisfaction of a judgment against a builder for the substitution of inferior material and for doing work in an unworkmanlike manner bars an action by the same plaintiff against the architect who made the plans for the building and contracted to supervise its erection in accordance therewith. It is said the former suit against the builder was based on his violation of the building contract, while this suit appears to have been brought for the purpose not only of recovering damages from the defendant for his alleged neglect as an architect, but also to recover damages arising in consequence of the omissions, negligence, unfaithfulness and wrongdoing of the builder. It is true that the acts of the builder which formed the basis for the damages awarded in the suit against him are now alleged to have been allowed to occur by reason of the architect's negligence in the performance of his duty. But whether the wrongdoing complained of in the former case be the joint act of the builder and the defendant or the several tort of each can make no difference in determining the validity of the plea or the admissibility of the record in evidence in this case. If the defendant and the builder had both been sued in the first case for the injury there alleged there could have been but one recovery. And it would seem to be very clear reason, and authority as well, that the same result must follow when the same injury is caused by the independent acts of several wrong-doers. The reason of this rule is apparent. It is neither just nor lawful that there should be more than one satisfaction for the same injury whether that injury be done by one or more.²²

In Ontario the recovery of a judgment against one defendant bars an action against any other; but an action may be brought against several and if judgment is rendered against one a motion may be made to include the others. *Sheppard Pub. Co. v. Pres. Pub. Co.*, 10 Ont. L. R. 243.

A discontinuance as to one defendant is immaterial as to the oth-

ers. *Strickland v. Wedgeworth*, 154 Ala. 654, overruling *Torrey v. Forbes*, 94 Ala. 135.

²⁰ *Ashcraft v. Knoblock*, 146 Ind. 169.

²¹ *Indianapolis T. & T. Co. v. Holtzelaw*, 40 Ind. App. 311.

²² *Berkley v. Wilson*, 87 Md. 219, citing *Cleveland v. Bangor*, 87 Me. 264; *Brown v. Cambridge*, 3 Allen, 474; *Lovejoy v. Murray*, 3 Wall.

§ 137. Principles on which joint right or liability for tort determined. Whether actions in tort are joint as to the parties injured or as to those liable depends on very plain principles. The injury is joint where it at once affects property or interests jointly owned; in other words, there must be a community of interest between the parties injured in that which the injury affects. Husband and wife may not join in an action to recover damages on account of a nervous shock to her, and expense and loss of time by him, both having been caused by the unlawful entry of the landlord on premises jointly occupied by them.²³ And to render wrong-doers jointly liable there must be concert or a common purpose between them.²⁴ Persons who are jointly interested in the damages recoverable for an injury to property may unite in a suit for their recovery although they are not joint owners of the property itself. Thus two persons in possession of land carrying on business in a mill which belongs to one of them only may unite in an action for damages for a negligent burning of it,²⁵ and parties who may, as individual owners of land held in severalty, join in an action for injury thereto, may also claim damages sustained by them individually from the

1, 18 L. ed. 129; *Gunther v. Lee*, 45 Md. 67, 24 Am. Rep. 504.

²³ *Stewart v. Alvis*, 30 Ind. App. 237.

²⁴ Persons who have committed distinct torts in relation to the same property may not be joined. *Hackney v. Perry*, 152 Ala. 626.

If one or more persons conspire with another to commit, or two or more persons combine together to effect, the violation of a contract and their object be effected to the damage of a third person, the latter may recover against him who broke the contract and against those so connected with the wrong. *Martens v. Reilly*, 109 Wis. 464. See *Quinn v. Leatham*, [1901] App. Cas. 495.

Where the complaint alleged that each of two defendants was negligent in not having a sufficient wall to sustain his building, by reason

whereof both buildings fell upon and destroyed the plaintiff's building, at the same time and on the whole of said building and both of which became an undistinguishable mass, as was the building on which they fell, so that it could not be said which produced the greater damage, and it could not be determined as to the extent of the damage either did, both defendants were liable for the whole damage and neither could complain that both were sued jointly. If the evidence showed that either was not negligent he would not be liable, in which case the others would have no reason to complain of the misjoinder. *Johnson v. Chapman*, 43 W. Va. 639.

²⁵ *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449; *Rhoads v. Booth*, 14 Iowa, 575.

same acts.²⁶ If injury is done both to the possession and the freehold and the interests of both owners are affected, though in different degrees, the life tenant and the remainder-man may join in case for the recovery of the damages.²⁷ All joint owners of personal property are rightly joined in actions for tortious injuries thereto.²⁸ At common law the rule was that "when two or more persons are jointly entitled, or have a joint legal interest in the property affected, they must, in general, join in the action or the defendant may plead in abatement."²⁹ As to tenants in common who bring actions against third parties a distinction existed between real and personal actions. "When the action is in the realty they must sue separately;³⁰ when in the personalty they must join."³¹ This rule must give way if the effect of enforcing it will be to deny a remedy. The reason for it—to protect defendants from a multiplicity of suits—is good; but if adherence to it will cause a failure of justice the reason for departing from the rule is stronger than that for applying it because there is a possibility that no other suit will be brought on the cause of action; while there is a certainty that adherence to it will work the loss of a remedy. These considerations induced the Minnesota court to permit one tenant in common of personalty to maintain an action against a stranger for a wrong done to it, the co-tenants refusing to join as plaintiffs, and, being non-residents, they could not be made defendants.³² The owner

²⁶ *Teel v. Rio Bravo O. Co.*, 47 Tex. Civ. App. 153.

²⁷ *Western & R. Co. v. Tate*, 129 Ga. 526; *McIntire v. Westmoreland C. Co.*, 118 Pa. 108.

²⁸ *Glover v. Austin*, 6 Pick. 209; *Pickering v. Pickering*, 11 N. H. 141.

But in California one joint owner can recover but one-half the damages for injury done to the joint property. *Loveland v. Gardner*, 79 Cal. 317, 4 L.R.A. 395.

If two machines are bought on joint account and paid for out of joint funds the fact that the purchasers entered into a separate con-

tract for each machine and that each contract was signed by one of them only in his individual name does not preclude parol proof that the purchase of each machine was made by one of them as agent for the other and on their joint account; such evidence will sustain a joint action for breach of warranty of the machines. *Fox v. Stockton H. etc. Works*, 83 Cal. 333.

²⁹ 1 Chitty Plead. 64.

³⁰ *Carley v. Parton*, 75 Tex. 98.

³¹ *Hill v. Gibbs*, 5 Hill, 56; *Rowland v. Murphy*, 66 Tex. 534.

³² *Peck v. McLean*, 36 Minn. 228, 1 Am. St. 665.

and lessee of land being cultivated on shares may join in an action for an injury to the crop resulting from the use of unfit seed.³³

§ 138. Tortious act not an entirety as to parties injured.

A tortious act is not an entirety as to the persons affected by it; it may affect many persons and do a several injury to each.³⁴ A single trespass upon real estate, injurious to the possession and to the inheritance, will be an entire cause of action if one person has the whole title and is in possession. But if one person has the possession and another a reversionary title a distinct wrong is done to each, for which each may bring a separate and independent action.³⁵ One having a special interest in real estate injured by the tortious act of another may recover damages therefor whether the wrong-doer is a stranger or has another interest in the same premises.³⁶ The purchaser of a crop of growing grass is entitled to the exclusive enjoyment of the crop standing on the land during the proper period of its full growth and removal, and may maintain trespass *quare clausum fregit* against a stranger who during that time wrongfully enters and cuts and carries away the grass.³⁷ He could maintain a like action against the general owner of the land for such a trespass.³⁸ The general rule that actions for injuries to the person or to character must be maintained sever-

³³ *Fuhrman v. Interior W. Co.*, — Wash. —, 116 Pac. 666.

³⁴ *Tobin v. Best*, 120 App. Div. (N. Y.) 387; *Stecher v. People*, 217 Ill. 348 (action under dramshop act); *Mitchell v. Heisen*, 169 Ill. App. 531.

³⁵ *Nashville, etc. R. Co. v. Heikens*, 112 Tenn. 378, 65 L.R.A. 298; *Wood v. Williamsburgh*, 46 Barb. 601; *Gilbert v. Kennedy*, 22 Mich. 5; *Files v. Magoon*, 41 Me. 104; *Stevens v. Adams*, 1 Thomp. & C. 587; *Stoner v. Hunsieker*, 47 Pa. 514; *Adams v. Emerson*, 6 Pick. 57; *Robbins v. Borman*, 1 Pick. 122; *Jordan v. Benwood*, 42 W. Va. 312, 36 L.R.A. 519; *Yeager v. Fairmont*,

43 W. Va. 259, 2 Am. Neg. Rep. 668.

In Pennsylvania a joint action may be maintained. *McIntire v. Westmoreland C. Co.*, 118 Pa. 108; *Knula v. Moose Mountain Limited*, 26 Ont. L. R. 332.

³⁶ *Hasbrouck v. Winkler*, 48 N. J. L. 431; *Luse v. Jones*, 39 N. J. L. 707; *Turnpike Co. v. Fry*, 88 Tenn. 296.

³⁷ *Dolloff v. Danforth*, 43 N. H. 219; *Howard v. Lincoln*, 13 Me. 122; *Austin v. Hudson River R. Co.*, 25 N. Y. 334.

³⁸ *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215; *Caldwell v. Julian*, 2 Mills, 294.

ally by the persons affected,³⁹ does not prevent partners charged with dishonesty in the management of the business of the firm from maintaining a joint action, though they may sue severally.⁴⁰ In Louisiana persons who are jointly slandered may unite in an action.⁴¹ Where two or more persons suffer a joint damage and each also a separate damage from the same tort, in a joint action only the joint damage may be recovered.⁴²

§ 139. **General and special owners.** In such case the damages will be according to the tenure by which the plaintiff holds and such as result from the injury he has suffered. He must show that his title gives him an interest in the damages he claims, and can recover none except such as affect his right.⁴³ In actions against a stranger for taking or converting personal property a bailee, mortgagee or other special property man is entitled to recover its full value, but must account to the general owner for the surplus recovered beyond the value of his own interest; but against the general owner or one in privity with him only the value of the special property.⁴⁴ Where goods assigned to a creditor in trust to pay himself and other creditors were attached at the suit of some of the creditors as property of the assignor

³⁹ *Anderson v. Evansville B. Ass'n*, 49 Ind. App. 403.

⁴⁰ *Weitershausen v. Crotian* P. & P. Co., 157 Fed. 947.

⁴¹ *Madere v. Alexandre*, 126 La. 342.

⁴² *Collier v. Postum C. Co.*, 150 App. Div. (N. Y.) 169; *Rhoads v. Booth*, 14 Iowa 576; *Jefferson F. Co. v. Rich*, 182 Ala. 633.

⁴³ *Gilbert v. Kennedy*, 22 Mich. 5.

One who has borrowed property cannot maintain an action for its loss. *Lockhart v. Western & A. R. Co.*, 73 Ga. 472, 44 Am. Rep. 883.

⁴⁴ *Southern R. Co. v. Adams Mach. Co.*, 165 Ala. 436; *Walsh v. United States T. & A. Co.*, 153 Ill. App. 229; *Denver, etc. R. Co. v. Frame*, 6 Colo. 382; *White v. Webb*, 15 Conn. 302; *Seaman v. Luce*, 23 Barb. 240; *Chadwick v. Lamb*, 29

Barb. 518; *Rhoads v. Woods*, 41 Barb. 471; *Sherman v. Fall River I. Co.*, 5 Allen, 213; *Bartlett v. Kidder*, 14 Gray, 449; *Russell v. Butterfield*, 21 Wend. 300; *Fallon v. Manning*, 35 Mo. 271; *Chaffee v. Sherman*, 26 Vt. 237; *Soule v. White*, 14 Me. 436; *Mead v. Thompson*, 78 Ill. 62; *Guttner v. Pacific S. W. Co.*, 96 Fed. 617, citing the text; *Armory v. Delamire*, 1 Str. 505; *The Jersey City*, 2 C. C. A. 365, 51 Fed. 527; *Knight v. Carriage Co.*, 18 C. C. A. 287, 71 Fed. 662; *The Mercedes*, 108 Fed. 559. See §§ 1136, 1137.

A bailee who is under no liability to his bailor cannot recover for an injury to property held by him. *Claridge v. South Staffordshire T. Co.*, [1892] 1 Q. B. 422.

before the assignment was assented to by any creditor but the assignee, and the value of the goods exceeded the amount of the latter's demand, in an action of trespass brought by the assignee against the attaching officer, the measure of damages was the amount of the plaintiff's demand against the assignor and not the value of the goods.⁴⁵ An officer, with an execution against one of two partners, who makes himself a trespasser *ab initio* by levying on the entire property of the concern, still represents the interest of the execution debtor, and the owner of the other interest can recover against him only the value thereof.⁴⁶

Several persons having separate and distinct interests in a chattel cannot unite in replevin for it;⁴⁷ two persons cannot join in suing for an injury done to one of them.⁴⁸ Where two constables levy on the same goods by virtue of separate executions they cannot join in an action against one who takes away the goods.⁴⁹ One of several joint debtors whose separate goods are taken on execution and wasted must sue alone for redress; and so if the officer extorsively demand and receive of the debtors illegal fees.⁵⁰ Actions for torts connected with the matter of a contract, where the tort consists in the mere omission of a contract duty, must be brought by the party injured.⁵¹ In one suit the court will not take cognizance of distinct and separate claims of different persons. Where the damage as well as the interest is several each party must sue separately.⁵² Whether the plain-

⁴⁵ Boyden v. Moore, 11 Pick. 362; Mantonya v. Emerich O. Co., 172 Ill. 92, citing the text.

⁴⁶ Berry v. Kelly, 4 Robert. 106.

⁴⁷ Chambers v. Hunt, 18 N. J. L. 339.

⁴⁸ Winans v. Denman, 3 N. J. L. 124.

⁴⁹ Warne v. Rose, 5 N. J. L. 809.

⁵⁰ Ulmer v. Cunningham, 2 Me. 117; Slaughter v. American Baptist P. Soc., (Tex. Civ. App.), 150 S. W. 224.

⁵¹ Fairmount R. Co. v. Stutler, 54 Pa. 375, 6 Am. Neg. Cas. 260, 93 Am. Dec. 714.

The assignment by one member of

a firm of all his right, title and interest in and to the partnership assets gives the assignee such an interest in a claim secured by a mortgage on crops as makes him a proper complainant with the other partner in an action for their conversion or a special action on the case in the nature of trover for damages thereto. Keith v. Ham, 89 Ala. 590.

⁵² Andrews v. Weekerman, 144 Mich. 199; Nahte v. Hansen, 106 Minn. 365; Hufnagel v. Mt. Vernon, 49 Ill. 286; Governor v. Hicks, 12 Ga. 189; Rhoads v. Booth, 14 Iowa,

tiffs in a joint action are co-partners or not is immaterial so long as their cause of action is shown to be joint.⁵³

§ 140. **Joint and several liability for torts.** If injuries or damage are sustained through the affirmative acts or negligence of several persons, an action may be brought against all or any of them without prejudicing the plaintiff's rights.⁵⁴

575; *Schaeffer v. Marienthal*, 17 Ohio St. 183.

⁵³ *Wood v. Pithian*, 24 N. J. L. 33.

⁵⁴ *Reynolds v. Metropolitan St. Ry. Co.* 180 Mo. App. 138; *Arnold v. C. Hoffman & Son Milling Co.*, 93 Kan. 54; *Thoreson v. St. Paul T. & L. Co.*, 73 Wash. 99; *Kirkpatrick v. San Angelo Nat. Bank* (Tex. Civ. App.), 148 S. W. 362; *Maddox v. Neuton*, 4 Ala. App. 454; *American S. Co. v. Souers*, 50 Ind. App. 475; *Young v. Aylesworth*, 35 R. I. 259, citing the text; *Marsh v. Usk H. Co.*, 73 Wash. 543; *Traffler v. Detroit & C. N. Co.*, 181 Fed. 256; *Mason v. Wolkwich*, 10 L.R.A. (N.S.) 765, 150 Fed. 699, 80 C. C. A. 435; *The Hamilton*, 146 Fed. 724, 77 C. C. A. 150; *Southern R. Co. v. Jones C. Co.*, 167 Ala. 575; *Abney v. Mize*, 155 Ala. 391; *Roach v. Rector*, 93 Ark. 521; *Southwestern Tel. & T. Co. v. Bruce*, 89 Ark. 581; *St. Louis, etc. R. Co. v. Coolidge*, 73 Ark. 112, 108 Am. St. 21, 67 L.R.A. 555; *Allen v. Ruland*, 79 Conn. 405; *Burns v. Horkan*, 126 Ga. 161; *Western & A. R. Co. v. Henderson*, 6 Ga. App. 385; *Finley v. Southern R. Co.*, 5 Ga. App. 722; *Parmalee Co. v. Wheelock*, 224 Ill. 194; *Baltimore, etc. R. Co. v. Kleespies*, 39 Ind. App. 151; *St. Louis, etc. R. Co. v. Noland*, 75 Kan. 691; *Guernsey v. Davis*, 67 Kan. 378; *Bowman v. Hazen*, 69 Kan. 682; *Hawkins F. Co. v. Morris*, 143 Ky. 738; *Probst v. Hinesley*, 133 Ky. 64; *Illinois Cent. R. Co. v. Coley*, 121 Ky. 385, 1 L.R.A. (N.S.) 370; *Cum-*

berland Tel. & T. Co. v. Ware, 115 Ky. 581; *D'Almeida v. Boston & M. R.*, 209 Mass. 81; *Corey v. Havener*, 182 Mass. 250; *Fryklund v. Great Northern R. Co.*, 101 Minn. 37; *Berry v. St. Louis, etc. R. Co.*, 214 Mo. 593; *Faust v. Pope*, 132 Mo. App. 287; *Rand v. Butte E. R. Co.*, 40 Mont. 398; *Fitzgerald v. Union S. Co.*, 89 Neb. 393, 33 L.R.A. (N.S.) 983; *Starr v. Bankers' Union*, 81 Neb. 377, 129 Am. St. 680; *Squire v. Ordemann*, 194 N. Y. 394; *Hughes v. Harbor & S. B. & S. Ass'n*, 131 App. Div. (N. Y.) 185; *Barber v. Dewes*, 101 App. Div. (N. Y.) 432; *Upton C. & M. Co. v. Williams*, 28 Ohio C. C. 388; *Warner v. DeArmond*, 49 Ore. 199; *McElroy v. Harnack*, 213 Pa. 444; *Moore v. Chattanooga E. R. Co.*, 119 Tenn. 710, 16 L.R.A. (N.S.) 978; *Coleman v. Bennett*, 111 Tenn. 705; *San Marcos E. L. & P. Co. v. Compton*, 48 Tex. Civ. App. 586; *Sexton R. & I. Co. v. Sexton*, 48 Tex. Civ. App. 190; *Groot v. Oregon S. L. R. Co.*, 34 Utah, 152; *Walton v. Miller*, 109 Va. 210, 132 Am. St. 908; *Helberg v. Hosmer*, 143 Wis. 620; *Olwell v. Skobis*, 126 Wis. 308; *O'Keefe v. Walsh* (1903) 2 Irish, 681; *Moore v. Fryman*, 154 Iowa, 534; *Williams v. Sheldon*, 10 Wend. 654; *Merryweather v. Nixan*, 8 T. R. 186; *Wheeler v. Worcester*, 10 Allen, 591; *Murphy v. Wilson*, 44 Mo. 313, 100 Am. Dec. 390; *Moore v. Appleton*, 26 Ala. 633.

Some authorities state the rule thus: If injuries or damage are

If separate judgments are obtained the plaintiff may, at his option, where the judgments are for varying amounts, elect to

sustained through the affirmative acts or negligence of several persons acting jointly, or, if contributed to by each, in pursuance of a joint purpose, an action may be brought against all or any of them. Others, and the weight of authority favors the rule as stated in the text, ignore the necessity for joint action or the existence of a common purpose; as where by the separate, but concurrent, negligence of two carriers a passenger is injured by a collision, or a person is simultaneously arrested on two warrants issued at the instance of two persons. *Colgrove v. New York*, etc. R. Co., 20 N. Y. 492, 75 Am. Dec. 419; *Slater v. Mersereau*, 64 N. Y. 147; *Boyd v. Watt*, 27 Ohio St. 268; *City El. St. R. Co. v. Conery*, 61 Ark. 381, 54 Am. St. 262, 31 L.R.A. 570; *Pine Bluff W. & L. Co. v. McCain*, 62 Ark. 118; *Klauber v. McGrath*, 35 Pa. 118, 78 Am. Dec. 329; *Peckham v. Burlington*, *Brayton*, 134; *Allison v. Hobbs*, 96 Me. 26; *Boston & A. R. Co. v. Shanly*, 107 Mass. 568; *Newman v. Fowler*, 37 N. J. L. 89, 16 Am. Neg. Cas. 722; *Lake Erie & W. R. Co. v. Middlecoff*, 150 Ill. 27; *Kansas City v. Slangstrom*, 53 Kan. 431; *Pugh v. Chesapeake & O. R. Co.*, 101 Ky. 77, 2 Am. Neg. Rep. 159, 72 Am. St. 392; *Stone v. Dickson*, 5 Allen, 29, 81 Am. Dec. 727; *Cuddy v. Horn*, 46 Mich. 603; *Flaherty v. Minneapolis*, etc. R. Co., 39 Minn. 328, 12 Am. St. 654; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266; *Brown v. Cox*, 75 Fed. 689; *McFadden v. Metropolitan St. R. Co.*, 161 Mo. App. 652. See § 141 and note. But this doctrine has been doubted. *Lull v. Fox & W.*

I. Co., 19 Wis. 100; *Trowbridge v. Forepaugh*, 14 Minn. 133; *Larkins v. Eekwurzel*, 42 Ala. 322, 94 Am. Dec. 651; *Powell v. Thompson*, 80 Ala. 51.

It has been said, *arguendo*, of a complaint which set up the separate and distinct wrongs of the respective defendants and sought to enforce a joint liability for acts which were not joint in themselves nor bound together by the tie of a common purpose, that this cannot be done; the wrong done must be jointly done in fact by the defendants, or if contributed to by each, a joint purpose must be imputable to them before they can be said to be joint tort-feasors, and responsible jointly and severally for the resulting injury. It will not suffice, as a general proposition at least, that the separate wrongful acts or omissions of two persons, having no connection with each other, the motive of each being foreign to that of the other, have in their unintended coalescence and coaction produced an injury. *Richmond & D. R. Co. v. Greenwood*, 99 Ala. 501, 11 Am. Neg. Cas. 9; *Ensley L. Co. v. Lewis*, 121 Ala. 100.

This appears to be in conformity with the rule in England. In a recent case the plaintiff brought an action for negligently excavating near his house, whereby it was damaged; the defendant attributed the damage, wholly or in part, to the negligence of a water company in leaving a main insufficiently stopped. The court declined to join such company as a defendant because the torts were separate, though the resulting damage was the same in each case. *Thompson*

enforce the one which is for the largest amount.⁵⁵ The rule concerning the bringing of actions applies in equity as well as at law.⁵⁶ Such persons may participate so as to be thus liable by preconcert to do the wrong complained of, or to procure it to be done, as well as by jointly taking part in it, or by subsequently adopting the act done or neglect suffered as principals.⁵⁷ The extent of individual participation in, or of expected benefit from, a joint tort is immaterial; each and all of the tort-feasors

v. London County Council, [1897] 1 Q. B. 84.

In an earlier case against two defendants it was alleged that each of them, by their several acts, and that they by their combined acts, obstructed the plaintiff's access to his premises, and an injunction and damages were prayed against each of them; it was determined that the action could not be maintained; that one of the defendants must be struck out. *Sadler v. Great Western R. Co.*, [1896] App. Cas. 450, affirming [1895] 2 Q. B. 688.

Where a municipality is bound to see that its streets and sidewalks are kept in proper condition it cannot be joined as a defendant with a resident property owner whose duty it is to see that the walk adjoining his premises is in good repair for an injury resulting from his neglect. Their co-operation is not of a nature which makes them joint wrongdoers. *Dutton v. Lansdowne*, 198 Pa. 563. See *Wiest v. Electric T. Co.*, 200 Pa. 148, 58 L.R.A. 666; *Schneider v. Augusta*, 118 Ga. 610.

The joint liability of a wife for her husband's tort depends upon her volition in doing the wrong. *Mathoney v. Roberts*, 86 Ark. 130.

⁵⁵ *Roodhouse v. Christian*, 55 Ill. App. 107; *Kansas City v. Slangstrom*, 53 Kan. 431; *Pugh v. Chesapeake & O. R. Co.*, *Young v. Aylesworth*, 35 R. I. 259; *Blackman v.*

Simpson, 120 Mich. 377, 58 L.R.A. 410; *Berkson v. Kansas City C. R. Co.*, 144 Mo. 211; *Burk v. Howley*, 179 Pa. 539, 57 Am. St. 607; *Koch v. Peters*, 97 Wis. 492.

⁵⁶ *New Jersey P. Co. v. Schaeffer*, 159 Fed. 171; *Old Dominion C. M. & S. Co. v. Bigelow*, 203 Mass. 159, 40 L.R.A. (N.S.) 314; *Hopkins v. Oxley S. Co.*, 28 C. C. A. 99, 103, 83 Fed. 912, citing *Cunningham v. Pell*, 5 Paige, 607; *Wall v. Thomas*, 41 Fed. 620.

⁵⁷ *Pioneer M. Co. v. Mitchell*, 190 Fed. 937, 111 C. C. A. 771; *Zobel v. Rawlings M. Co.*, 49 Colo. 134; *Grimes v. Greenblatt*, 47 Colo. 495; *Chattahoochee B. Co. v. Goings*, 135 Ga. 529; *Golibart v. Sullivan*, 30 Ind. App. 428; *Stuart v. Chapman*, 104 Me. 17; *Chase v. Cochran*, 102 Me. 431; *Medairy v. McAllister*, 97 Md. 488; *Cascarella v. National G. Co.*, 151 Mich. 15; *Carp v. Queen Ins. Co.*, 203 Mo. 295; *Summers v. Keller*, 152 Mo. App. 626; *Cooper v. Seyoc*, 104 Mo. App. 414; *First Nat. Bank v. Avery P. Co.*, 69 Neb. 329, 111 Am. St. 541; *Carey v. Wolff*, 72 N. J. L. 510; *Murdough v. Tuten*, 76 S. C. 502; *Hunt v. Di Bacco*, 69 W. Va. 449; *Smith v. Healey*, — N. Y. Misc. —, 121 Supp. 230; *Mathews v. Livingston*, 86 Conn. 263; *Virtue v. Creamery P. Mfg. Co.*, 123 Minn. 17; *Schafer v. Ostmann*, 172 Mo. App. 602; *Fanning v. Brandl*, 178 Ill. App. 224;

are liable for the entire damage.⁵³ The law is thus accurately and comprehensively laid down in a New York case: "To entitle the plaintiff to a verdict against all the defendants as joint trespassers it must appear that they acted in concert in committing the trespass complained of; if some aided and assisted the others to commit the trespass or assented to the trespass committed by others, having an interest therein, they are all jointly guilty; . . . it would not be material if they had unequal interests in the avails of the trespass; for those who

Rebont v. Pense, 31 S. D. 619, (in the absence of proof of a conspiracy); *Northern T. Co. v. Palmer*, 171 Ill. 383; *Donovan v. Consolidated C. Co.*, 187 Ill. 28, aff'g 88 Ill. App. 589; *Lewis v. Read*, 13 M. & W. 834; *Davis v. Newkirk*, 5 Denio 92; *Cook v. Hopper*, 23 Mich. 511; *Bonnel v. Dunn*, 28 N. J. L. 153; *Ford v. Williams*, 13 N. Y. 584; *Ball v. Loomis*, 29 N. Y. 412; *Hyde v. Cooper*, 26 Vt. 552; *Lewis v. Johns*, 34 Cal. 629; *Adams v. Freeman*, 9 Johns. 118; *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234; *Hume v. Oldaere*, 1 Stark. 351; *Stewart v. Wells*, 6 Barb. 81; *Wheeler v. Worcester*, 10 Allen, 591.

The ratification by a national union of the act of a local union in expelling a member makes the former a proper party to the action for redress. *Schouten v. Alpine*, 77 N. Y. Misc. 19.

⁵³ *McCool v. Mahoney*, 54 Cal. 491; *Learned v. Castle*, 73 id. 454; *McCalla v. Shaw*, 72 Ga. 458; *Everroad v. Gabbert*, 83 Ind. 489; *Westbrook v. Mize*, 35 Kan. 299; *Sharpe v. Williams*, 41 Kan. 56; *Boaz v. Tate*, 43 Ind. 60; *Breedlove v. Bundy*, 96 id. 319; *Page v. Freeman*, 19 Mo. 421; *Wright v. Lathrop*, 2 Ohio, 275; *Knickrbacker v. Colver*, 8 Cow. 111; *Turner v. Hitchcock*, 20 Iowa, 310; *Nelson v. Cook*, 17 Ill.

443; *McMannus v. Lee*, 43 Mo. 206, 97 Am. Dec. 386; *Brown v. Perkins*, 1 Allen, 89; *Barden v. Felch*, 109 Mass. 154; *Williams v. Sheldon*, 10 Wend. 654; *Currier v. Swan*, 63 Me. 323; *Mason v. Sieglitz*, 22 Colo. 320; *Hunter v. Wakefield*, 97 Ga. 543; *Sternfels v. Metropolitan St. R. Co.*, 73 App. Div. (N. Y.) 494; *Hill v. Ninth Ave. R. Co.*, 109 N. Y. 239, 9 Am. Neg. Cas. 665; *Atlanta v. Chattanooga F. & Pipeworks*, 64 L.R.A. 721, 61 C. C. A. 387, 127 Fed. 23; *Hayes v. Miller*, 150 Ala. 621, 11 L.R.A.(N.S.) 748, 124 Am. St. 93; *Marriott v. Williams*, 152 Cal. 705, 125 Am. St. 87; *Forsythe v. Los Angeles R. Co.*, 149 Cal. 569; *Cordiner v. Los Angeles T. Co.*, 5 Cal. App. 400; *Pern H. Co. v. Lenhart*, 48 Ind. App. 319; *Wisecarver v. Chicago, etc. R. Co.*, 141 Iowa 121; *Holderman v. Hood*, 70 Kan. 267; *Woodbury v. Sparrell Print*, 198 Mass. 1; *Cook v. Hastings*, 150 Mich. 289, 14 L.R.A.(N.S.) 1123; *Bragg v. Metropolitan St. R. Co.*, 192 Mo. 331; *Brouster v. Fox*, 117 Mo. App. 711. An exception is noted in § 1059.

In an action against conspirators the jury may assess damages against the separate defendants according to the respective dates when they became conspirators. *O'Keefe v. Walsh*, [1903] 2 Irish 681.

confederate to do an unlawful act are deemed guilty of the whole although their share in the profits may be small. But if any of the defendants are not guilty at all, or if any of them, though guilty, were acting separately and for themselves alone, without any concert with the others, they ought to be acquitted and those only found guilty who were acting jointly."⁵⁹ The fact that one who orders an act done, which results in injury to a third person, gave such order as the officer of a municipal or private corporation does not absolve him from liability for the consequences.⁶⁰ The rule is that two or more persons cannot be held jointly liable for verbal slander.⁶¹ While admitting this it is said in a recent case in which slander of title was the ground of the action, that under circumstances where all the defendants are jointly concerned and interested and participate in the general purpose, their concert and co-operation may be shown although the false and malicious statements may have been made by one alone.⁶² Where a master is liable for the tort of his servant, a principal for that of his agent or deputy, they are jointly liable.⁶³ Joint liability attaches to a firm for a slander

⁵⁹ *Williams v. Sheldon*, 10 Wend. 654; *Howard v. Dayton C. & I. Co.*, 94 Ga. 416; *Pittsburgh R. Co. v. Chapman*, 145 Fed. 886, 76 C. C. A. 418; *Le Laurin v. Murray*, 75 Ark. 232; *Millard v. Miller*, 39 Colo. 103; *Howe v. Bradstreet Co.*, 135 Ga. 564; *Shannon v. Swanson*, 208 Ill. 52; *Lawrence v. Leathers*, 31 Ind. App. 414; *Bernheimer v. Beeker*, 102 Md. 250, 3 L.R.A.(N.S.) 221, 111 Am. St. 356; *Stone v. Heggie*, 82 Miss. 410; *Paddock-H. I. Co. v. Rice*, 179 Mo. 480; *Otrich v. St. Louis, etc. R. Co.*, 154 Mo. App. 420; *Barton v. Barton*, 119 Mo. App. 507; *Allen v. Bear Creek C. Co.*, 43 Mont. 269; *West v. Grocery Co.*, 138 N. C. 166; *Sanders v. Cline*, 22 Okla. 154; *Citizens' R. & L. Co. v. Atwood*, — Tex. Civ. App. —, 138 S. W. 1101.

⁶⁰ *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578; *Myers v.*

Daubenbiss, 84 Cal. 1; *New Ellerslie F. Club v. Stewart*, 123 Ky. 8, 9 L.R.A.(N.S.) 475.

⁶¹ *Blake v. Smith*, 19 R. I. 476; *Cox v. Strickland*, 120 Ga. 104; *Duquesne D. Co. v. Greenbaum*, 135 Ky. 182, 24 L.R.A.(N.S.) 955. See *Hendricks v. Middlebrooks Co.*, 118 Ga. 131; *Kellar v. James*, 63 W. Va. 139, 14 L.R.A.(N.S.) 1003; *State v. Marlier*, 46 Mo. App. 233; *Butts v. Long*, 94 id. 687, 692.

⁶² *Chesebro v. Powers*, 78 Mich. 472. See *Thomas v. Rumsey*, 6 Johns. 26.

⁶³ *Balme v. Hutton*, 9 Bing. 471; *Waterbury v. Westervelt*, 9 N. Y. 598; *Morgan v. Chester*, 4 Conn. 387; *Barker v. Braham*, 3 Wils. 368; *Bates v. Pilling*, 6 B. & C. 38; *Newberry v. Lee*, 3 Hill, 523; *Crook v. Wright*, R. & M. 278; *Armstrong v. Dubois*, 4 Keyes, 291; *Baker v. Davis*, 127 Ga. 649; *Malone v. Ham-*

by an agent or servant if it was directed, authorized or ratified.⁶⁴ If an officer takes property of a wrong person on process he, as well as the party or attorney who directs it and even the sureties who execute a bond of indemnity to the officer covering that tort, may be jointly liable.⁶⁵ An action for deceit in the nature of a conspiracy cannot be sustained against a principal for the unauthorized fraudulent acts and representations of the agent alone.⁶⁶ According to the Iowa court if one joint wrong-doer was actuated by malice his condition of mind will be attributed to the others, and each will be liable for all the damages, actual and exemplary, resulting from the wrong.⁶⁷ But this we regard as a very doubtful proposition. In Kentucky a cause of action under the common law against one party for compensatory damages cannot be joined with an action against another party for punitive damages, the right thereto resting on a statute, although both causes of action arose out of the same transaction.⁶⁸ The better rule is that co-operation is necessary to make a joint tort a wilful one.⁶⁹

§ 141. Same subject. In an action for diverting water from a natural water-course so as to flood the plaintiff's land it appeared that the defendant did it by walling the banks on his own land to preserve them. A third person, by certain acts

mond, 6 Ga. App. 114; Louisville & N. R. Co. v. Gollihur, 40 Ind. App. 480; Corliss v. Keown, 207 Mass. 149; Cascarella v. National G. Co., 151 Mich. 15; Krolik v. Curry, 148 Mich. 214; Mayberry v. Northern Pac. R. Co., 100 Minn. 79, 12 L.R.A. (N.S.) 675; Meloon v. Read, 73 N. H. 153; Coalgate v. Bross, 25 Okla. 244, 138 Am. St. 915; Sanders v. Cline, *supra*; Williams v. Tolbert, 76 S. C. 211; Ruddell v. Seaboard A. L. R., 75 S. C. 290; Gibson v. Holmes, 78 Vt. 110, 4 L.R.A. (N.S.) 451; Johnson v. Far West L. Co., 47 Wash. 492; Morrison v. Northern Pac. R. Co., 34 Wash. 70; Ott v. Murphy, 160 Iowa, 730.

⁶⁴ Duquesne D. Co. v. Greenbaum, *supra*.

⁶⁵ Woodworth v. Gorsline, 30 Colo. 186, 58 L.R.A. 417; Murray v. Lovejoy, 2 Cliff. 191; Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129; Lewis v. Johns, 34 Cal. 629; Knight v. Nelson, 117 Mass. 458; Ball v. Loomis, 29 N. Y. 412; Herring v. Hoppock, 15 N. Y. 409; Root v. Chandler, 10 Wend. 110, 35 Am. Dec. 546; Vincent v. McNamara, 70 Conn. 332.

⁶⁶ Page v. Parker, 40 N. H. 47.

⁶⁷ Reizenstein v. Clark, 104 Iowa, 287, 292, citing this section. See ch. 9.

⁶⁸ Clayton v. Henderson, 103 Ky. 228, 44 L.R.A. 474.

⁶⁹ Schafer v. Ostmann, 148 Mo. App. 644.

wholly independent of defendant's and without concert with him, increased the volume of water that flowed upon such land. The defendant was only liable for the flooding caused by him, and not for that part of the plaintiff's damages resulting from the increased volume of water caused by such third person.⁷⁰ But where nine different creditors, acting without concert and without knowing that they were employing a common agent, wrongfully caused their debtor to be arrested by the same officer on their several writs, service being made simultaneously, and by virtue thereof committed the debtor to jail where he was confined upon all of the writs at the same time, they were deemed joint trespassers, and full satisfaction recovered by the debtor from one of them was held a bar to an action against the others.⁷¹

⁷⁰ *Wallace v. Drew*, 59 Barb. 413; *Equitable P. Mfg. Co. v. Cleveland, etc. R. Co.*, 155 Ill. App. 265; *Carhart v. State*, 115 App. Div. (N. Y.) 1.

⁷¹ *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727; *Allison v. Hobbs*, 96 Me. 26; *Vandiver v. Pollak*, 107 Ala. 547, 54 Am. St. 118. *Bigelow, J.*, said in the Massachusetts case: "As a matter of first impression, it might seem that the legal inference from . . . (The fact that the defendants acted separately and independently of each other without any apparent concert among themselves) . . . is that the plaintiff might hold each of them liable for his tortious act, but that they could not be regarded as co-trespassers, in the absence of proof of any intention to act together, or of knowledge that they were engaged in a common enterprise or undertaking. But a careful consideration of the nature of the action, and of the injury done to the plaintiff, for which he seeks redress in damages, will disclose the fallacy of this view of the case. The plaintiff alleges in his declaration that he was unlawfully arrested and imprisoned. This is

the wrong which constitutes the gist of the action, and for which he is entitled to indemnity. But it is only one wrong, for which in law he can receive but one compensation. He has not in fact suffered nine separate arrests, or undergone nine separate terms of imprisonment. The writs against him were all served simultaneously, by the same officer, acting for all the creditors, and the confinement was enforced by the jailor on all the processes, contemporaneously, during the entire period of his imprisonment. The alleged trespasses on the person of the plaintiff were, therefore, simultaneous and contemporaneous acts, committed on him by the same person, acting at the same time for each and all of the plaintiffs in the nine writs upon which he was arrested and imprisoned. It is, then, the common case of a wrongful or unlawful act, committed by a common agent, acting for several and distinct principals.

"It does not in any way change or affect the injury done to the plaintiff, or enhance in any degree the damages which he has suffered, that the immediate trespassers, by

It is not possible to harmonize the cases on the extent of the co-operation which makes parties jointly liable. It seems perfectly proper that an unlawful act done by one person, though it be in furtherance of a lawful purpose in the accomplishment of which others are engaged, should not make the latter liable if it is done without their concurrence, and no benefit is received by them from it.⁷² Where the effects of the independent acts of two persons on opposite sides of a street united in causing

whom the tortious act was done, were the agents of several different plaintiffs, who without preconcert had sued out separate writs against him. The measure of his indemnity cannot be made to depend on the number of principals who employed the officers to arrest and imprison him. We know of no rule of law by which a single act of trespass committed by an agent can be multiplied by the number of principals who procured it to be done, so as to entitle the party injured to a compensation graduated, not according to the damages actually sustained, but by the number of persons through whose instrumentality the injury was inflicted. The error of the plaintiff consists in supposing that the several parties who sued out writs against him, and caused him to be arrested and imprisoned, cannot be regarded as co-trespassers, because it does not appear that they acted in concert, or knowingly employed a common agent. Such preconcert or knowledge is not essential to the commission of a joint trespass. It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable to the party injured. Whether the act was done by the procurement of one person or of many, and, if by many, whether they acted from a

common purpose and design in which they all shared, or from separate and distinct motives, and without any knowledge of the intentions of each other, the nature of the injury is not in any degree changed, or the damages increased which the party injured has a right to recover. He may, it is true, have a good cause of action against several persons for the same wrongful act, and a right to recover damages against each and all thereof, with the privilege of electing to take his satisfaction *de melioribus damnis*. But there is no rule of law by which he can claim to convert a joint into a several trespass, or to recover more than one satisfaction for his damages, when it appears that he has suffered the consequences of a single tortious act only." *Bagley v. Wonderland Co.*, 205 Mass. 238. See *Wehle v. Butler*, 12 Abb. Pr. (N. S.) 139.

⁷² *Wert v. Potts*, 76 Iowa, 612, 14 Am. St. 252; *Livesay v. First Nat. Bank*, 36 Colo. 526, 6 L.R.A.(N.S.) 598, 118 Am. St. 120.

One does not become a participator in an assault and battery by witnessing and mentally approving it, no word or sign being used. *Lister v. McKee*, 79 Ill. App. 210.

After mortgaged goods were wrongfully attached by creditors of the mortgagor other creditors placed their writs in the officer's hands and

injury, there being no concert of action, they were held not jointly liable.⁷³ So where a dam was filled with deposits of coal dirt from different mines on the stream above the dam, worked by persons having no connection with each other, it was held that they were not jointly liable for the combined results of throwing coal dirt into the river by all the workers of the mines; that the ground of action was not the deposit of dirt in the dam by the stream but the negligent act above. Throwing the dirt into the stream was the tort; the deposit in the dam only the consequence. The tort of each was several when committed and did not become joint because its consequences united with other consequences.⁷⁴ Agnew, J., referring to the instructions of the trial court asserting a joint liability or the liability of each for the combined results, said: "The doctrine of the learned judge is somewhat novel, though the case itself is new; but if correct is well calculated to alarm all riparian owners who may find themselves by slight negligence overwhelmed by others in gigantic ruin. It is immaterial what may be the

he indorsed returns of a levy upon the same goods, subject to the first levy. It appears to have been the opinion of the court that if such subsequent attaching creditors did nothing further they might not have been liable jointly with the officer and the original attaching creditor, in the absence of proof showing concert of action (*Sparkman v. Swift*, 81 Ala. 231; *Lee v. Maxwell*, 98 Mich. 496); but they afterward joined together in directing and assisting the officer in selling the goods, and in bringing a suit in equity to set aside the mortgage as fraudulent, and to enjoin a sale of the property by the mortgagee, in consequence of which acts they and the indemnitors of the officer became jointly liable with the officer and the first attaching creditors. *Koch v. Peters*, 97 Wis. 492, citing *Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129.

Where creditors employed the same attorney and separate attachments were levied on the property of their debtor, neither creditor being in any way interested in the claim of any other creditor or its prosecution, the creditors were not joint tort-feasors. *Miller v. Beck*, 108 Iowa, 575.

⁷³ *De Donato v. Morrison*, 160 Mo. 581; *Baird v. Yohn*, 26 Pa. 482; *Leidig v. Bucher*, 74 Pa. 67; *Wiest v. Electric T. Co.*, 200 Pa. 148, 58 L.R.A. 666; *Sun Co. v. Wyatt*, 48 Tex. Civ. App. 349.

⁷⁴ *Little Schuylkill, etc. Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209; *Tackaberry v. Sioux City S. Co.*, 154 Iowa, 358, 40 L.R.A. (N.S.) 102; *Watson v. Colusa-P. M. & S. Co.*, 31 Mont. 513, and cases cited; *Swain v. Tennessee C. Co.*, 111 Tenn. 430. *Contra*, *Day v. Louisville C. & C. Co.*, 60 W. Va. 27, 10 L.R.A. (N.S.) 167.

nature of the several acts or how small their share in the ultimate injury. If instead of coal dirt others were felling trees and suffering their tops and branches to float down the stream finally finding a lodgment in the dam with the coal dirt, he who threw in the coal dirt and he who felled the trees would each be responsible for the acts of the other. In the same manner separate trespassers who should haul their rubbish upon a city lot and throw it upon the same pile would each be liable for the whole if the final result be the only criterion of liability." The court rejected this view and held as above. The judge further said: "True, it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide, and a jury in a case of such difficulty caused by the party himself would measure the injury of each with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held to be liable for the torts of others without concert. It would be simply to say because the plaintiff fails to prove the injury one man does him he may therefore recover from that one all the injury that others do. This is bad logic and hard law. Without concert of action no joint suit could be brought against the owners of all the collieries, and clearly this must be the test."⁷⁵

⁷⁵ Sellick v. Hall, 47 Conn. 260; Watson v. Colusa-P. M. & S. Co., 31 Mont. 513. Compare Upson C. & M. Co. v. Williams, 28 Ohio C. C. 388.

In Hillman v. Newington, 56 Cal. 57, the plaintiff was entitled to four hundred inches of the water in a creek; the defendants severally and without concert of action diverted water to such an extent that he did not receive that quantity. In passing upon the question of misjoinder of parties defendant the court said: "It is not at all improbable that no one of the defendants deprives the plaintiff of the amount to which he is entitled. If not, upon what ground could he maintain an action against any one of them? If he

were entitled to all the water of the creek, then every person who diverted any of it would be liable to him in an action. But he is only entitled to a certain specific amount of it, and if it is only by the joint action of the defendants that he is deprived of that amount, it seems to us that the wrong is committed by them jointly because no one of them alone is guilty of any wrong. Each of them diverts some of the water; and the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by any one would not. It is quite evident, therefore, that without unity or concert of action no wrong could be committed, and we think that in

In some states, as has been seen, independent concert of action is a basis for holding the parties jointly liable.⁷⁶ Thus, where several persons were entitled to water from a reservoir and the wrongful and excessive use of the water by some deprived the plaintiff of his share, it was said the case was analogous to that of an injury produced by the collision of two railroad trains under different ownership and management, caused by the concurring negligence of both companies. Each is jointly and severally liable. It would be impossible to apportion the damages between the two acts of negligence or determine the amount produced by each. The law does not permit one person to shield himself from liability for an act resulting in injury because someone else has at the same time contributed to produce the same injury.⁷⁷ Independent action is not a defense to an action for creating a public nuisance.⁷⁸ The difficulty of apportioning the damages in cases of the kind here considered will not bar the plaintiff from obtaining redress; the jury will be allowed a large license in that respect.⁷⁹

Separate owners are not jointly liable for injuries jointly committed by their respective animals though the latter happen to unite in a single transaction. Each owner is liable only for the injury committed by his own animal; and his liability

such a case all who act must be held to act jointly. If there be a surplus [of water] the defendants can settle the priority of right to it among themselves. That can in no way affect the plaintiff's right to the amount to which he is entitled. It does not seem to us that the defendants' answer that each one of them is acting independently of every other one shows that the wrong complained of is not the result of their joint action; and if it does not the answer in that respect is insufficient to constitute a defense. The case so far as we are advised is *sui generis*. No parallel case is cited by either side." See § 142.

As to the measure of co-operation

necessary to make persons joint wrong-doers in a conspiracy to ruin the business of another, see *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. 203, 43 L.R.A. 797; *Martens v. Reilly*, 109 Wis. 464; *State v. Huegin*, 110 Wis. 189, 62 L.R.A. 700.

⁷⁶ *Consolidated I. Mach. Co. v. Keifer*, 134 Ill. 481, 10 L.R.A. 696, 23 Am. St. 692; *Peru H. Co. v. Lenhart*, 48 Ind. App. 319.

⁷⁷ *Elkhart P. Co. v. Fulkerson*, 36 Ind. App. 219; *South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185; *Hillman v. Newington*, *supra*.

⁷⁸ See § 1059.

⁷⁹ *Carhart v. State*, 115 App. Div. (N. Y.) 1.

is based on his duty to restrain it and his neglect in allowing it to go at large where, in pursuing its known natural inclination, it may do damage.⁸⁰ If, however, separate owners keep animals in common and by a concurring negligence or design suffer them to run at large as one herd, they are jointly liable for all damages by the united trespass of all or any of them.⁸¹ Where three persons opened a gate leading to a vacant lot in which was a horse owned by a fourth person, and turned their horses into such lot, and one of these three horses injured such other horse, each of those persons was liable as a joint tort-feasor for such injury, regardless of whether they owned the horses they turned in or knew they were vicious.⁸² Two railroad companies used the same track by joint arrangement, governed by common rules; their trains collided owing to mutual and concurring negligence and caused a single injury. They were jointly liable. It is immaterial that the companies were engaged in the performance of unconnected duties; the test of liability is the inseparableness of the consequences of the neg-

⁸⁰ *Foster v. Bussey*, 132 Iowa, 640; *Anderson v. Halverson*, 126 Iowa, 125; *Nohre v. Wright*, 98 Minn. 477; *Pacific Livestock Co. v. Murray*, 45 Ore. 103; *Dyer v. Hutchins*, 87 Tenn. 198; *Auchmuty v. Ham*, 1 Denio, 495, 1 Am. Neg. Cas. 229; *Wilbur v. Hubbard*, 35 Barb. 303, 1 Am. Neg. Cas. 231; *Partenheimer v. Van Order*, 20 Barb. 479, 1 Am. Neg. Cas. 433; *Russell v. Tomlinson*, 2 Conn. 206, 1 Am. Neg. Cas. 74; *Adams v. Hall*, 2 Vt. 9, 1 Am. Neg. Cas. 252 (the rule has been changed by statute, *Remele v. Donohue*, 54 Vt. 555; *Fairchild v. Rich*, 68 Vt. 202); *Van Steinburgh v. Tobias*, 17 Wend. 562, 1 Am. Neg. Cas. 235; *Buddington v. Shearer*, 20 Pick. 477; *Nierenberg v. Wood*, 59 N. J. L. 112.

Under a statute expressing that every owner or keeper of a dog engaged in doing damage to sheep, lambs, or other domestic animals

shall be liable in an action of tort to the county for all damages so done, the liability is for all the damages in the doing of which the dog engages. *Worcester County v. Ashworth*, 160 Mass. 186; *Nelson v. Nugent*, 106 Wis. 477. The same conclusion has been reached under a statute less general in its language. *Kerr v. O'Connor*, 63 Pa. 341, 1 Am. Neg. Cas. 242.

If cattle owned by different persons do equal damage to land on which they trespass the damages will be apportioned among them according to the number owned by each. *Wood v. Snider*, 187 N. Y. 28, 12 L.R.A.(N.S.) 912.

⁸¹ *Jack v. Hudnall*, 25 Ohio St. 255, 1 Am. Neg. Cas. 434, 18 Am. Rep. 298; *Wilson v. White*, 77 Neb. 351, 124 Am. St. 852.

⁸² *Martin v. Farrell*, 66 App. Div. (N. Y.) 177. See § 140, note.

ligence.⁸³ The same rule applies to adjourning landowners by whose concurring negligence an insecure party wall is maintained,⁸⁴ to connecting carriers who fail to properly feed animals in transit, the neglect of the initial carrier being continued by the connecting carrier,⁸⁵ and also in case of concurrent negligence of a street car company in the operation of its car and of the city in suffering a street to remain in bad condition resulting in injury to a passenger alighting from a car.⁸⁶

§ 142. Same subject; civil damage statutes; acts of members of partnership. A statute giving a joint action to any person who shall be injured in his means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole or in part of such person or persons, gives a right of action against all such persons who participate in causing a particular or several particular intoxications of a person; if damages result therefrom the person injured may sue such persons jointly or severally; and also all persons who, only by the sale of liquor to a person, materially contribute to make him an habitual drunkard may be sued jointly by the person injured in consequence. But the two classes cannot be sued jointly, and those who alone contributed to cause habitual intoxication made responsible jointly with those who only contributed to the particular intoxication and the reverse.⁸⁷ Under the Iowa statute whoever contributes to a single act of intoxication, though by sales of liquor made in separate places, whereby dis-

⁸³ *Colegrove v. New York, etc. R. Co.*, 20 N. Y. 492, 9 Am. Neg. Cas. 618, 75 Am. Dec. 418; *Lindenbaum v. New York, etc. R. Co.*, 197 Mass. 314; *Feneff v. Boston & M. R.*, 196 Mass. 575; *Chesapeake & O. R. Co. v. Davis*, 119 Ky. 641; *Illinois Cent. R. Co. v. Harris*, 85 Miss. 15; *Martin v. Seaboard A. L. R. Co.*, 148 N. C. 259; *Harrill v. Railroad Co.*, 135 N. C. 601; *Maumee Valley R. & L. Co. v. Montgomery*, 81 Ohio, 426, 26 L.R.A. (N.S.) 987, 135 Am.

St. 802; *Galveston, etc. R. Co. v. Vollrath*, 40 Tex. Civ. App. 46; *Keeley v. Great Northern R. Co.*, 139 Wis. 448. See § 140 note.

⁸⁴ *Klauder v. McGrath*, 35 Pa. 128, 78 Am. Dec. 329.

⁸⁵ *Baltimore, etc. R. Co. v. Wood*, 130 Ky. 839.

⁸⁶ *Reynolds v. Metropolitan St. Ry. Co.*, 180 Mo. App. 138.

⁸⁷ *Tetzner v. Naughton*, 12 Ill. App. 148.

tinnet damages are caused, is a joint wrong-doer.⁸⁸ Knowledge or consent by a member of a firm is not essential to his liability.⁸⁹ But there is no joint liability unless the defendants contributed to a specific act or acts of intoxication.⁹⁰ In an earlier case the court say: "A joint liability arises where an

⁸⁸ Kearney v. Fitzgerald, 43 Iowa, 580; Woolheather v. Risley, 38 Iowa, 486.

⁸⁹ Mathre v. Story City D. Co., 130 Iowa, 111.

⁹⁰ Richmond v. Schickler, 57 Iowa, 486.

Boyd v. Watt, 27 Ohio St. 259, is a novel and interesting case. The widow of Dr. Watt brought an action; the complaint alleged that he was a physician with an extensive practice, from the profits of which he was able to furnish her comfortable means of support; that about April, 1865, he became and was in the habit of getting intoxicated, and so continued until his death in 1869, of which the defendant had notice; that during that period and at sundry and divers times the defendant sold him in quantities of from one pint to a quart intoxicating liquors, causing said Watt to become intoxicated and an habitual drunkard; and by reason thereof during said period, and resulting therefrom, he became incapable of attending to his usual business, and squandered his estate, and so deprived her of her means of support. Johnson, J., speaking for a majority of the court, said: "The statute gives the action against 'any person who shall . . . have caused the intoxication.' This intoxication may be 'habitual or otherwise.' A right of action is given for damages resulting from single cases of intoxication or from habitual intoxication. Under the code several distinct causes of action may be joined

in one action for damages growing out of distinct cases of intoxication, where each cause of action is separate and distinct, and is between the same parties; but if on trial it appears that some of the acts of intoxication were caused by others, no recovery as to them could be had. In such case the causes of action are separate, and the damages resulting from each are distinct and disconnected; and the causes of action should be separately stated and numbered.

"In such a case the question would be as to each case of intoxication, who caused it, and what damages resulted from it. What would constitute a causing or a single act under the statute to render one liable would then arise. That question is not made in this case. The charge is of causing *habitual* intoxication for a series of years. The damages alleged are not the proximate results from distinct cases, but the ultimate result of habitual intoxication. This continued habit of drinking is alleged to have rendered the husband incapable of attending to his business, and caused him to squander his estate. This final result deprived the plaintiff of her means of support. It is a charge of repeated illegal acts, producing by their united effects an ultimate *state or condition* of Dr. Watt, out of which the damages arise. The plaintiff asks to recover the damages resulting from this *state or condition* of her husband, caused by repeated illegal sales for a series of

immediate act is done by the co-operation or joint act of two or more persons. Mere successive wrongs, being the independ-

years, and not the damages from a single case of intoxication, nor of a series of distinct cases at different times, caused by separate and distinct illegal sales. The means used were sales in quantity by the pint and quart. To a person of Dr. Watt's habits, frequent sales in such quantity were calculated to produce the result complained of. Every person is presumed to have intended the natural and probable consequences of his acts. The defendant was, in violation of law, using means calculated to produce the alleged injury. If the jury found that this was so, and that the means so employed were so continued as to produce the condition of the husband alleged, then they had the right to presume he intended the result which followed, though others, with or without preconcert, contributed to cause it. The intent with which the act or acts are done is always an important element in the case. In this case it is peculiarly so. The means used, the force or agency employed, are to be considered in ascertaining that intent. If as seems to be claimed, a defendant can only be liable, except in cases of conspiracy or agreement, when he is the *sole* cause of the habitual intoxication, and no recovery can be had unless the damages can be separated (an impossibility in most cases of this class), then this part of the statute is virtually a dead letter.

"Why should the defendant be exonerated from the injury he has caused by his habitual wrongs for a series of years by showing that others, without his knowledge, have also contributed by like means to

this result? He was using adequate means to produce the result, and may, therefore, fairly be presumed to have intended it. True, he may not have enjoyed a monopoly in the profits accruing, by reason of the competition of others in a common business; but that certainly is no reason why he should not be liable for the injuries he was intentionally engaged in causing. If such is the law, then he could take advantage of his own wrong by showing that during this four years another or others had also contributed. Such is not the law in criminal cases at common law, as will be shown hereafter; and we know no reason for greater strictness under this statute than in cases of the highest crimes known to the law. This section of the statute, we take it, is to be construed by ordinary canons of construction."

The foregoing views of the court presuppose that the defendant insisted on complete exemption from responsibility because other persons made sales to Dr. Watt. But the case as reported does not disclose that any such position was taken. The defendant asked the court to charge the jury "that the defendant was only liable for damages to the plaintiff occasioned by intoxication produced by the intoxicating liquor which the defendant himself had sold to said Dr. Watt, and that the defendant was not liable for any damages produced by the intoxication of said Dr. Watt, occasioned by intoxicating liquors sold to him during said period by other persons:" which charge the court refused to give except with the following qualifications: "Should you find that the

ent acts of the persons doing them, will not create a joint liability although the wrongs may be committed against the same

defendant sold intoxicating liquor to Joseph Watt in violation of law within the time charged in the petition, and that the plaintiff sustained damages by reason of the intoxication of said Watt, caused thereby to her person, property or means of support, the fact that other persons also sold liquor to said Watt, in violation of law, within that period, and which liquor may have contributed to increase the intoxication, and consequently to enhance the injury resulting to the plaintiff therefrom; such facts, if they be shown to have existed, will not exonerate the defendant from the consequence of his wrongful acts; but, on the contrary, he will still be responsible for all the injury resulting to the plaintiff from the intoxication of Joseph Watt, caused by his illegal sale of liquor to him. *If you can separate the damages resulting from the intoxication caused by illegal sales to Watt by defendant from the damages resulting from sales by others, you must do so; but if such separation cannot be made you will render your verdict against the defendant for all the actual pecuniary damages resulting to the plaintiff in person, property or means of support by reason of the intoxication of the said Joseph Watt, to which intoxication the illegal sales of intoxicating liquor by the defendant contributed.*"

The judgment for the plaintiff was affirmed. And upon the state of facts supposed by the defendant's request, the appellate court treat the defendant and all other persons who sold liquor to Dr. Watt as jointly and severally liable—as joint tortfeasors. On that point the learned

judge who delivered the majority opinion states the defendant's position and the answer as follows: "Counsel properly admit that where two or more act by concert in an unlawful design each is liable for *all damages*, but claim if each acts independently, or without the knowledge of the other, then he is only liable for his own acts. In the former case the acts of others co-operating are his acts, because they are only in furtherance of a common unlawful design. If there is no common intent there can be no joint liability, but each is responsible for his own act. If there is a common intent, or one without such intent aids one with it in doing an unlawful act, the latter is nevertheless guilty, though not the sole cause. They claim this principle is limited to cases of conspiracy or concerted action. In this we think they mistake the authorities. We hold that this common intent, which is sufficient to create mutual liability, may exist without previous agreement or a common understanding to do the unlawful act, and that it may be presumed to exist when the means employed create that presumption as well as by proving an express agreement."

This "common intent which is sufficient to create mutual liability" is further on in the opinion, thus elucidated: "If the defendant was using the means calculated to produce the injury, the law presumes that he intended to produce it. If others, with or without concert, were concurrently co-operating with him, using like means, they were acting with the same common design, and if the injury resulted each is liable,

person. There must be concurrent action, co-operation or a consent or approval in the accomplishment by the wrong-doers of the particular wrong in order to make them jointly liable."⁹¹ But where it is provided that the person who furnishes the liquor which causes the intoxication "in whole or in part," habitual or otherwise, shall be liable the damages cannot be apportioned; full recovery may be had against any one who contributed to the result complained of,⁹² regardless of the time the several defendants began the sale of liquor to the prohibited person.⁹³ Under the statutes of Nebraska the joint and several liability of dealers extends to the sureties on their bonds.⁹⁴

Each partner is an agent of the firm of which he is a member for the purpose of carrying on its business in the way it is usu-

though each was acting without the knowledge of what the other was doing. So if the defendant alone was using such means as created this presumption of intent to do the act and another, without concert, free from such intent, was contributing to the injury, the former is liable for all damages, notwithstanding the other also contributed."

The majority of the court came to the conclusion that vendors of intoxicating liquors who separately sell to a man, who, by thus imbibing, in a period of several years, becomes an habitual drunkard, are in law jointly and severally liable for that result, though they have no concert in the sense of communicating with each other on the subject; though they do not act together, that is, no two of them join in any one sale, and each may be unacquainted with the others, and perhaps may not even know that there are others; though the only circumstance that is supposed to join and unify them is they are engaged in the same kind of business and each is doing such a business as has a tendency

to make drunkards, and in a particular case they have thus made one.

⁹¹ *La France v. Krayner*, 42 Iowa, 143; *Hitchner v. Ehlers*, 44 id. 40; *Faivre v. Manderscheid*, 117 Iowa, 724; *Morems v. Crawford*, 15 Hun, 45. See *Stahinka v. Krietele*, 66 Neb. 829.

⁹² *Neuerberg v. Gaultner*, 4 Ill. App. 348; *Bryant v. Tidgewill*, 133 Mass. 86; *Werner v. Edmiston*, 24 Kan. 147; *Rantz v. Barnes*, 40 Ohio St. 43; *Aldrich v. Parnell*, 147 Mass. 409; *Jones v. Bates*, 26 Neb. 693; *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

This is the rule applied in Michigan, although the statute does not contain the words "in whole or in part." *Steele v. Thompson*, 42 Mich. 594; *Bowden v. Voorheis*, 135 Mich. 684; *Merrinane v. Miller*, 157 Mich. 279, 25 L.R.A. (N.S.) 585; *Seahill v. Aetna Ind. Co.*, 157 Mich. 310. See *Sutherland's Stat. Const.*, § 377.

⁹³ *Earp v. Lilly*, 120 Ill. App. 123.

⁹⁴ *Horst v. Lewis*, 71 Neb. 365, 370.

ally prosecuted; hence an ordinary partnership is liable for the results of the negligence or other wrong of any one of its members in conducting its affairs in the usual way.⁹⁵ Such liability extends to the fraudulent or malicious conduct of one partner though the others had no knowledge of it, if the act was done for the benefit of the firm and was within the scope of the partnership.⁹⁶ But it does not embrace acts done beyond such scope⁹⁷ unless they are authorized or adopted by the firm.⁹⁸ A partnership is also responsible for the negligence of its servants subject to the same limitations.⁹⁹ The stockholders of a corporation which unauthorizedly carries on business in a state other than that under whose laws it was created are liable as partners for torts committed by it therein.¹

⁹⁵ *Haase v. Morton*, 138 Iowa, 205; *Linton v. Hurley*, 14 Gray, 191; *Buckie v. Cone*, 25 Fla. 1; *Mode v. Penland*, 93 N. C. 292; *Gerhardt v. Swaty*, 57 Wis. 24; *Robinson v. Goings*, 63 Miss. 500; *Wiley v. Stewart*, 122 Ill. 545; *Hall v. Younts*, 87 N. C. 285; *Hyrne v. Erwin*, 23 S. C. 226; *Stroher v. Elting*, 97 N. Y. 102, 49 Am. Rep. 515, 12 Am. Neg. Cas. 400; *Rice v. Van Why*, 49 Colo. 7; *Burgess v. Patterson*, 139 Ky. 547.

⁹⁶ *Interurban C. Co. v. Hayes*, 191 Mo. 248; *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528; *Locke v. Stearns*, 1 Mete. (Mass.) 560, 35 Am. Dec. 382; *Durant v. Rogers*, 87 Ill. 508; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Guillou v. Peterson*, 89 Pa. 163; *Robinson v. Goings*, 63 Miss. 500. But see *Suth. Dam. Vol. I.—29*.

Gilbert v. Emmons, 42 Ill. 143, 89 Am. Dec. 412; *Grund v. Van Vleck*, 69 Ill. 478; *Rosenkrans v. Barker*, 115 id. 331, 56 Am. Rep. 169.

⁹⁷ *Gwynn v. Duffield*, 66 Iowa, 708, 55 Am. Rep. 286; *Schwabacker v. Riddle*, 84 Ill. 517.

⁹⁸ *Graham v. Meyer*, 4 Blatch. 129; *Heirn v. McCaughan*, 32 Miss. 17; *Taylor v. Jones*, 42 N. H. 25; *Ernstman v. Black*, 14 Ill. App. 381; *Woodling v. Knickerbocker*, 31 Minn. 268.

⁹⁹ *Roberts v. Johnson*, 58 N. Y. 613; *Stables v. Eley*, 1 C. & P. 614, 6 Am. Neg. Cas. 200; *Brent v. Davis*, 9 Md. 217; *Linton v. Hurley*, 14 Gray, 191.

¹ *Mandeville v. Courtright*, 6 L.R.A.(N.S.) 1003, 142 Fed. 97, 73 C. C. A. 321.

CHAPTER V.

LEGAL LIQUIDATIONS AND REDUCTIONS.

SECTION 1.

CIRCUITY OF ACTION.

- § 143. Defense of.
144. Agreement not to sue.
145. Principle operates in favor of plaintiff.
146. Damages must be equal.
147. Reciprocal obligations.

SECTION 2.

MUTUAL CREDIT.

148. Compensation by mutual demands.

SECTION 3.

MITIGATION OF DAMAGES.

149. Equitable doctrine of.
150. Absence of malice.
151. Words as provocation for assault; agreements to fight; payment of fine.
152, 153. Provocation in libel and slander.
154. Mitigating circumstances in trespass and other actions.
155. Plaintiff's acts and negligence.
156, 157. Measures of prevention; return of property; discharge of plaintiff's debt.
158. No mitigation when benefit not derived from defendant.
159. Fuller proof of the *res geste* in trespass, negligence, etc.
160. Official neglect.
161. Same subject; modification of the old rule.
162. Plaintiff's consent.
163. Injuries to character and feelings.
164. Reduction of loss or benefit.
165, 166. Pleading in mitigation.
167. Payments.

SECTION 4.

RECOUPMENT AND COUNTER-CLAIM.

- 168, 169. Definition and history of recoupment.

- 170, 171. Nature of defense.
- 172. Constituent features of recoupment.
- 173. Remedy by counter-claim.
- 174. Validity of claim essential.
- 175, 176. Parties.
- 177. Maturity of claim or demand; statute of limitations.
- 178. Cross-claim must rest on contract or subject-matter of action.
- 179, 180. Recoupment for fraud, breach of warranty, negligence, etc.
- 181. What acts may be the basis of recoupment.
- 182. Cross-claims between landlord and tenant.
- 183. Cause of action, connection between and cross-claim.
- 184. Recoupment between vendor and purchaser.
- 185. Liquidated and unliquidated damages may be recouped.
- 186. Affirmative relief not obtainable.
- 187. Election of defendant to file cross-claim or sue upon his demand.
- 188. Burden of proof; measure of damages.
- 189. A cross-claim used in defense cannot be sued upon.
- 190. Notice of cross-claim.

SECTION 5.

MARSHALING AND DISTRIBUTION.

- 191. Definition.
- 192. Sales of incumbered property in parcels to different purchasers.
- 193. Sale subject to incumbrance.
- 194. Effect of creditor releasing part.
- 195. Rights where one creditor may resort to two funds and another to only one.
- 196. Same where the funds belong to two debtors.
- 197. Principles on which priority determined.

SECTION 6.

SET-OFF OF JUDGMENTS.

- 198. Power to direct set-off inherent.
- 199. When it will or will not be granted.
- 200. Interest of the real parties considered.
- 201. Set-off not granted before judgment.
- 202. Assignee must make an absolute purchase.
- 203. Nature of action immaterial; foreign judgments.
- 204. Liens of attorneys.

SECTION 1.

CIRCUITY OF ACTION.

§ 143. **Defense of.** The defense of circuity of action is available where the parties stand in such legal relation to each other

that if the plaintiff recovers against the defendant the latter, thereupon and by reason thereof, has a cause of action against the former for the very sum so recovered. The plaintiff's demand is then neutralized by his liability, consequent upon recovery, to pay back such sum; by legal equation the plaintiff has no cause of action. This defense accomplishes the same result as would the circuitry of action. Thus in an action against the surviving partner upon the promissory note of a partnership an indenture by which the plaintiff and others had covenanted to indemnify the defendant against all debts due from the partnership and against all actions brought against him by reason of such debts was a bar to the action.¹ Under a statute which imposes a personal liability upon stockholders for the debts of a corporation a creditor, who is himself a stockholder, cannot maintain an action to enforce such liability against a co-stockholder.² One who is a surety upon an official bond cannot recover from his fellow-sureties the full amount of damages he has sustained by its breach.³

§ 144. Agreement not to sue. On this principle if a creditor makes a valid agreement never to sue his debtor upon a specified demand it operates to extinguish the debt like a release.⁴ But when the covenant is that a demand shall not be put in suit within a limited time a breach thereof cannot be

¹ Whitaker v. Salisbury, 15 Pick. 534; Austin v. Cummings, 10 Vt. 26.

² Gray v. Coffin, 9 Cush. 192, 206; Bailey v. Baucker, 3 Hill, 188, 38 Am. Dec. 625.

³ Alderson v. Mendes, 16 Nev. 298.

The plaintiff declared on a note made by C. and payable to the plaintiff or his order, and afterwards indorsed by him to the defendant, who reindorsed it to the plaintiff. After verdict for the latter the judgment was arrested. Bishop v. Hayward, 4 T. R. 470. But if it appears that the plaintiff's name was originally used for form only, and that it was understood by all the parties to the instrument that the note, though nominally made payable to the

plaintiff, was substantially to be paid to the defendant, and the declaration so alleges, the defense of circuitry of action is not good. *Id.*; Wilders v. Stevens, 15 M. & W. 208.

⁴ Robinson v. Godfrey, 2 Mich. 408; Cuyler v. Cuyler, 2 Johns. 186; Phelps v. Johnson, 8 id. 54; Lane v. Owings, 3 Bibb, 247; Millett v. Hayford, 1 Wis. 401; Reed v. Shaw, 1 Blackf. 245; McNeal v. Blackburn, 7 Dana, 170; Jackson v. Stackhouse, 1 Cow. 122, 13 Am. Dec. 514; Sewall v. Sparrow, 16 Mass. 24; Gibson v. Gibson, 15 id. 106, 8 Am. Dec. 94; Jones v. Quinpiack Bank, 29 Conn. 25; Clark v. Bush, 3 Cow. 151; Dearborn v. Cross, 7 id. 48.

pleaded in bar of that demand. The reason is that the damages for the breach of the latter covenant being uncertain and not determinable by the amount of the demand, the principle of circuity of action is not applicable.

§ 145. **Principle operates in favor of plaintiff.** The principle of avoiding circuity of action will sometimes operate in favor of the plaintiff. A town was compelled to pay damages for an injury resulting from a defect in a highway occasioned by the want of repair of a cellar way constructed in a sidewalk and leading to an adjoining building occupied by a tenant; it was held that the occupant, and not the owner, was liable to the town for such damages, and was *prima facie* liable to third persons suffering injury from any such defect; but if there be an express agreement between the landlord and tenant that the former shall keep the premises in repair, so that in case of a recovery against the tenant he would have his remedy over, then the party injured, to avoid circuity, may bring his suit in the first instance against the landlord.⁵

§ 146. **Damages must be equal.** If a deed contains reciprocal covenants which are governed by the same rule of damages one covenant may be pleaded in bar to another to avoid circuity of action. But where the covenants are distinct and independent they cannot be so pleaded, for the damages may not be commensurate and each party must recover against the other separate damages according to the justice of the case.⁶ This defense has been termed a setting off of one right of action against another.⁷ It is available though the damages be unliquidated, but the damages on the two causes of action must be the same in amount as matter of law, and must so appear by the pleadings.⁸ In other words, a good plea in avoidance of circuity of action must show that the sum which the defendant is entitled to re-

⁵ *Lowell v. Spaulding*, 4 Cush. 277; *Payne v. Rogers*, 2 H. Bl. 349.

⁶ *Gibson v. Gibson*, 15 Mass. 106, 112, 8 Am. Dec. 94; *Guard v. Whiteside*, 13 Ill. 7; *Millett v. Hayford*, 1 Wis. 401; *Thurston v. James*, 6 R. I. 103; *Howland v. Marvin*, 5 Cal 501.

⁷ *Mayne on Dam.* (8th ed.), p. 160.

⁸ *Id.*; *Turner v. Thomas*, L. R. 6 C. P. 610; *De Mattos v. Saunders*, 7 id. 570; *Walmesley v. Cooper*, 11 A. & E. 216; *Carr v. Stephens*, 9 B. & C. 759; *Connop v. Levy*, 11 Q. B. 769.

cover from the plaintiff is necessarily the same as that in respect of which the plaintiff is suing. The rigid severity and precision of this test are illustrated in the following case. By a charter-party it was agreed between the master and the charterers that one-third of the stipulated freight should be paid before the sailing of the vessel, the same to be returned if the cargo was not delivered at the port of destination, the charterers to insure the amount at the owner's expense and deduct the cost of doing so from the first payment of freight. The charterers paid the one-third freight, deducting the premium for insurance. The vessel and cargo did not reach their destination. In an action by the charterers to recover the freight so paid, the owner pleaded that the loss of the part of the freight to be returned was such a loss as was by the charter-party to be insured against by the charterers at the owner's expense, and such insurance, if effected, would have indemnified the defendant against the loss of the freight stipulated to be returned; that although the plaintiffs might, with the use of reasonable care and diligence, have effected an insurance, whereby the defendant and the owner of the ship would have been fully indemnified against the loss of the one-third freight so to be returned, yet the plaintiffs effected the insurance so negligently and in such disregard of the usual course of business that the same became of no use or value, and the defendant, by reason of such improper conduct, had sustained damages to the amount of the said third freight so insured, and the plaintiffs thereby became liable to the defendant for the same, and liable to make good to him such amount as he should have to return to the plaintiffs under the charter-party, and any sum paid or returned by the defendant to the plaintiffs in respect of the freight would be the damage sustained by the defendant by reason of such improper conduct and deviation, and he would be damnified to that extent. The court held that the plea was bad inasmuch as the conclusion it drew was not warranted by the facts stated, for the liability of the plaintiffs in respect of their negligence in effecting the insurance was a liability for damages which were not necessarily identical in amount with the claim set up by

them in their action. Jervis, C. J.: "It is not denied that the rule in question is plain and well ascertained, viz.: that to justify a defendant in setting up a demand in avoidance of circuity of action he must show that the sum which he claims to be entitled to recover back is of necessity the identical sum which the plaintiff is suing for. The only difficulty arises from the application of the rule. I was somewhat struck by a difficulty arising from the allegation in the plea that, by and through the negligent and improper conduct of the plaintiffs in effecting the insurance, the insurance became of no use or value and the defendant thereby sustained damage to the amount of one-third of the freight so insured; and that the plaintiffs thereby became liable to the defendant for the same, . . . and liable to make good to the defendant such amount as he should have to return to the plaintiffs under the charter-party; and that the sum paid by the defendant to the plaintiffs, or received by them, . . . would be the damages sustained by the defendant by reason of such improper conduct. But I think my brother Channell has relieved me from that difficulty by suggesting that it is a mere conclusion drawn from the previous allegations,—not a conclusion of law necessarily resulting from such previous allegations, one which a jury might or might not arrive at. I think that unless the judge would be bound to tell the jury that the amount which the defendant claims by his plea is necessarily the same amount as the plaintiffs claim by their declaration the plea does not bring the case within the rule as to circuity of action. The case differs materially from those which were cited, . . . in which the defendant was bound to a liquidated and ascertained sum on the failure of the plaintiff to perform a duty. This is a matter which sounds in damages. The plaintiffs had undertaken to effect an insurance for the defendant with third persons; and it *may* be that in the result the defendant will be entitled to recover from the plaintiffs precisely the same amount of damages that the plaintiffs will recover in this action; but there are various circumstances which might by possibility arise to reduce the damages in that action to a lesser or even to a nominal amount; and unless the

defendant could negative all these possible circumstances, he could not make this a good plea.⁹

§ 147. **Reciprocal obligations.** The reciprocal obligations of the parties may be such that the action of one may be barred by a counter covenant which is not only a good defense on the ground of avoiding circuity of action, but also as a release. Of this nature is a covenant never to sue.¹⁰ To sustain a bar in that form, however, the contract must be technically such as to amount to a release. But the defense of circuity of action does not depend on the principle of a release, but on the policy of the law against unnecessary litigation and the convenience of admitting a party to his ultimate right by the shortest and most direct process.

⁹ Charles v. Altin, 15 C. B. 46. Crowder, J., doubted. He said: "I have entertained considerable doubts during the argument, and I must confess that these doubts are not altogether removed; and although my lord and my two learned brothers think otherwise, it is with considerable reluctance that I should come to the conclusion that the plea is no answer to the declaration. The rule as to the avoidance of circuity of action is in my opinion a just and valuable one, and it is important that a case should be brought within it if possible. In point of fact and common sense nobody can doubt that, if these plaintiffs recover back the one-third freight to-day and the defendant were to bring a cross-action against them, and to allege and prove what is stated in this plea, the jury would be directed to give damages to precisely the same amount." After quoting the language of Mr. Justice Washington in Morris v. Summerl, 2 Wash. C. C. 203, he continued: "It is not said that, as a positive matter of law, he is responsible to that extent. It probably amounts to this, that the loss would

be the reasonable measure of damages. The learned judge is referring to a course of dealing. The case before us arises upon a contract to insure the amount,—the *precise amount*,—which the plaintiffs are claiming under the charter-party to have returned to them; and the question is whether the breach of the engagement to insure does not so clearly entitle the defendant to recover from the plaintiffs the precise sum which they by their action are seeking to recover from him, as to warrant the plea. If this had been a contract of indemnity, there could have been no doubt." Alston v. Herring, 11 Ex. 822.

¹⁰ Smith v. Mapleback, 1 T. R. 441; Johnson v. Carre, 1 Lev. 152; Harvey v. Harvey, 3 Ind. 473; Reed v. Shaw, 1 Blackf. 245; Jackson v. Stackhouse, 1 Cow. 122, 13 Am. Dec. 514; Phelps v. Johnson, 8 Johns. 54; Jones v. Quinpiack Bank, 29 Conn. 25; Walker v. McCulloch, 4 Me. 421; Lane v. Owings, 3 Bibb 247; Hastings v. Dickinson, 7 Mass. 153, 5 Am. Dec. 341; Shed v. Pierce, 17 Mass. 623. See § 6.

SECTION 2.

MUTUAL CREDIT.

§ 148. **Compensation by mutual demand.** Mutual debts or credits do not compensate each other except when pleaded under statutes of set-off unless they are so connected that the parties have reciprocally the right to retain out of the moneys they owe the amount they are creditors for. Then the accounts are reciprocal payments, and no demand exists upon either side except for the net balance. This is the case where the demands of both parties are, with their mutual consent, brought into one account as debit and credit;¹¹ and also wherever a party has a lien on moneys in his hands or which he holds for the satisfaction of a cross-demand in favor of himself, as in the case of factors, brokers and others. In an early case a ship broker recovered for his principal a sum of money for damages done to his ship by collision; the broker paid over all but his charges for services, and it was held in a suit by the principal for the reasonable sum so retained that the defendant had a right to it. The action was for money had and received, and it was said the plaintiff should not receive more than he was in equity entitled to, and this could not be more than what remained after deducting all just allowances which the defendant was entitled to out of the very sum demanded; it was not in the nature of a cross-demand or mutual debt, but a charge which makes the sum received for the plaintiff's use so much less.¹²

In conformity to a natural equity that one debt shall compensate another, and for the convenience of commerce, the courts favor liens and recognize them, first, where there is an express contract; second, where one may be implied from the

¹¹ Pond v. Clark, 47 Vt. 565; McNeil v. Garland, 27 Ark. 343; Sanford v. Clark, 29 Conn. 457; Myers v. Davis, 26 Barb. 367.

¹² Dale v. Sollet, 4 Burr. 2133; 1 Chitty's Pl. 563; Rawson v. Samuel, Cr. & Ph. 161; Green v. Farmer, 4 Burr. 2214; Patrick v. Hazen, 10 Vt. 183; Saltus v. Everett, 20 Wend.

267; Muller v. Pondir, 55 N. Y. 325; Dresser Mfg. Co. v. Waterson, 3 Mete. (Mass.) 9; Turpin v. Reynolds, 14 La. 473; Holbrook v. Receivers, 6 Paige, 220. See Taft v. Aylwin, 14 Pick. 336; Schermerhorn v. Anderson, 2 Barb. 584; Citizens' Bank v. Carson, 32 Mo. 191.

usage of trade; third, where it may be implied from the manner of dealing between the parties in the particular case; fourth, where the defendant has acted in the capacity of a factor.¹³ Where it was part of the contract between a servant and his master that the former should pay out of his wages the value of his master's goods lost by his negligence it was an agreement that the wages were to be paid only after deducting the value of the things lost, and their loss was provable under the general issue.¹⁴ So where by the custom of the hat trade the amount of injury done to hats in dyeing was to be deducted from the dyer's wages, evidence of injury from this cause was admitted in reduction of damages.¹⁵ Equity will grant relief aside from the statute where there is a mutual credit between the parties based on the existence of a debt due from the crediting party to the other.¹⁶

SECTION 3.

MITIGATION OF DAMAGES.

§ 149. **Equitable doctrine of.** Mitigation of damages is what the expression imports, a reduction of their amount; not by proof of facts which are a bar to a part of the plaintiff's cause of action, or a justification, nor of facts which constitute a

¹³ *Id.*

¹⁴ *Le Loir v. Bristow*, 4 Camp. 134; *Cleworth v. Pickford*, 7 M. & W. 314.

¹⁵ *Bamford v. Harris*, 1 Stark. 343. See *Alder v. Keighley*, 15 M. & W. 119. In this case the bankrupt had given the defendant a bill drawn by himself for 600*l.*, which the defendant agreed to discount, retaining 100*l.* and the discount. He never paid the bankrupt anything. The action was brought by the assignees for breach of the agreement. The jury gave a verdict for 495*l.*, being the amount of the bill, minus the 100*l.* and discount. This was held correct though the bill had become worthless on account of the

bankruptcy. Pollock, C. B., said: "If this had been an action of trover for the bill, no doubt it would have been altogether a question for the jury as to the amount of damages. So, also, if it had been an accommodation bill, or the bankrupt's own bill. But this is not an action of trover, but of breach of contract. The defendant promised to deliver to the bankrupt the amount of the bill, minus 100*l.* and discount. The bankrupt would have to receive that sum, and his assignees are entitled to recover the same amount which he would be entitled to receive, had he continued solvent, by reason of the breach of contract."

¹⁶ *Tuttle v. Bisbee*, 144 Iowa, 53.

cause of action in favor of the defendant; but rather of facts which show that the plaintiff's conceded cause of action does not entitle him to so large an amount as the showing on his side would otherwise justify the jury in allowing him. Facts for mitigation are addressed to the equity of the law, and are admitted to assist in the application of the paramount rule that damages should not exceed just compensation unless the case calls for severity in the form of exemplary damages.¹⁷ But if a wrong is wilfully done courts are not inclined to allow the resulting damages to be mitigated by taking into account lawful acts of the wrong-doer which have benefited the other party.¹⁸ There are, however, few exceptions to the rule that any circumstance competent as evidence to reduce the damages may be proven on the trial for that purpose although it may not have been effective until after the suit was begun.¹⁹

§ 150. Absence of malice. Matters may be proved in mitigation which tend to excuse or justify the act complained of, though they are not a full excuse or justification.²⁰ Thus, where the plaintiff was taken into custody for an offense not justifying an arrest, evidence of the offense was allowed to be given, for it was in the nature of an apology for the defendant's conduct.²¹

¹⁷ *Huntington E. P. Co. v. Parsons*, 62 W. Va. 26, 9 L.R.A. (N.S.) 1130, 125 Am. St. 954.

¹⁸ *Whorton v. Webster*, 56 Wis. 356. See § 155.

¹⁹ *Marsh v. McPherson*, 105 U. S. 709, 716, 26 L. ed. 1139, 1141; *Gabay v. Doane*, 77 App. Div. (N. Y.) 413. An exception has been properly made in case of the breach of the contract where the conduct of the party in default has misled the other by causing him to believe that performance would be made as soon as practicable. *Cronan v. Stutsman*, 168 Mo. App. 46, and another where the injured person is not skilled in doing the work needed to be done to protect his property and may not be qualified to select a person of the proper capacity, as the repairing of

stockguards. *Texas & St. Louis R. Co. v. Young*, 60 Tex. 201; *Houston, etc. R. Co. v. Adams*, 63 id. 200; *St. Louis S. R. Co. v. Lee* (Tex. Civ. App.), 151 S. W. 331.

²⁰ *Shaffer v. Austin*, 68 Kan. 234, 31 L.R.A. (N.S.) 957; *Spencer v. Minnick*, 41 Okla. 613; *Massee v. Williams*, 124 C. C. A., 207 Fed. 222.

Where express malice is alleged in a libel suit it is competent for the libelant to show good faith and absence of malice. *Snyder v. Tribune Co.*, 161 Iowa, 671, but not so in a suit for slander in the absence of such an allegation. *Brandt v. Story*, 161 Iowa, 451.

²¹ *Linford v. Lake*, 3 H. & N. 276; *Warwick v. Fonlkes*, 12 M. & W. 507; *Wells v. Jackson*, 3 Munf. 458;

In trespass for false imprisonment the void warrant of arrest and proceedings had under it are admissible in evidence to disprove malice and prevent the recovery of exemplary damages,²² but not to mitigate those which are compensatory.²³ Advice of counsel does not mitigate compensatory damages.²⁴ The absence of malice is relevant in an action for openly shadowing a person by detectives.²⁵

§ 151. **Words as provocation for assault; agreements to fight; payment of fine.** Although the general rule is that no words of provocation whatever will justify the offended party in inflicting a blow upon the offender,²⁶ they generally constitute an excuse which will mitigate the damages, and may be proved for that purpose.²⁷ But such provocation or any other must be so recent as to induce the presumption that the violence was committed under the immediate influence of the passion thus ex-

Paine v. Farr, 118 Mass. 74; *Bradner v. Faulkner*, 93 N. Y. 515.

²² *Woodall v. McMillan*, 38 Ala. 622; *Wells v. Jackson*, 3 Munf. 458.

²³ *Lewis v. Lewis*, 9 Ind. 105. See §§ 1257, 1258.

²⁴ *Richards v. Sanderson*, 39 Colo. 270, 121 Am. St. 167.

²⁵ *Schultz v. Frankfort Marine A. & P. G. Ins. Co.*, 151 Wis. 537, 43 L.R.A.(N.S.) 520.

²⁶ *Willey v. Carpenter*, 64 Vt. 212, 15 L.R.A. 853; *Lampkin v. Louisville & N. R. Co.*, 106 Ala. 287; *Abney v. Mize*, 155 Ala. 391; *Birmingham R., L. & P. Co. v. Mullen*, 138 Ala. 614; *Le Laurin v. Murray*, 75 Ark. 232; *Mitchell v. United R. Co.*, 125 Mo. App. 1 (noting some exceptions); *Mahoning Valley R. Co. v. De Pascale*, 70 Ohio, 179, 65 L.R.A. 860. *Contra.* *Thompson v. Shelverton*, 131 Ga. 714; *Mason v. Nashville, etc. R. Co.*, 135 Ga. 741, 33 L.R.A.(N.S.) 280; *Bomeval v. American C. Co.*, 127 La. 57, and local cases cited. The question is for the jury. *Garrett v. Herring-*

dine, 7 Ga. App. 744; *Thompson v. Shelverton*, *supra*.

²⁷ *Birmingham R., L. & P. Co. v. Coleman*, 181 Ala. 478; *Rarden v. Maddox*, 141 Ala. 506 (an earlier case says that the mitigation goes only to punitive damages). *Mitchell v. Gambill*, 140 Ala. 316; *Doerhoefer v. Shewmaker*, 123 Ky. 646; *Harvey v. Harvey*, 124 La. 595; *Stockham v. Malcolm*, 111 Md. 615; *Baumgartner v. Hodgdon*, 105 Minn. 22; *Prindle v. Haight*, 83 Wis. 50; *Burke v. Melvin*, 45 Conn. 243; *Kiff v. Youmans*, 86 N. Y. 324, 50 Am. Rep. 543; *Bonino v. Caledonio*, 144 Mass. 299; *Frazer v. Berkeley*, 7 C. & P. 789; *Perkins v. Vaughan*, 5 Scott N. R. 881; *Thrall v. Knapp*, 17 Iowa, 468; *Lund v. Tyler*, 115 Iowa, 236; *Cushman v. Ryan*, 1 Story, 91; *Avery v. Ray*, 1 Mass. 12; *Lee v. Woolsey*, 19 Johns. 319, 10 Am. Dec. 230; *Maynard v. Beardsley*, 7 Wend. 560, 22 Am. Dec. 595; *Genung v. Baldwin*, 77 App. Div. (N. Y.) 584; *Rochester v. Anderson*, 1 Bibb 428; *McAlexander v. Harris*, 6

cited.²⁸ The language of the parties is often so immediately associated and identified with the transaction that it is impracticable to suppress it in giving evidence of their conduct; and, indeed, the suppression of it, if practicable, would only tend to exhibit the transaction in false and deceitful colors.²⁹ The law mercifully makes this concession to the weakness and infirmities of human nature, which subject it to uncontrollable influences when under great and maddening excitement, superinduced by insult and threats. But it wholly discountenances the cruel disposition which for a long time broods over hastily and unguardedly spoken words, and seeks, when opportunity offers, to make them an excuse for brutal behavior. With such a temper it has no sympathy.³⁰ The mitigating effect of a provocation in words

Munf. 465; McBride v. McLaughlin, 5 Watts 375; Waters v. Brown, 3 A. K. Marsh. 557; Corning v. Corning, 6 N. Y. 97; Currier v. Swan, 63 Me. 323; Matthews v. Terry, 10 Conn. 455; Delevan v. Bates, 1 Mich. 97; Saltus v. Kipp, 12 How. Pr. 342. See §§ 162, 1255.

²⁸ Long v. Seigel, 177 Ala. 338; Mills v. Warner, 167 Mich. 619; Birmingham R., L. & P. Co. v. Norris, 2 Ala. App. 610; Le Laurin v. Murray, 75 Ark. 232; Warner v. Talbot, 112 La. 817, 66 L.R.A. 336, 104 Am. St. 460; Jackson v. Old Colony St. R., 206 Mass. 477, 30 L.R.A.(N.S.) 1046; Glassey v. Dye, 83 Neb. 615; Davis v. Collins, 69 S. C. 460; Houston & T. Cent. R. Co. v. Batchler, *infra*; Corning v. Corning, Rochester v. Anderson, *supra*; Ellsworth v. Thompson, 13 Wend. 658.

A provocation in the morning does not mitigate an assault made in the afternoon of the same day. Keiser v. Smith, 71 Ala. 48, 46 Am. Rep. 342. And so with an assault made one day after the alleged cause. Gronan v. Kuekkuek, 59 Iowa, 18; Carson v. Singleton, 23 Ky. L. Rep. 1626.

In Brooks v. Carter, 34 Fed. 505, the defendant gave the plaintiff thirty minutes in which to retract statements made by him, and on his declining to do so made an assault. There was too much deliberation to allow the facts to mitigate the damages.

In Irwin v. Porter, 1 Hawaii, 159, a provocation given on Saturday was allowed to be proven in mitigation of damages for an assault committed the following Monday.

²⁹ Birmingham R., L. & P. Co. v. Mullen, 138 Ala. 614, and cases cited in the second and third notes to this section.

³⁰ Shoemaker v. Jackson, 128 Iowa 488, 1 L.R.A.(N.S.) 137; Carson v. Singleton, 23 Ky. L. Rep. 1626, quoting the text. In Keiser v. Smith, 71 Ala. 481, 46 Am. Rep. 342, the text is quoted, and the rules stated are said to be sustained by the uniform current of decisions in this country for the past three-quarters of a century. Gaither v. Blowers, 11 Md. 536.

If deliberation is shown in committing an assault and battery the defendant may not prove the words

is spent when there has been time for reflection, and for the passion excited by it to cool. Other antecedent facts, however, may be proved in mitigation, where they are connected with the acts complained of, and afford an explanation of the motives and conduct of the defendant, and show him less culpable than he would otherwise appear. Thus where the injury is inflicted in an attempt to prevent the execution of previous threats, the defendant may prove such threats in mitigation of damages, as conducing to show that an excusable motive governed him, as well as the motives with which the other acted in the rencontre.³¹ And so for the purpose of determining whether insulting words shall mitigate the damages the court will view the whole situation, and if they were induced by previous offensive words used by the defendant the recovery will not be mitigated because of their use.³² In a case in Maine³³ there was an affray between the plaintiff and one of the defendants in the afternoon. In the evening of the same day the defendant assaulted the plaintiff at his own house. It was held that the defendants might show the fact of the affray in the afternoon, but not its details, in mitigation of damages for the last assault. "It was to show the object and purpose of the second assault, or the state of mind with which it was done. Otherwise there would have been nothing to indicate to the jury but that the house was entered for the purpose of robbery and plunder, or something of the kind. The fact of the previous affray might have some weight on the question of the amount of damages recoverable, and might legitimately be regarded as part of the transaction to be investigated in this suit." And in a case in Wisconsin³⁴ it was held in an action

communicated to him as those used in insulting his daughter, he having knowledge of the insult the day before the assault and being informed as to the words used about thirty minutes prior thereto. *Lovlace v. Miller*, 150 Ala. 422, 11 L.R.A. (N.S.) 670.

³¹ *Waters v. Brown*, 3 A. K. Marsh. 557; *Rhodes v. Bunch*, 3

McCord 66; *McKenzie v. Allen*, 3 Strobb. 546.

³² *Houston & T. Cent. R. Co. v. Batchler*, 37 Tex. Civ. App. 116.

³³ *Currier v. Swan*, 63 Me. 323.

³⁴ *Fairbanks v. Witter*, 18 Wis. 287, 86 Am. Dec. 765.

Where there has been a persistent continuation and repetition of insults for the sole purpose of exciting

for an injury to the person, committed in an affray, that evidence offered should have been received that the plaintiff for several years had frequently tried to provoke a quarrel with the defendant, and on various occasions threatened his life, some of these being made to the defendant, and all of them brought to his knowledge before the occasion in question. If the insulting language used by the plaintiff was used because of his intoxicated condition resulting from the use of liquors sold him by the defendant no mitigation will be allowed.³⁵

The defendant may show that the parties fought by agreement;³⁶ but, the fighting being unlawful, the consent of the plaintiff does not defeat a recovery.³⁷ Where a battery proceeds from a dispute in which the parties impugn each other's veracity courts have differed as to whether the defendant may prove in mitigation that his statement in the altercation was true. Such proof has been excluded in Indiana,³⁸ but in Maryland where the parties disputed and blows ensued from questioning each other's veracity the defendant was allowed to show that he told the truth.³⁹ Proof by the plaintiff in aggravation of damages that the defendant threatened to beat him because he had circulated slanderous words concerning the defendant does not entitle the latter to give evidence that the plaintiff had in fact circulated the slander.⁴⁰ Some question has been raised as to the extent to which damages may be mitigated by proof of

and irritating another, and these have been repeated from day to day, the case is not to be controlled or limited by a few hours or a single day. *Dolan v. Fagan*, 63 Barb. 73.

³⁵ *Robichaud v. Maheux*, 104 Me. 524.

³⁶ *Willey v. Carpenter*, 64 Vt. 212, 15 L.R.A. 853; *Adams v. Waggoner*, 33 Ind. 531, 5 Am. Rep. 230; *Logan v. Austin*, 1 Stew. 476; *Barholt v. Wright*, 45 Ohio St. 177, 4 Am. St. 535.

³⁷ *Morris v. Miller*, 83 Neb. 218, 20 L.R.A.(N.S.) 907, 131 Am. St. 636; *Shay v. Thompson*, 59 Wis. 540, 48 Am. Rep. 538; *Bell v. Hans-*

ley, 3 Jones, 131; *Stout v. Wren*, 1 Hawks, 420, 9 Am. Dec. 653; *Lund v. Tyler*, 115 Iowa, 236; *McCue v. Klein*, 60 Tex. 168, 48 Am. Rep. 260; *State v. Burnham*, 56 Vt. 415, 48 Am. Rep. 801. Compare *Galbraith v. Fleming*, 60 Mich. 408; *Smith v. Simon*, 69 Mich. 481; *McNeil v. Mullun*, 70 Kan. 634; *Lizana v. Lang*, 90 Miss. 469.

³⁸ *Butt v. Gould*, 34 Ind. 552.

³⁹ *Marker v. Miller*, 9 N. D. 338; *contra*, it seems *Houston & T. Cent. R. Co. v. Batchler*, *supra*.

⁴⁰ *Rochester v. Anderson*, 1 Bibb 428.

provocation in words. Judge Story said they might be reduced to nominal when the words were "very gross and reprehensible and calculated from the circumstances to draw forth strong resentment."⁴¹ This has been doubted,⁴² but it seems to be supported by authority. When the wrong is done under circumstances arising without the plaintiff's fault, and these furnish a reasonable excuse for the violation of public order, considering the infirmities of human temper, there is no foundation for exemplary damages, but the plaintiff is entitled to compensation. But where there is a reasonable excuse for the violation of public order arising from the provocation or fault of the plaintiff, but not sufficient to entirely justify the wrong done, there can be no exemplary damages and the circumstances of mitigation must be applied to the actual damages.⁴³ Dixon, C. J.,⁴⁴ said: "This seems to follow as the necessary and logical result of the rule which permits exemplary damages to be recovered. Where motive constitutes a basis for increasing the damages of the plaintiff above those actually sustained, there it should, under proper circumstances, constitute the basis for reducing them below the same standard. If the malice of the defendant is to be punished by the imposition of additional damages or smart money, then malice on the part of the plaintiff, by which he provoked the injury complained of, should be subject to like punishment, which, in his case, can only be inflicted by withholding the damages to which he would otherwise be entitled. The law is not so one-sided as to scrutinize the motives and punish one party to the transaction for his malicious conduct and not punish the other for the same thing; nor so unwise as not to make an allowance for the infirmities of men when smarting under the sting of gross and immediate provocation. If it were, then, as has been well said, it would frequently happen that the plaintiff would get full compensa-

⁴¹ *Cushman v. Ryan*, 1 Story, 100.

⁴² *Birchard v. Booth*, 4 Wis. 67.

⁴³ *Robison v. Rupert*, 23 Pa. 523; *Reed v. Bias*, 8 W. & S. 189; *Ellsworth v. Thompson*, 13 Wend. 663; *Genung v. Baldwin*, 77 App. Div. (N. Y.) 584; *Irwin v. Porter*, 1

Hawaii, 159; *Mason v. Nashville*, etc. R. Co., 135 Ga. 741, 33 L.R.A. (N.S.) 280. See *Stoekham v. Malcolm*, 111 Md. 615; *Baltimore & O. R. Co. v. Strube*, 111 Md. 119.

⁴⁴ *Moreley v. Dunbar*, 24 Wis. 183.

tion for damages occasioned by himself,—a result which would be contrary to every principle of reason and justice. And so I find the uninterrupted course of decision both in England and this country.”⁴⁵ In opposition to this view there are several dissents including the supreme court of Wisconsin and other

⁴⁵ Citing *Robison v. Rupert*, 23 Pa. 523; *Fraser v. Berkeley*, 7 C. & P. 621; *Millard v. Brown*, 35 N. Y. 297; *Finnerty v. Tipper*, 2 Camp. 72; *Avery v. Rac*, 1 Mass. 11; *Cushman v. Ryan*, 1 Story, 100; *Gaither v. Blowers*, 11 Md. 551, 552; *Child v. Homer*, 13 Pick. 503; *Keyes v. Devlin*, 3 E. D. Smith, 518; *Rochester v. Anderson*, 1 Bibb, 428; *Lee v. Woolsey*, 19 Johns. 319, 10 Am. Dec. 230; *Ireland v. Elliott*, 5 Iowa 478, 68 Am. Dec. 715; *Maynard v. Beardsley*, 7 Wend. 560, 22 Am. Dec. 595; *Waters v. Brown*, 3 A. K. Marsh. 577; *Prentiss v. Shaw*, 56 Me. 427, 96 Am. Dec. 475; *Rhodes v. Bunch*, 3 McCord 65; *McKenzie v. Allen*, 3 Strobb. 546; *Matthews v. Terry*, 10 Conn. 459; *Coxe v. Whitney*, 9 Mo. 531; *Collins v. Todd*, 17 Mo. 539; *Corning v. Corning*, 6 N. Y. 103; *Willis v. Forrest*, 2 Duer, 310; *Tyson v. Booth*, 100 Mass. 258; *Marker v. Miller*, 9 Md. 338; *Bingham v. Garnault*, Buller's N. P. 17.

In *Wilson v. Young*, 31 Wis. 574, the subject was again under discussion, and a majority of the court held to a middle ground between the doctrine of *Birchard v. Booth* and *Morely v. Dunbar*—that in an action for assault and battery compensatory, as distinguished from punitive, damages are of two kinds: 1. Those which may be recovered for the actual personal or pecuniary injury and loss, the elements of which are loss of time, bodily suffering, impaired physical or mental powers, mutilation and disfigurement, expenses of surgical and other attend-

ance and the like. 2. Those which may be recovered for injuries to the feelings arising from the insult or indignity, the public exposure and contumely, and the like. That compensatory damages of the *first* kind are to be determined without reference to the question whether the defendant was influenced by malicious motives in the act complained of; and, on the other hand, evidence of threatening or aggravating language or malicious conduct on the plaintiff's part, not constituting a legal justification of the defendant's acts, cannot be considered in mitigation of such damages. That compensatory damages of the *second* kind depend entirely upon the malice of the defendant; and as evidence of such malice may be given to increase that kind of damages, so evidence of threatening and malicious words or acts on the plaintiff's part, just previous to the assault, though not constituting a legal justification, should be admitted to mitigate or even defeat such damages. The distinction above made between the kinds of compensatory damages is disapproved of in *Craker v. Chicago*, etc. R. Co., 36 Wis. 657, 17 Am. Rep. 504, 8 Am. Neg. Cas. 665.

There are other Wisconsin cases which declare that “personal abuse which may have had something to do with inducing and bringing upon another an assault may be considered by a jury in mitigation of damages. But a man commencing an assault and battery under such circumstances is liable for the actual

courts of high repute. The argument of Judge Dixon seems to the editor to be fully answered by the court of Vermont, which, like the other courts that deny that words of provocation may mitigate compensatory damages, grant that they mitigate exemplary damages. "If provocative words may mitigate, it follows that they may reduce the damages to a mere nominal sum and thus practically justify an assault and battery. But why, under this rule, may they not fully justify? If in one case the provocation is so great that the jury may award only nominal damages, why, in another in which the provocation is far greater, should they not be permitted to acquit the defendant and thus overturn the well-settled rule of law that words cannot justify an assault. On the other hand, if words cannot justify they should not mitigate. A defendant should not be heard to say that the plaintiff was first in the wrong by abusing him with insulting words, and therefore, though he struck and injured the plaintiff, he was only partly in the wrong and should pay only part of the actual damages. If the right of the plaintiff to recover actual damages were in any degree dependent on the defendant's intent, then the plaintiff's provocation to the defendant to commit the assault upon him would be legitimate evidence bearing upon that question, but it is not. Even lunatics and idiots are liable for actual damages done by them to the property or person of another,⁴⁶ and certainly a person in the full possession of his faculties should be held liable for his actual injuries to another unless done in self-defense or under reasonable apprehension that the plaintiff was about to do him bodily harm. The law is that a person is liable in an action of trespass for an assault and battery, although the plaintiff made the first assault, if the defendant used more force than was necessary for his protection, and the symmetry of the law is better preserved by holding that the defendant's liability for actual damages begins with the beginning of his own wrongful act."⁴⁷

damages which result." *Fenelon v. Butts*, 53 Wis. 344. *Corcoran v. Harran*, 55 Wis. 120. See *Yates v. New York, etc. R. Co.*, 67 N. Y. 100, 8 Am. Neg. Cas. 555.

⁴⁶ See § 16.

⁴⁷ *Goldsmith v. Joy*, 61 Vt. 488, 499, 4 L.R.A. 500, 15 Am. St. 923; *Grace v. Dempsey*, 75 Wis. 313; *Prindle v. Haight*, 83 Wis. 50; *Jacobs v. Hoover*, 9 Minn. 204; *Cushman v. Waddell*, 1 Baldwin, 57;

The fact that the offending person in an action for assault and battery has been subjected to fine in a criminal prosecution does not bar or mitigate his liability to exemplary⁴⁸ or compensatory⁴⁹ damages in a civil action. This question will be more fully considered in the chapter on exemplary damages.⁵⁰ The character of the party assaulted cannot affect the damages which he is entitled to recover,⁵¹ nor can proof be made of the generally peaceable character of the defendant to rebut malice or mitigate the damages.⁵² The malice entertained by the plaintiff toward the defendant when the assault was committed does not mitigate the latter's liability.⁵³

Immediately after the civil war the plaintiff, having publicly and indecently exulted over the assassination of President Lincoln, was arrested, pursuant to a general order of the defendant as commander of a military department. The order was illegal but was issued without malice and was intended as a means of preserving the public peace. The plaintiff was held not entitled to exemplary damages for his arrest and imprisonment, but, having been manacled and compelled to labor with other prisoners during the time he was held in custody, these circumstances were held to be good ground for enhancement of the damages.⁵⁴

McBride v. McLaughlin, 5 Watts 375; Donnelly v. Harris, 41 Ill. 126; Gizler v. Witzel, 82 Ill. 322; Johnson v. McKee, 27 Mich. 471; Prentiss v. Shaw, 56 Me. 712; Mangold v. Oft, 63 Neb. 397; Armstrong v. Rhoades, 4 Penn. (Del.) 151; Mitchell v. Gambill, 140 Ala. 316; Le Laurin v. Murray, 75 Ark. 232; Marriott v. Williams, 152 Cal. 705, 125 Am. St. 87; Warner v. Talbot, 112 La. 817, 66 L.R.A. 336, 104 Am. St. 460; Burley v. Menefee, 129 Mo. App. 518; Mitchell v. United R. Co., 125 Mo. App. 1; Covell v. Carpenter, 24 R. I. 1; Parham v. Langford, 43 Tex. Civ. App. 31; Hardin v. Hoges, 33 Tex. Civ. App. 155; McNeil v. Mullin, 70 Kan. 634.

⁴⁸ Irby v. Wilde, 155 Ala. 388; Abney v. Mize, 155 Ala. 391; Hood-

ley v. Watson, 45 Vt. 289, 12 Am. Rep. 197; Cook v. Ellis, 6 Ill. 466, 41 Am. Dec. 757; McWilliams v. Bragg, 3 Wis. 424; Brown v. Swineford, 44 id. 282, 28 Am. Rep. 582; Wilson v. Middleton, 2 Cal. 54; Corwin v. Walton, 18 Mo. 71, 59 Am. Dec. 285. *Contra*, Smithwick v. Ward, 7 Jones, 64, 75 Am. Dec. 453. See § 402 and ch. 26.

⁴⁹ Id.; Powell v. Wiley, 125 Ga. 823; Reddin v. Gates, 52 Iowa, 210.

⁵⁰ Ch. 9.

⁵¹ Corning v. Corning, 6 N. Y. 97, 104; Smithwick v. Ward, 7 Jones, 64; Ward v. State, 28 Ala. 53. See § 94.

⁵² Reddin v. Gates, *supra*.

⁵³ Mills v. Warner, 167 Mich. 619.

⁵⁴ McCall v. McDowell, Deady, 233; Roth v. Smith, 54 Ill. 431.

§ 152. **Provocation in libel and slander.** In actions for libel or slander it may be proved in mitigation that there was an immediate provocation in the acts and declarations of the plaintiff.⁵⁵ The defendant cannot, however, prove such acts and declarations done or made at a different time or any antecedent facts which are not fairly to be considered part of the same transaction, however irritating and provoking they may be.⁵⁶ It has been held that a criminatory retort made after three days is not part of the same transaction, nor when it has no relation to the previous publication and there is no preceptible connection between them.⁵⁷ It has also been held that where a party is sued for republishing a libelous article in a newspaper, and the republication is accompanied by remarks tending to a justification of the article, but not amounting to it, the defendant is not permitted to prove the truth of the remarks in mitigation of damages because the evidence would tend to prove the charge well founded; that evidence in mitigation must be such as admits the charge to be false.⁵⁸ The defendant may show that he was drunk or insane when he spoke the words.⁵⁹

Upon common principles the general issue in an action on the case for slander would put in issue, not only the speaking of the slanderous words, but their alleged falsity and the malice. The early adjudications were in harmony with this view, but upon consultation of the judges in England about one hundred and eighty years ago it was resolved that in the future, if the

⁵⁵ *Alderson v. Kahle*, 73 W. Va. 690, 51 L.R.A.(N.S.) 1198; *Miles v. Harrington*, 8 Kan. 425; *Jauch v. Jauch*, 50 Ind. 135; *Beardsley v. Maynard*, 4 Wend. 336; *Moore v. Clay*, 24 Ala. 235, 60 Am. Dec. 461; *Powers v. Presgroves*, 38 Miss. 227; *McClintock v. Crick*, 4 Iowa, 453; *Duncan v. Brown*, 15 B. Mon. 186; *Ranger v. Goodrich*, 17 Wis. 78; *Freeman v. Tinsley*, 50 Ill. 497; *Mousler v. Harding*, 33 Ind. 176, 5 Am. Rep. 195.

⁵⁶ *Hamilton v. Eno*, 81 N. Y. 116; *Lee v. Woolsey*, 19 Johns. 319, 10 Am. Dec. 230.

⁵⁷ *Beardsley v. Maynard*, 4 Wend. 336. See *Graves v. State*, 9 Ala. 448; *Maynard v. Beardsley*, 7 Wend. 560; *Lister v. Wright*, 2 Hill, 320; *Underhill v. Taylor*, 2 Barb. 348; *Richardson v. Northrup*, 56 Barb. 105.

⁵⁸ *Cooper v. Barber*, 24 Wend. 105.

⁵⁹ *Howell v. Howell*, 10 Ired. 84; *Gates v. Meredith*, 7 Ind. 440; *Jones v. Townsend*, 21 Fla. 431, 57 Am. Rep. 171; *Alderson v. Kahle*, 73 W. Va. 690, 51 L.R.A.(N.S.) 1198, citing the text. *Contra*, *Mix v. McCoy*, 22 Mo. App. 488.

defendant intend to justify, he shall plead his justification that the plaintiff may know what he has to meet.⁶⁰ The rule then promulgated has ever since prevailed in England and has been followed in this country.⁶¹ It has also ensued that, under the general issue in such actions, the defendant cannot prove the truth of the words spoken either to rebut malice or mitigate damages.⁶² It has been deemed as important that the plaintiff should have notice that the truth of the words is intended to be proved when the purpose is mitigation of damages, as when the proof is intended for any other object.⁶³ In some jurisdictions, therefore, the defendant has been precluded from all proof under the general issue which implies the truth of the charge or tends to prove it.⁶⁴ To get the opportunity to adduce any such proof he was required to plead the truth of the words as a justification; then if he succeeded he was exonerated from all liability; but if he failed, the plea, being a repetition of the defamatory words, aggravated the damages, for malice was conclusively presumed.⁶⁵ In New York by such an unsustained plea

⁶⁰ Underwood v. Parker, 2 Strange, 1200.

⁶¹ Bodwell v. Swan, 3 Pick. 376; Knight v. Foster, 39 N. H. 576; Taylor v. Robinson, 29 Me. 323; Kay v. Fredrigal, 3 Pa. 221; Jarnigan v. Fleming, 43 Miss. 710; Douge v. Pearce, 13 Ala. 127; Henson v. Veatch, 1 Blackf. 369; Gilman v. Lowell, 8 Wend. 573; Wagstaff v. Ashton, 1 Harr. 503; Snyder v. Andrews, 6 Barb. 43; Shirley v. Keathy, 4 Cold. 29; Barns v. Webb, 1 Tyler, 17; Updegrove v. Zimmerman, 13 Pa. 619; Root v. King, 7 Cow. 613; Swift v. Dickerman, 31 Conn. 285.

⁶² Knight v. Foster, 39 N. H. 576; Bailey v. Hyde, 3 Conn. 463; Swift v. Dickerman, 31 Conn. 291; Shepard v. Merrill, 13 Johns. 475.

⁶³ Wolcott v. Hall, 6 Mass. 514, 4 Am. Dec. 173; Jarnigan v. Fleming, 43 Miss. 710; Treat v. Browning, 4 Conn. 408, 10 Am. Dec. 156.

⁶⁴ Gilman v. Lowell, 8 Wend. 573; Knight v. Foster, 39 N. H. 576; Moyer v. Pine, 4 Mich. 409; Regnier v. Cabot, 7 Ill. 34; McAlexander v. Harris, 6 Munf. 465; Porter v. Bottkins, 59 Pa. 484; Chamberlin v. Vance, 51 Cal. 75; Pease v. Shippen, 80 Pa. 513, 21 Am. Rep. 116; Wornmouth v. Cramer, 3 Wend. 395, 20 Am. Dec. 706; McGee v. Sodusky, 5 J. J. Marsh., 185, 20 Am. Dec. 251. See Commercial News Co. v. Beard, 116 Ill. App. 501.

If the plaintiff puts in evidence a fact not pleaded tending to create an inference of express malice the defendant may rebut that inference by explanatory evidence. Reiley v. Timme, 53 Wis. 63.

⁶⁵ Id.; Gorman v. Sutton, 32 Pa. 247; Larned v. Bullinton, 3 Mass. 546, 3 Am. Dec. 185; Robinson v. Drummond, 24 Ala. 174; Pool v. Devers, 30 Ala. 672; Downing v.

the defendant was held to admit the malice on his part, and he could not resort to any defense based on its absence.⁶⁶ While he had technically a right to introduce evidence in mitigation, still without a plea of justification he could establish no fact which would show that he had good reason to believe the charge to be true when the words were spoken, and if he put in the only plea which would give him a right to introduce such proof he lost the benefit of it by the stubborn presumption of malice unless his proof was sufficient to establish the truth of the charge. There was therefore very little scope for mitigation in that class of actions.⁶⁷ The injustice of such a rule induced the courts in some of the states, as well as in England, to admit proof of facts and circumstances tending to show the truth of the words spoken, but falling short of proving it; in other words, the defendant might show that he had reason to believe when he uttered the words that they were true.⁶⁸ Under this rule it has been allowed to be proved that there were reports in the neighborhood that the plaintiff had been guilty of practices similar to those imputed to him,⁶⁹ or that general reports that he was guilty of the very offense were, previously to the speaking of the words, in circulation.⁷⁰ But the defendant to mitigate damages and repel the presumption of malice cannot give in evidence

Brown, 3 Colo. 571; Cavanaugh v. Austin, 42 Vt. 576.

⁶⁶ Gilman v. Lowell, 8 Wend. 573; Purple v. Horton, 13 id. 9, 27 Am. Dec. 167; Fero v. Ruscoe, 4 N. Y. 162.

⁶⁷ See Bush v. Prosser, 11 N. Y. 347; Bisbey v. Shaw, 12 id. 67.

⁶⁸ Knobel v. Fuller, Norris' Peake Add. Cas. 32; ——— v. Moor, 1 M. & S. 285; Leicester v. Walter, 2 C. & P. 251; East v. Chapman, 2 C. & P. 570; Bailey v. Hyde, 3 Conn. 463, 8 Am. Dec. 202; Bridgman v. Hopkins, 34 Vt. 532; Williams v. Miner, 18 Conn. 464; Haywood v. Foster, 16 Ohio, 88; Wagner v. Holbrunner, 7 Gill, 296; Huson v. Dale, 19 Mich. 17, 2 Am. Rep. 66; Rigden v. Wolcott, 6 Gill & J. 413; Morris

v. Barker, 4 Harr. 520; Galloway v. Courtney, 10 Rich. 414; Williams v. Cawley, 18 Ala. 206; Brown v. Brooks, 3 Ind. 518; Wilson v. Apple, 3 Ohio, 270; Minesinger v. Kerr, 9 Pa. 312; Van Derveer v. Sutphin, 5 Ohio St. 293; Farr v. Rasco, 9 Mich. 353, 80 Am. Dec. 88; Massee v. Williams, 124 C. C. A. 492, 207 Fed. 222.

⁶⁹ ——— v. Moor, 1 M. & S. 285. See ch. 34.

⁷⁰ Calloway v. Middleton, 2 A. K. Marsh. 372, 12 Am. Dec. 409; Kennedy v. Gregory, 1 Binn. (Pa.) 85; Treat v. Browning, 4 Conn. 408, 10 Am. Dec. 156; Case v. Marks, 20 Conn. 248; Bridgman v. Hopkins, 34 Vt. 532; Blickenstaff v. Perrin, 27 Ind. 527; Morris v. Barker, 4 Harr.

facts of which he was ignorant at the time of uttering the words complained of.⁷¹ The fact that reports were in circulation prior to the uttering of the words, to the effect that plaintiff was guilty of the offense imputed to him cannot generally be proven in mitigation in courts which admit proof which is not full justification but which tends to show the truth of the words spoken.⁷² The general character of the plaintiff at the time the defamatory words were spoken is uniformly deemed in issue, for it is the foundation of his claim for damages, and he is at all times, without special notice in the pleadings, supposed to be prepared to sustain it against any attack.⁷³

§ 153. Same subject. It is held in Michigan that where only the general issue is pleaded and evidence is offered in mitigation tending to show the truth of the words spoken, the offer conclusively admits that the charge was false though at the time the defendant made it he believed it to be true. Such an offer, under such pleadings, should be treated as involving a disclaimer of the truth of the words and a conclusive admission that they were not true; but not as inconsistent with the idea

520; *Henson Veatch*, 1 Blackf. 369; *Church v. Bridgman*, 6 Mo. 190; *Easterwood v. Quin*, 2 Brev. 64, 3 Am. Dec. 700; *Shilling v. Carson*, 27 Md. 175, 92 Am. Dec. 632; *Cook v. Barkley*, 2 N. J. L. 169, 2 Am. Dec. 343; *Wetherbee v. Marsh*, 20 N. H. 561, 51 Am. Dec. 244; *Bowen v. Hall*, 20 Vt. 232; *Fletcher v. Burroughs*, 10 Iowa, 557; *Sheahan v. Collins*, 20 Ill. 325, 71 Am. Dec. 271; *Kimball v. Fernandex*, 41 Wis. 329. See ch. 34.

⁷¹ *Bailey v. Hyde*, 3 Conn. 463, 8 Am. Dec. 202; *Hatfield v. Lasher*, 81 N. Y. 246; *Willower v. Hill*, 72 id. 36; *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. Rep. 307, 5 Am. St. 413; *Whitney v. Janesville Gazette*, 5 Biss. 330; *Edwards v. Kansas City Times Co.*, 32 Fed. Rep. 813.

⁷² *Anthony v. Stephens*, 1 Mo. 254; *Fisher v. Patterson*, 14 Ohio, 418; *Wilson v. Fitch*, 41 Cal. 363;

Bush v. Prosser, 11 N. Y. 347, 361. See *Bowen v. Hall*, 20 Vt. 232.

⁷³ *Buford v. McLuny*, 1 N. & McC. 268; *Sawyer v. Eifert*, 2 id. 511, 10 Am. Dec. 633; *Douglass v. Tousey*, 2 Wend. 352; *Hamer v. McFarlin*, 4 Denio, 509; *Pallet v. Sargent*, 36 N. H. 496; *Sanders v. Johnson*, 6 Blackf. 53; *Rhodes v. Ijams*, 7 Ala. 574; *Wolcott v. Hall*, 6 Mass. 514, 4 Am. Dec. 173; *Moyer v. Moyer*, 49 Pa. 210; *Alderman v. French*, 1 Pick. 1; *Bodwell v. Swan*, 3 id. 376; *McNutt v. Young*, 8 Leigh, 542; *Dewit v. Greenfield*, 5 Ohio 225; *Fitzgerald v. Stewart*, 53 Pa. 343; *Powers v. Presgroves*, 38 Miss. 227; *Warner v. Lockerby*, 31 Minn. 421; *Maxwell v. Kennedy*, 50 Wis. 645; *Pattangall v. Mooers*, 113 Me. 412; *Simonson v. Lovewell*, — Ark. —, 175 S. W. 407; *Burkhiser v. Lyons*, — Tex. Civ. App. —, 167 S. W. 244.

that the defendant at the time he uttered them may have believed them to be true. He therefore has a right to introduce any facts and circumstances tending to show grounds for such belief at the time of the speaking of the words.⁷⁴ The same doctrine is held in Ohio. The whole reason of the rule for admitting such evidence is to relieve the defendant from the consequences which attach to *malice* in the speaking of the words. He may show particular acts of the plaintiff which, unexplained, gave him a just reason to believe the truth of the declarations which he uttered; but which, when explained and understood, may be found to be compatible with the plaintiff's innocence. This is permitted upon the ground that the proof when introduced may serve to show that the defendant was mistaken in making the charge, that he misconstrued the act or conduct of the party by supposing it to be criminal, while in fact it was not. When the testimony can have no other effect than to make apparent the plaintiff's guilt and prove the truth of the words spoken, its introduction to the jury must tend to justify the speaking; not to mitigate damages by showing the absence of malice. To be competent for the former purpose the facts relied on must be pleaded specially and cannot be given in evidence under the general issue.⁷⁵

The rule has been far from universal that an unsustained plea of justification shall in all cases be deemed proof of malice or have the effect to exclude evidence of the absence thereof. Where a plea of justification is interposed without any expectation of sustaining it, there is no reason why such deliberate repetition of the slander should not be taken into consideration in the assessment of damages. But it has not been deemed just to hamper a *bona fide* defense with the hazard of such a consequence as matter of law. Perley, C. J., said: "If he believed when he spoke the words that they were true, and makes a *bona fide* defense to the action under the plea of justification, we do not see why he should make it under the penalty of

⁷⁴ *Huson v. Dale*, 19 Mich. 17, 2 Apple, 3 Ohio, 270; *Dewit v. Green*-
Am. Rep. 66.

⁷⁵ *Reynolds v. Tucker*, 6 Ohio St. field, 5 Ohio, 225; *Haywood v. Fos*-
516, 67 Am. Dec. 353; *Wilson v.* ter, 16 Ohio, 88.

being punished by increased damages if he should fail to satisfy the jury of the fact any more than in other cases where a defendant does not succeed in a *bona fide* defense. We think it should be left to the jury to decide the weight and character of the evidence introduced in support of the plea and the manner and spirit in which the defense is conducted; whether the real object of the plea and evidence was to defend the action with reasonable expectation of success or to repeat the original slander.”⁷⁶

These principles have now been established by statute in many states where the harsher rule formerly prevailed. In New York, as well as in many other jurisdictions having codes, it is provided that the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and whether he prove the justification or not he may give evidence of such circumstances. This statute does not mean that he must connect them together, that he cannot allege one without the other; but that he should not be prohibited from alleging either; accordingly the defendant, without pleading the truth of the words spoken, may allege facts tending to establish their truth and prove such facts in mitigation.⁷⁷ If a plea of justification or in mitigation is interposed in bad faith, and for the purpose of injuring the plaintiff's reputation, the fact may be considered by the jury.⁷⁸

§ 154. Mitigating circumstances in trespass and other actions.

In trespass for levying on the plaintiff's property under an execution against a third party the defendant may show in mitigation of damages on a writ of inquiry, after judgment by default, that at and prior to the levy the property was in his possession, or that the plaintiff was not the owner; but he is estopped by the judgment from showing that the plaintiff had

⁷⁶ Pallet v. Sargent, 36 N. H. 496; Byrket v. Monohon, 7 Blackf. 83, 41 Am. Dec. 212; Chalmers v. Shackell, 6 C. & P. 475; Sanders v. Johnson, 6 Blackf. 50, 36 Am. Dec. 564; Thomas v. Dunaway, 30 Ill. 373; Cummerford v. McAvoy, 12 Ill. 311; Corbley v. Wilson, 71 Ill. 209, 22

Am. Rep. 98; Rayner v. Kinney, 14 Ohio St. 283.

⁷⁷ Bush v. Prosser, 11 N. Y. 347; Bisbey v. Shaw, 12 N. Y. 67.

⁷⁸ Cruikshank v. Gordon, 118 N. Y. 178; Distin v. Rose, 69 N. Y. 122; Bennett v. Matthews, 64 Barb. 410. See Doe v. Roe, 32 Hun, 628.

not such interest as would entitle him to maintain the suit.⁷⁹ Where a building was blown up without authority to stay the progress of a conflagration, the fact was allowed to be shown; and the jury in estimating the damages, it was held, should consider the circumstances under which the building and its contents were and their chance of being saved, even though not at the time on fire, and should determine the damages with reference to the peril to which they were exposed.⁸⁰ So if a landlord enters to make repairs which are necessary and which the tenant ought to have made, but neglected to make, or if he enters to make repairs which he is bound to make, but which the tenant forbids him to make, the damages will be estimated with reference to these circumstances and will be less than if the entry were made without color of excuse.⁸¹ A person sued for entering and cutting down trees may show in mitigation a verbal license from the plaintiff,⁸² or, when sued for breach of a contract, that performance would have been useless.⁸³ In actions for false imprisonment or malicious prosecution the fact that the defendant acted under instructions of his employer will not mitigate damages.⁸⁴ Evidence that the plaintiff in a suit for false imprisonment committed a theft in consequence of which he was held in private custody may be shown in mitigation of damages.⁸⁵ The advice of counsel, if given *bona fide*, is a circumstance which may be considered to disprove malice and mitigate exemplary damages,⁸⁶ if it was given on a full disclosure of the facts.⁸⁷ The damages recoverable for the breach of a marriage promise are not lessened because the defendant with-

⁷⁹ Sterrett v. Kaster, 37 Ala. 366; Squire v. Hollenbeck, 9 Pick. 551, 20 Am. Dec. 506; Lowell v. Parker, 10 Mete. (Mass.) 309, 43 Am. Dec. 436.

⁸⁰ Parsons v. Pettingell, 11 Allen, 507; Reed v. Bias, 8 W. & S. 189; Scott v. Rawls, 159 Ala. 399. See Workman v. Great Northern R. Co., 32 L. J. (Q. B.) 279.

⁸¹ Reeder v. Purdy, 41 Ill. 279.

⁸² Chicago T. & T. Co. v. Core, 223 Ill. 58; Wallace v. Goodall, 18 N. H. 439.

⁸³ Louisville & P. C. Co. v. Rowan, 4 Dana, 606.

⁸⁴ Josselyn v. McAllister, 22 Mich. 300.

⁸⁵ Nelson v. Snoyenbos, 155 Wis. 590.

⁸⁶ Fox v. Davis, 55 Ga. 298; Bohm v. Dunphy, 1 Mont. 333.

⁸⁷ Louisville & N. R. Co. v. Smith, 141 Ala. 335, citing the text; Shores v. Brooks, 81 Ga. 468, 13 Am. St. 332. See ch. 25.

drew his affections from the plaintiff without cause.⁸⁸ Any act done, no matter by whom, by which the injury resulting from a trespass is put an end to or mitigated may be proved.⁸⁹ The good faith of a trespasser who has cut timber on or removed ore from the land of another may lessen his liability for the added value given by his labor to the timber or ore.⁹⁰ The defendant's belief in the harmlessness of a wild animal which injured the plaintiff has been considered in mitigation.⁹¹

§ 155. Plaintiff's acts and negligence. The acts and negligences of the plaintiff which have enhanced the injury resulting from the defendant's act or neglect may be shown in mitigation of damages. The defendant is liable for the natural and proximate consequences of his violations of contract and of his unlawful acts; but if the plaintiff has rendered these consequences more severe to himself by some voluntary act from which it was his duty to refrain, or if by his neglect to exert himself reasonably to limit the injury and prevent damage, in the cases in which the law imposes that duty, and thereby he suffers additional injury from the defendant's act, evidence is admissible in mitigation to ascertain to what extent the damages claimed are to be attributed to such acts or omissions of the plaintiff.⁹² If he omit to use his opportunities and does not reasonably exert himself to lessen the damages which may result from such act he is not entitled to compensation for the injury which he might and ought to have prevented, except to the extent of proper compensation for such measures or acts of prevention as the case required and were within his knowledge and power.⁹³ The

⁸⁸ *Richmond v. Roberts*, 98 Ill. 472.

⁸⁹ *Alabama Midland R. Co. v. Coskry*, 92 Ala. 254.

In proceedings for the condemnation of land the owner is not bound so to act as to lessen the liability of the condemnor. *Birmingham R., L. & O. Co. v. Long*, 5 Ala. App. 510.

⁹⁰ §§ 1126 *et seq.*

⁹¹ *Besozzi v. Harris*, 1 *Fost. & F.* 92; *Hayes v. Miller*, 150 Ala. 621, 11 L.R.A.(N.S.) 748, 124 Am. St. 93, it seems.

⁹² *Chicago & E. I. R. Co. v. Mitchell*, 56 Ind. App. 354; *Kopezynski v. Bolcom, V. L. Co.*, 71 Wash. 93; *Alabama City G. & A. Co. v. Brady*, 160 Ala. 615; *Liebler v. Carrel*, 155 Mich. 196; *Foehr v. New York S. L. R. Co.*, 40 Pa. Super. 7; *Pratt v. Dunlap*, 85 Conn. 180; *Cincinnati, N. O. & T. P. R. Co. v. Crabtree*, 30 Ky. L. Rep. 1000; *Bogges v. Metropolitan St. R. Co.*, 118 Mo. 328, quoting the text.

⁹³ *Id.*; *Sloss-S. S. & I. Co. v. Mitchell*, 161 Ala. 278; *Dickerson v.*

measure of his duty in this regard is ordinary care and diligence.⁹⁴ "To require one who has been injured to take proper

Finley, 158 Ala. 149; St. Louis S. R. Co. v. Reagan, 79 Ark. 484, 7 L.R.A.(N.S.) 997; Parks v. Sullivan, 46 Colo. 340, 25 L.R.A.(N.S.) 625; Moses v. Antuono, 56 Fla. 499, 20 L.R.A.(N.S.) 350; Woodward v. Pierce, 147 Ill. App. 339; Kimball v. Citizens' G. & E. Co., 141 Iowa, 632; Mystic M. Co. v. Chicago, etc. R. Co., 131 Iowa, 10; Bennett v. Mt. Vernon, 124 Iowa, 537; Lorenzo v. Puerto Rico S. Co., 5 Porto Rico Fed. 535; Balbas v. Rogers, 4 id 82. Stonega C. & C. Co. v. Addington, 112 Va. 807, 37 L.R.A.(N.S.) 969; Smith v. Hughey, 66 Ore. 408; Seaboard Air Line Ry. Co. v. Patrick, 10 Ala. App. 341; Moody v. Sindlinger, — Colo. —, 149 Pac. 263; Nelson v. Buick Motor Co., 183 Ill. App. 323; Walley v. Wiley, 56 Ind. App. 171; Atkinson v. Kirkpatrick, 90 Kan. 515; Crosby v. Plummer, 111 Me. 355; Dubinsky v. Wells Bros. Co. of New York, 218 Mass. 232; Weller v. Missouri Lumber & Mining Co., 176 Mo. App. 243; Carthage Stone Co. v. Travelers' Ins. Co., 186 Mo. App. 318; Waterman Lumber & Supply Co. v. Holmes, — Tex. Civ. App. —, 161 S. W. 70; Spokane Casket Co. v. Mitchell, 76 Wash. 425; Hay v. Long, 78 Wash. 616; Dietrich v. Hannibal & St. J. R. Co., 89 Mo. App. 36; Kumberger v. Congress S. Co., 158 N. Y. 339, 345; Warren v. Stoddart, 105 U. S. 224, 26 L. ed. 1117; Goshen v. England, 119 Ind. 368, 5 L.R.A. 253; Louisville, etc. R. Co. v. Jones, 108 Ind. 551, 9 Am. Neg. Cas. 298; Sherman Center T. Co. v. Leonard, 46 Kan. 354, 26 Am. St. 101; Miller v. Mariners' Church, 7 Me. 51, 20 Am. Dec. 341; Mather v. Butler County, 28 Iowa, 253; Maynard v.

Maynard, 49 Vt. 297; Arden v. Goodacre, 11 C. B. 371; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Sutherland v. Wyer, 67 Me. 64; Williams v. Chicago C. Co., 60 Ill. 149; Benziger v. Miller, 50 Ala. 206; Dunn v. Johnson, 33 Ind. 54, 5 Am. Rep. 177; Keyes v. Western Vermont S. Co., 34 Vt. 81; Cook v. Soule, 56 N. Y. 420; Campbell v. Miltenberger, 26 La. Ann. 72; Parsons v. Sutton, 66 N. Y. 92; Bisher v. Richards, 9 Ohio St. 495; Dobbins v. Duquid, 65 Ill. 464; Hayden v. Cabot, 17 Mass. 169; Emery v. Lowell, 109 Mass. 197; True v. International Tel. Co., 60 Me. 9; Grindle v. Eastern Exp. Co., 67 Me. 317, 24 Am. Rep. 31; Luse v. Jones, 39 N. J. L. 707; United States v. Smith, 94 U. S. 214, 24 L. ed. 115; Beymer v. McBride, 37 Iowa, 114; Le Blanche v. London, etc. R. Co., 1 C. P. Div. 286; Hamlin v. Great Northern R. Co., 1 H. & N. 408; Smeed v. Foord, 1 E. & E. 602; Fullerton v. Fordyce, 144 Mo. 519; Uhlig v. Barnum, 43 Neb. 584; Loomer v. Thomas, 38 Neb. 277; Packet Co. v. Hobbs, 105 Tenn. 29, 45; Nashua I. & S. Co. v. Brush, 33 C. C. A. 456, 91 Fed. 213, citing the text; Friedenstien v. United States, 35 Ct. of Cls. 1; Bickham v. Hutchinson, 50 La. Ann. 765; Gooden v. Moses, 99 Ala. 230; Raymond v. Haverhill, 168 Mass. 382. Compare Wieting v. Millston, 77 Wis. 523, which is disapproved in the Massachusetts case.

⁹⁴ Ross v. City of Stamford, 88 Conn. 260; Doran v. Waterloo, C. F. & N. Ry. Co., — Iowa, —, 147 N. W. 1100; A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co., — Tex. Civ. App. —, 167 S. W. 256; Fairfield v. Salem, 213 Mass.

and immediate steps to prevent future consequences is demanding of him a degree of care and an infallibility of judgment which the most skilful physician does not possess."⁹⁵ "An injured person who, from the circumstances, might reasonably believe that her injury was of a character that rest alone would afford a speedy recovery therefrom, should not be required to incur the heavy expenses of nursing and medical attendance as a condition to her right of recovery of adequate damages."⁹⁶ If an injured person selects and uses all reasonably accessible means to cure his hurt and, for a time upon his own judgment and without medical advice, adopts and pursues such treatment as a physician of ordinary care, prudence and skill uses in treating a similar injury, his duty is fully discharged, though it appears that a more skilful treatment might have produced a more favorable result.⁹⁷ The rule which requires reasonable conduct on the part of one whose legal rights have been violated should not be invoked by a defendant as a basis for a critical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which were wiser or more advantageous to the defendant. Reasonably prudent action is required; not that action which the defendant, upon afterthought, may be able to show would have been more advantageous to him.⁹⁸ A wrongdoer may not insist upon the right to shut the plaintiff out from the use of other machines and force him to buy from him in order that

296; *Hurxthal v. Boom Co.*, 53 W. Va. 87, 97 Am. St. 954, quoting the preceding part of this section. *American Realty Co. v. Thompkins*, 37 App. D. C. 87; *Louisville, etc. R. Co. v. Falvey*, 104 Ind. 409.

⁹⁵ *Fullerton v. Fordyce*, 144 Mo. 519, 533.

⁹⁶ *Kennedy v. Busse*, 60 Ill. App. 440. See *Williams v. Brooklyn*, 33 App. Div. (N. Y.) 539.

⁹⁷ *Packet Co. v. Hobbs*, 105 Tenn. 29, 44.

⁹⁸ *The Thomas P. Sheldon*, 113 Fed. 779, 781; *Wabash R. Co. v. Campbell*, 117 Ill. App. 630, quot-

ing the text. See *Alabama S. & I. Co. v. Kratzer I. C. Co.*, 2 Ala. App. 604.

It may be the duty of the injured party to pay an illegal exaction to avoid a large loss if that can be done without waiving his rights and the sum paid can be recovered. *Holly v. Neodesha*, 88 Kan. 102. But compare *Northern Colorado I. Co. v. Pouppirt*, *infra*. But such party is not required to do acts which would work an estoppel as between him and the other party. *Northern Colorado I. Co. v. Pouppirt*, 22 Colo. App. 563.

he may mitigate his loss.⁹⁹ It is believed to be a general rule that where the party in default controls the market the other may stand on his legal rights and is not bound to accept from such party a substitute for that he was entitled to, especially if that substitute would increase the benefit to the party who had committed the default. This would be putting a premium on the breach of contracts. The acts and conduct of the plaintiff in a civil damage action toward the property of the defendant and the person of the plaintiff's husband, if disconnected with the illegal sales of liquors, cannot be shown in mitigation.¹

In some states and under the federal employers' liability act contributory negligence to a certain extent is not a defense if the defendant was also at fault. There such negligence diminishes the damages which the plaintiff may recover,² except where the defendant has been responsible for a positive, continuous tort.³ The plaintiff's negligence may be considered in mitigation whether the defendant's conduct has been merely negligent or reckless and wanton.⁴ The rule requiring the

Where there was a breach of duty to supply water for irrigation, in consequence of which plants ready for transplanting were lost, the measure of duty upon the landowner only required that reasonable diligence be exercised in an effort to secure other plants in the vicinity; it was not necessary to use the land to which the plants were to be transplanted for other purposes. *American Rio Grande L. & I. Co. v. Mercedes P. Co.*, (Tex. Civ. App.) 155 S. W. 286.

⁹⁹*Tubular R. & S. Co. v. Exeter B. & S. Co.*, 159 Fed. 824, 86 C. C. A. 648.

¹*Gough v. State*, 32 Ind. App. 22.

²*Tilghman v. Seaboard Air Line R. Co.*, 167 N. C. 163; *Florida R. Co. v. Dorsey*, 59 Fla. 260; *Benedict P. Co. v. Atlantic C. L. R. Co.*, 55 Fla. 514, 20 L.R.A.(N.S.) 92; *Southern R. Co. v. Gore*, 128 Ga. 627; *Rakes v. Atlantic G. & P. Co.*,

7 P. I. 359; *Louisville & N. R. Co. v. Martin*, 113 Tenn. 266; *Neil v. Idaho*, etc. R. Co., 22 Idaho 74; *Atlanta*, etc. R. Co. v. *Wyly* 65 Ga. 120; *Hardin v. Ledbetter*, 103 N. C. 90; *East Tennessee*, etc. R. Co. v. *Fain*, 12 Lea, 35; *Louisville & N. R. Co. v. Conner*, 2 Baxt. 382, 12 Am. Neg. Cas. 593; *East Tennessee*, etc. R. Co. v. *Thompson*, 12 Lea, 200, 12 Am. Neg. Cas. 593; *Railway Co. v. Howard*, 90 Tenn. 144, 12 Am. Neg. Cas. 591; *Galveston*, etc. R. Co. v. *Hodnett* (Tex. Civ. App.) 155 S. W. 678.

The rule applies under the Federal Employers' Liability Act. *Philadelphia*, etc. R. Co. v. *Tucker*, 35 App. D. C. 123.

³*Satterfield v. Rowan*, 83 Ga. 187.

⁴*Cincinnati*, etc. R. Co. v. *Davis*, 62 C. C. A. 565, 127 Fed. 933; *Railway Co. v. Wallace*, 90 Tenn. 52, 62, and this is true regardless of the extent of the plaintiff's negli-

wronged party to lessen the damage done has been held not to apply to a case of wilful injury. "Since one who has committed an assault and battery upon another cannot urge in his defense that the plaintiff might, by the use of due care, have avoided the battery, we think where the injury is intentional he should not be permitted to say in reduction of damages that the plaintiff might have prevented them at least in part by careful conduct on his part. If negligence contributing to the injury cannot be set up to defeat the action when the act of the defendant was wilful, by a parity of reasoning, the defendant in such a case should not be permitted to say that, but for the negligence of the defendant in failing to avoid the consequences of the wrong, he would have suffered no damage, or only a part of the damages for which he claims a recovery."⁵ Under a statute of this nature applying only to the plaintiff or his property his contributory negligence will bar the recovery for lost profits.⁶

§ 156. Measures of prevention; return of property; discharge of plaintiff's debt. Acts of the plaintiff or the defendant, and in some cases of third persons, by which the *prima facie* loss or injury from the act complained of has been reduced or partially compensated may be shown in reduction of damages.⁷ Measures of prevention taken by the plaintiff to prevent loss or to avert some of the consequences of the wrong complained of, and which have had an ameliorating effect, may be proved; and the damages will be mitigated, according to the particular facts, to the actual loss. Where goods have been taken from the owner, and

gence. *Tennessee Cent. R. Co. v. Binkley*, 127 Tenn. 77, and cases cited.

⁵ *Galveston, etc. R. Co. v. Zant-zinger*, 92 Tex. 365, 44 L.R.A. 553, 71 Am. St. 859.

Aggravated damages because the plaintiff was ravished may not be recovered in an action for assault and battery unless resistance to the ravishment is shown to have been made. *Cholodnieka v. Glonielzek*, 150 App. Div. (N. Y.) 206, follow-

ing *Dean v. Raplee*, 145 N. Y. 319.

The general subject of mitigation, or preventable damages, has been considered in §§ 88-90.

⁶ *Florida E. C. R. Co. v. Smith*, 61 Fla. 218.

⁷ If a proceeding for the recovery of a penalty for the violation of an ordinance is civil in its nature the defendant may show what he has done to prevent the wrong complained of. *Chicago v. Knobel*, 232 Ill. 112.

sold by an officer who cannot justify for want of a plea or because his writ would not avail for that purpose, such officer or any person liable for his tort may show that the plaintiff bought the goods at the tortious sale for less than their value.⁸

Whenever the owner recovers his property after any wrongful taking or detention the expense of procuring its return is the measure of damages, in the absence of special damage, if the property itself has not been injured or diminished in value. In other words, the wrong-doer is *prima facie* liable for the value of the property at the time he tortiously took or converted it, with interest; but if it has been returned and accepted by the owner its value then, or, if he has incurred expense to recover it, then its value less such expense, will be deducted by way of mitigation from the amount which would otherwise be the measure of damages.⁹ Where one recovers property which had been unlawfully taken he is considered as having accepted it in mitigation of damages upon the principle that he has thereby received partial compensation for the injury suffered.¹⁰ In an

⁸ Forsyth v. Palmer, 14 Pa. 96, 53 Am. Dec. 519; Murray v. Burling, 10 Johns. 175; Baker v. Freeman, 9 Wend. 36, 24 Am. Dec. 117; Ford v. Williams, 24 N. Y. 359; Baldwin v. Porter, 12 Conn. 473; Hurlburt v. Green, 41 Vt. 490; McInroy v. Dyer, 47 Pa. 118; Tamvaco v. Simpson, H. & R. 374; Kaley v. Shed, 10 Mete. (Mass.) 317; Sprague v. Brown, 40 Wis. 612; Reynolds v. Shuler, 5 Cow. 323.

⁹ Central R. Co. v. Montmollen, 145 Ala. 468, 117 Am. St. 58; Leonard v. Maginnis, 34 Minn. 506; Dailey v. Crowley, 5 Lans. 301; Greenfield Bank v. Leavitt, 17 Pick. 1, 28 Am. Dec. 268; Pierce v. Benjamin, 14 Pick. 356; Lucas v. Trumbull, 15 Gray, 306; Perkins v. Freeman, 26 Ill. 477; Hallett v. Novion, 14 Johns. 273; Delano v. Curtis, 7 Allen, 470; Cook v. Hartle, 8 C. & P. 568; Bennett v. Lockwood, 20 Wend. 223, 32 Am. Dec. 532; Burn

v. Morris, 2 Crompt. & M. 579; Doolittle v. McCullough, 7 Ohio St. 299; Wheelock v. Wheelwright, 5 Mass. 104, 1 Am. Neg. Cas. 659; Cook v. Loomis, 26 Conn. 483; Hepburn v. Sewell, 5 Harr. & J. 211, 9 Am. Dec. 512; Sprague v. Brown, 40 Wis. 612; Ewing v. Blount, 20 Ala. 694; Hurlburt v. Green, 41 Vt. 490; Johannesson v. Borschenius, 35 Wis. 131; Blewett v. Miller, 131 Cal. 149, quoting the text; First Nat. Bank v. Rush, 29 C. C. A. 333, 85 Fed. 539, citing the text.

¹⁰De Celles v. Casey, 48 Mont. 568; Whittler v. Sharp, 43 Utah, 419, 49 L.R.A.(N.S.) 931; Lyman v. James, 87 Vt. 486; Muenster v. Fields, 89 Tex. 102, affirming Fields v. Muenster, quoting the text; Kline v. McCandless, 139 Pa. 223; Fields v. Williams, 91 Ala. 502; Dodson v. Cooper, 37 Kan. 346, quoting the text; Sprague v. Brown, 40 Wis. 612; Lazarus v. Ely, 45 Conn. 504;

action of trespass for goods taken and carried away it appeared that the plaintiff, before suing, had demanded their return, and the defendant had promised to return them, but while preparing to do so they were attached on a writ against the plaintiff; the measure of damages was the same as though the defendant had returned them.¹¹ If restoration is obtained by the offer and payment of a reasonable reward this amount, with interest from the time of payment, is to be deducted from the value of the property returned.¹² Trouble and loss of time may be taken into consideration as part of the expense of obtaining restoration.¹³

Where there is a diminution in value from any cause intermediate the taking or conversion and return, the loss falls on the wrong-doer, and will lessen the mitigation to which he is entitled because of the return of the property.¹⁴ A mere offer to return will not lessen the damages; ¹⁵ nor will the tender of part of the value by an officer who has sold under a void process.¹⁶ A court may in a proper case, if the action is trover or trespass *de bonis*, order the plaintiff to accept the property in mitigation of damages, which will then be reduced to those actually sustained by the taking, with intervening costs and losses.¹⁷ In an action for damages for withholding or not conveying property, a tender of it or a part of it or a conveyance of the whole or a portion of it may be allowed at the trial in

First Nat. Bank v. Rush, 29 C. C. A. 333, 85 Fed. 539, citing the text: Merrill v. How, 24 Me. 126; § 1139.

¹¹ Kaley v. Shed, 10 Mete. (Mass.) 317; Lowell v. Parker, *id.* 309, 43 Am. Dec. 436.

¹² Greenfield Bank v. Leavitt, 17 Pick. 1, 28 Am. Dec. 268.

¹³ Johannesson v. Borschenius, 35 Wis. 131.

¹⁴ Lucas v. Trumbull, 15 Gray, 306; Perham v. Coney, 117 Mass. 102; Barrelett v. Bellgard, 71 Ill. 280; First Nat. Bank v. Rush, *supra*.

¹⁵ Georgia, F. & A. Ry. Co. v. Blish Milling Co., 15 Ga. App. 142; Munier v. Zachary, 138 Iowa, 219, Suth. Dam. Vol. 1.—31.

18 L.R.A.(N.S.) 572, 16 Ann. Cas. 526; Dooley v. Gladiator Consol. Gold Mines & Milling Co., 134 Iowa, 468, 13 Ann. Cas. 297; Arneson v. Nerger, 34 S. D. 201; Norman v. Rogers, 29 Ark. 365; Stickney v. Allen, 10 Gray, 352. See Worman v. Kramer, 73 Pa. 378; Dow v. Humbert, 91 U. S. 291, 23 L. ed. 368.

¹⁶ Clark v. Hallock, 16 Wend. 607.

¹⁷ Yale v. Saunders, 16 Vt. 243. See § 1140.

The consignee of delayed goods may not refuse to accept them without lessening the liability of the carrier. Southern R. Co. v. Moody, 151 Ala. 374.

mitigation, if under the circumstances such a course is reasonable.¹⁸ But this cannot be done in actions of *assumpsit* for breach of contract.¹⁹ By a wrongful conversion of property a cause of action arises which cannot be discharged except by the owner's act.²⁰ And his acceptance of a return of it is in general required to relieve the wrong-doer of any part of his liability for the value; but as damages in trover are assessed on equitable principles, as is the allowance of mitigations generally, if property wrongfully taken or its proceeds have been applied to the payment of the plaintiff's debts, or otherwise to his use, though without his direction or consent, such application may, under certain circumstances, be received in mitigation. An executor *de son tort* may show that he has applied the proceeds of the property with which he intermeddled in payment of the debts of the deceased.²¹

§ 157. **Same subject.** Where a guardian, having no power to commit waste by cutting and removing timber, unauthorizedly gave a license to another to commit such waste, and the latter, with the former's assent, applied the proceeds of the timber to the payment of taxes upon or debts against the infant's estate, such payments were allowed to be shown in mitigation.²² But it has been held that a voluntary purchaser from an executor *de son tort*, when sued in trover by the rightful representative, cannot show in mitigation of damages that since his purchase such executor has paid debts which the administrator was bound to pay in due course of administration.²³ A defendant in an

¹⁸ Towle v. Lawrence, 59 N. H. 501.

¹⁹ Colby v. Reed, 99 U. S. 560, 25 L. ed. 484.

²⁰ Livermore v. Northrup, 44 N. Y. 107; Franke v. Eby, 50 Mo. App. 579; Clark v. Brott, 71 Mo. 475.

²¹ Mountford v. Gibson, 4 East, 441; Saam v. Saam, 4 Watts, 432; Hostler v. Scott, 2 Haywood, 179; Cook v. Sanders, 15 Rich. 63, 94 Am. Dec. 136; Hanson v. Herriek, 100 Mass. 323; Perry v. Chandler, 2 Cush. 237; Chesapeake & O. R. Co. v. Lavin, 136 Ky. 205; State

v. Dirkmann, (Mo. App.) 124 S. W. 29.

²² Probate Court v. Bates, 10 Vt. 285; Torry v. Black, 58 N. Y. 185.

²³ Carpenter v. Going, 20 Ala. 587. In this case Dargan, C. J., said: "But the question is, can the purchaser from the executor *de son tort* be substituted to this equitable defense that the executor *de son tort* might himself make? We think he cannot, at least in a court of law. We do not intend to deny the common saying that trover is an equitable action and that the

action of trespass *de bonis asportatis* who is a mere trespasser, cannot take any benefit from the application to the plaintiff's use of property seized by him without the latter's express or implied authority or consent, although a lien held by a third party thereon is satisfied.²⁴ "One who has wrongfully taken property cannot mitigate the damages by showing that he has himself applied the property to the owner's use without his consent; but when the property has been so applied by the act of a third person and the operation of law, that fact should be taken into the account in estimating the plaintiff's damages."²⁵ In trover by the mortgagee of crops against a purchaser with notice, or in a special action for damages in the nature of trover, the unauthorized sale and conversion being admitted, the defendant cannot prove in mitigation that a part of the proceeds of the sale received by the mortgagor was applied by him to the discharge of a lien for rent which was superior to the mortgage.²⁶

plaintiff can recover damages only to the extent of the injury actually sustained; as if the mortgagee bring trover against the mortgagor he can recover only the amount of the debt; or if the goods be sold illegally to discharge a lien the owner can recover of the purchaser only the value of the goods, deducting the value of the lien. But we hold that this equity or right must be personal to the defendant himself; that is, it must have existed in him at the time he became liable to the action; or if acquired afterwards it must have been acquired by his own act; for at law he cannot be subrogated to the equities of another which have sprung up after the liability of the defendant has become perfect."

²⁴ *Bird v. Womack*, 69 Ala. 390; *McMichael v. Mason*, 13 Pa. 214 (wrongful levy by sheriff); *Dallam v. Fidler*, 6 W. & S. 323; *Hundley v. Chadick*, 109 Ala. 575, 584, citing the text, and disapproving a statement in *City Nat. Bank v. Jef-*

fries, 73 Ala. 123, to the effect that if it be shown that the property attached has yielded its full value this may be considered in mitigation.

²⁵ *Higgins v. Whitney*, 24 Wend. 379.

²⁶ *Keith v. Ham*, 89 Ala. 590. The court say: Had this action been against the mortgagor, there would have been more force in the position that the damages should be mitigated, for it was his duty to discharge the landlord's lien for rent; or had the case involved the general ownership of the property, and it appeared that the fruits of the conversion had been applied by the consent, express or implied, of the plaintiff, or through legal proceedings, had at the instance of a third person, to the payment of his debt, or in relieving his property from a lien, the damages recoverable by him in trover might be mitigated by the amount thus paid. *Bird v. Womack*, 69 Ala. 392; *Street v. Sinclair*, 71 id. 110. Or,

Where a tax collector became a purchaser at a sale made by him the sale was declared voidable in trover against him; but as the proceeds were applied to pay the plaintiff's tax the amount so paid was deducted from the damages.²⁷ So a sale by a sheriff without giving notice has been held a conversion, but the damages should be only the diminution of price caused by such omission.²⁸ If goods are tortiously taken and a creditor of the owner afterwards attaches and disposes of them according to law, and applies the proceeds in satisfaction of a judgment against the owner, such proceeding may be shown, not as a justification of the taking but in mitigation of damages. This is because it would be palpably unjust for the owner to receive

had a recovery been had in favor of the landlord against the defendant, it may be that evidence of that fact might go in reduction of the mortgagee's damages. But here, even conceding that the payment was in some sort to the advantage of the plaintiff, we cannot conceive how that fact will avail the defendant in this action, the *gravamen* of which is the wrongful purchase and possession. The wrong was fully consummated, the injury resulting from it had been sustained, and the plaintiff's right to sue had attached before the alleged payment to the landlord. The payment was not made by the defendant, but by the mortgagor. To hold that he is entitled to a credit for the amount would be to subrogate him to an equity created, if it exists at all, by an act with which he had no connection and to give him the benefit of a payment which he has not made.

If personal property is sold under a condition that the title shall be and remain in the vendor until a note given for the purchase price of it is fully paid, a purchaser of a part of such property who is chargeable with notice of the contract is

liable to the original vendor for the value of the property purchased, and cannot claim a mitigation of the damages because the money he paid his vendor was by him paid to the owner and indorsement thereof made on the note he held. The person in whom was the title had a right to the whole security until his demand was fully paid. That was not affected by the diminution of the debt by payments. Defendant's vendor had no right to dispose of the property in order to make a payment. The wrong to the plaintiff, resulting from the sale and conversion, was to diminish his security. If the proceeds of the property sold had paid the whole debt, there would be good reason for mitigating the damages, although the sale took place before the debt was paid; but under the facts the mitigation would not benefit the plaintiff because, though the debt due him was lessened, he had lost an equivalent amount of property. *Morgan v. Kidder*, 55 Vt. 367.

²⁷ *Pierce v. Benjamin*, 14 Pick. 356.

²⁸ *Wright v. Spencer*, 1 Stewart, 576, 18 Am. Dec. 76.

the full value of his goods in their application to the payment of his debts, and afterwards recover that value from another who has derived no substantial benefit from his property. This rule is not only in conformity with justice, but has the sanction of authority.²⁹ It is not the fact of the seizure that gives the

²⁹ *Willis v. Jarrett C. Co.*, 152 N. C. 100 (as between vendor and vendee); *Scanlan v. Guiling*, 63 Ark. 540; *Curtis v. Ward*, 20 Conn. 204.

In the last case *Ward*, an attaching creditor, and the officer who executed the writ, were defendants. *Ward* sued out an attachment and attached property, after which that writ was abandoned and the indorsement of service erased. Subsequently a new attachment was sued out, followed by judgment and execution, on which the goods were sold. The defendant in the execution brought trover for the original taking. As the defendants could not justify that taking by any return upon the first attachment they suffered judgment by default, but they were allowed to show the subsequent disposition of the property in mitigation, on the authority of previous cases cited. *Baldwin v. Porter*, 12 Conn. 473; *Clark v. Whitaker*, 19 id. 330. Referring to the cases in New York denying the benefit of such mitigation to the wrong-doer when the sale is made upon process sued out by his agency or for his benefit, *Waite, J.*, said: "We are unable to yield our assent to the correctness of that doctrine as applied to a case like the present, where there has been a legal appropriation of the property. *Ward*, the defendant had a legal right to attach the goods in question; and as they were subsequently legally appropriated to the payment of the plaintiff's debt, he has

in that way received the full value of his property. The defendants admit that they have committed a trespass in taking the goods; and that they are liable to pay the plaintiff all the damage he has sustained thereby, and no more. These are for the original taking and detention until the second attachment. Beyond this they have done him no wrong. He has no more right to complain of a second attachment than he would if made by any other creditor, or if there had been no previous taking of the property. When the goods were attached the second time the copy left in service with him showed their situation. It was then at his option to regain the possession either by writ of replevin or by the payment of the debt upon which they were attached, or suffer them to be applied in satisfaction of that debt. Had he obtained his goods in either of the former modes it would hardly be claimed that he could afterwards recover their value of the defendant. The same result ought to follow if he suffered them to be applied in due form of law to the payment of his debt." See *Wehle v. Butler*, 61 N. Y. 245, which was apparently a similar case, in which the New York doctrine was applied and mitigation denied. See *Bates v. Courtwright*, 36 Ill. 518; *Wannamaker v. Bowes*, 36 Md. 42; *Squire v. Hollenbeck*, 9 Pick. 551, 20 Am. Dec. 506.

The defendant in trespass for the wrongful levy of an attachment may

defense, but that it has been seized under such circumstances that the owner has had or could have the benefit of it.³⁰ But in New York, as the law is settled, to protect the wrong-doer or to entitle him to prove such sale and application of proceeds in mitigation the seizure must be at the instance of a third person and not at the instance of the wrong-doer or upon process in his favor.³¹ Where the wrong-doer is not thus excluded by the policy of the law in reprobation of his tort from the benefit of such mitigation it is generally available to him.³²

If animals are killed through negligence it is the duty of their owner, if their carcasses are of any appreciable value, to use such measure of diligence as is reasonable considering the circumstances, to realize for them all they are worth. If he fails to do so their net value must be estimated and deducted from the damages claimed.³³

Where two ships were injured in a collision, the liability of one for the damage being admitted, and the injured ship was dry docked for repairs, and while in dock had her bottom cleaned and painted, and her bilge keels fitted, things the doing of which had been contemplated but not decided upon before the collision, and the doing of which in no way delayed or otherwise interfered with the making of the repairs, the wrong-doer was not entitled to a reduction of the dock charges because of these facts.³⁴ There is no principle of law which requires a

show in mitigation that the property which he wrongfully took from the plaintiff has been applied for the benefit or advantage of the owner thereof, and it is immaterial that such defendant was not the plaintiff in the attachment suit. *Grisham v. Bodman*, 111 Ala. 194; citing *Squire v. Hollenbeck*, *supra*; *Perry v. Chandler*, 2 Cush. 237.

³⁰ *Ball v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511.

³¹ *Id.*; *Otis v. Jones*, 31 Wend. 394; *Lyon v. Yates*, 52 Barb. 237; *Peak v. Lemon*, 1 Lans. 295; *Higgins v. Whitney*, 24 Wend. 379;

Sherry v. Schuyler, 2 Hill. 204; *Wehle v. Butler*, 61 N. Y. 245.

³² *Howard v. Cooper*, 45 N. H. 339; *Doolittle v. McCullough*, 7 Ohio St. 299; *Montgomery v. Wilson*, 48 Vt. 616.

³³ *Case v. St. Louis R. Co.* 75 Mo. 668; *Dean v. Chicago & N. R. Co.*, 43 Wis. 305; *Georgia Pac. R. Co. v. Fullerton*, 79 Ala. 298; *Illinois Cent. R. Co. v. Finnegan*, 21 Ill. 646; *Roberts v. Richmond & D. R. Co.*, 88 N. C. 560; *Harrison v. Missouri Pac. R. Co.*, 88 Mo. 625.

³⁴ *The Acanthus*, 112 L. T. 153, [1902] Prob. 17. *Contra* in principle. *The Sequoia*, 132 Fed. 625.

person to contribute to an outlay merely because he had derived a material benefit from it.³⁵ Nor is one who has been injured in his right of property to receive less than compensation because he did not contemplate the full use of the property, as where water at a dam was appropriated.³⁶ One who has become liable because of his breach of contract may not lessen his liability by showing that a contingent benefit may result to the plaintiff on account of the defendant's liability to a third person whom he wronged.³⁷

§ 158. No mitigation when benefit not derived from defendant. Generally there can be no abatement of damages on the principle of partial compensation received for the injury where it comes from a collateral source, wholly independent of the defendant, and is as to him *res inter alios acta*.³⁸ As where a man whose wife was killed remarries; the pecuniary value of the services rendered by the wife of the second marriage cannot avail the party who is responsible for the death of the first

³⁵ *Ruabon S. Co. v. London Assurance*, [1900] App. Cas. 6.

³⁶ *Green Bay, etc. C. Co. v. Kaukauna W. P. Co.*, 112 Wis. 323, 62 L.R.A. 579; *Patterson v. Mississippi B. Co.*, 98 U. S. 403, 25 L. ed. 206; *Jegon v. Vivian*, L. R. 6 Ch. App. 742.

³⁷ *Banewunn v. Levenson*, 171 Mass. 1.

³⁸ *Engleken v. Webber*, 47 Iowa, 558; *Ennis v. Shiley*, id. 552; *Western U. Tel. Co. v. Nye*, 70 Neb. 251, 63 L.R.A. 803, quoting the text; *Neiderstein v. Cusick*, 126 App. Div. (N. Y.) 409, citing the text; *Toledo, etc. T. Co. v. McFall*, 28 Ohio C. C. 362.

In an action against a railroad company and the construction company which built its road to recover for damage to adjacent property by excavations in the streets it was competent to prove that the damage had been repaired by the

city soon after it was done. *Alabama Midland R. Co. v. Coskry*, 92 Ala. 254.

Cases where there has been an increase in the value of the property involved in the action, aside from any action by the wrongdoer, are illustrative of the principle. *Ellwell v. Skiddy*, 77 N. Y. 282; *Canda v. Wick*, 49 N. Y. Super. 497; *Harrison v. Brega*, 20 Up. Can. Q. B. 324.

An unauthorized payment made by one joint tortfeasor to the beneficiary of the deceased does not lessen the liability of the other wrongdoer against whom the action is being prosecuted. *Louisville v. Hart*, 143 Ky. 171, 35 L.R.A. (N.S.) 207.

The profits made by a vendor on the goods the vendee has refused to accept do not affect the liability of the latter. *Sharpe v. White*, 25 Ont. L. R. 298.

wife.³⁹ A man who was working for a salary was injured by the negligence of the carrier; the fact that the employer did not stop the salary of the injured party during the time he was disabled was held not available to the defendant in mitigation;⁴⁰ nor does the gratuitous care and nursing of an injured plaintiff relieve the party who caused the injury from liability for their worth.⁴¹ Nor will proof of money paid to the injured party by an insurer or other third person by reason of the loss or injury be admissible to reduce damages in favor of the party by whose fault such injury was done.⁴² The payment of such moneys not being procured by the defendant, and they not having been either paid or received to satisfy in whole or in part his liability, he can derive no advantage therefrom in mitigation of

³⁹ *Davis v. Guarnieri*, 45 Ohio St. 470, 4 Am. St. 548.

⁴⁰ *Pittsburgh, C., C. & St. L. Ry. Co. v. Bir*, — Ind. —, 105 N. E. 921; *Nashville, etc. R. Co. v. Miller*, 120 Ga. 453, 67 L.R.A. 87, citing the text (payment of salary as matter of grace); *Houston & B. T. R. Co. v. Johansen*, (Tex. Civ. App.) 143 S. W. 1186; *Missouri Pac. R. Co. v. Jarrard*, 65 Tex. 560; *Ohio, etc. R. Co. v. Dickerson*, 59 Ind. 317, 9 Am. Neg. Cas. 279. But see ch. 36.

Where the plaintiff made the loss of wages an item of his claim and returned sick benefits received in order that he might claim full wages, which he recovered, he could not recover the benefits. *Pittsburgh, etc. R. Co. v. Fagin*, 3 Ohio N. P. (N. S.) 30, (Cincinnati superior court, general term), citing *Drinkwater v. Dinsmore*, 80 N. Y. 390, 36 Am. Rep. 624.

⁴¹ *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 Am. Neg. Cas. 175. In some states neither of the two preceding rules is recognized. See ch. 36.

⁴² *Dempsey v. Baltimore & O. R. Co.*, 219 Fed. 619; *Watson v.*

Adams, 187 Ala. 490; *Blalack v. Blacksher*, 11 Ala. App. 545; *Cincinnati, H. & D. Ry. Co. v. McCullom*, — Ind. —, 109 N. E. 206; *Gray v. Boston Elevated Ry. Co.*, 215 Mass. 143; *Long v. Kansas City, etc. R. Co.*, 170 Ala. 635; *Pace v. Louisville & N. R. Co.*, 166 Ala. 519; *Rome v. Rhodes*, 134 Ga. 650, citing the text; *Devaney v. Otis E. Co.*, 251 Ill. 28; *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, citing the text; *Consolidated C. Co. v. Shepherd*, 112 Ill. App. 458; *Citizens' G. & O. M. Co. v. Whipple*, 32 Ind. App. 203; *Blanchard v. Olds G. E. Works*, 142 Mo. App. 319; *Cornish v. North Jersey St. R. Co.*, 73 N. J. L. 273; *Norfolk & W. R. Co. v. Perrow*, 101 Va. 345; *Brewster v. Silverstein*, 133 N. Y. Misc. 473; *Cunningham v. Evansville, etc. R. Co.*, 102 Ind. 478, 52 Am. Rep. 683; *Hammond v. Schiff*, 100 N. C. 161; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431, 10 Am. Neg. Cas. 367, 26 Am. Rep. 384; *Pittsburg, etc. R. Co. v. Thompson*, 56 Ill. 138; *Texas & P. R. Co. v. Levi*, 59 Tex. 674; *Hayward v. Cain*, 105 Mass. 213; *Clark v. Wilson*, 103 id. 219, 4 Am. Rep.

damages for which he is liable. As has been said by another, to permit a reduction of damages on such a ground would be to allow the wrong-doer to pay nothing and take all the benefit of a policy of insurance without paying the premium.⁴³ The same principle has been applied to life insurance in recent cases.⁴⁴ In the English case cited in the note the writer of the opinion of the house of lords said that money provisions made by a husband for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in esti-

532; *Propellor Monticello v. Molison*, 17 How. 152, 15 L. ed. 68; *The Yeager*, 20 Fed. 653; *Owens v. Baltimore & O. R. Co.*, 35 id. 715; *Weber v. Morris, etc. R. Co.*, 36 N. J. L. 213; *Carpenter v. Eastern T. Co.*, 71 N. Y. 574; *Briggs v. New York, etc. R. Co.*, 72 N. Y. 26; *Perrrott v. Shearer*, 17 Mich. 48; *Yates v. Whyte*, 4 Bing. N. C. 272; *Kingsbury v. Westfall*, 61 N. Y. 356; *Althorff v. Wolfe*, 22 N. Y. 355, 16 Am. Neg. Cas. 749; *Port Glasgow & N. S. Co. v. Caledonia R. Co.*, 19 Rettie. 608; *Lake Erie & W. R. Co. v. Griffin*, 8 Ind. App. 47, 52 Am. St. 465; *Allen v. Barrett*, 100 Iowa, 16; *Mathews v. St. Louis, etc. R. Co.*, 121 Mo. 298, 336, 25 L.R.A. 161, quoting the text; *Rolfe v. Boston & M. R. Co.*, 69 N. H. 476; *Lake Erie & W. R. Co. v. Falk*, 62 Ohio St. 297, 7 Am. Neg. Rep. 341; *Lindsay v. Bridgewater G. Co.*, 3 Pa. Dist. Rep. 716, citing the text; *Anderson v. Miller*, 96 Tenn. 35, 54 Am. St. 812, 31 L.R.A. 604; *Brown v. McRae*, 17 Ont. 712; *Chicago, etc. R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490; *Chesapeake I. Works v. Hochschild*, 119 Md. 303; *Bachelder v. Morgan*, 179 Ala. 339; *Fitzgerald v. Union S. Co.*, 91 Neb. 493; *Texas Cent. R. Co. v. Cameron* (Tex. Civ. App.), 149 S. W. 709; *Nussbaum v. Trinity & B. Valley*

R. Co. (Tex. Civ. App.), 149 S. W. 1083; *Heath v. Seattle T. Co.*, 73 Wash. 177 (policemen's pension fund).

A property owner who seeks recourse against a corporation for its negligence in not furnishing fire protection and who has insurance on the property in question may recover from the former only to the extent his loss was not made good by the insurer. *Georgetown W., etc. Co. v. Neale*, 137 Ky. 197.

⁴³ *Mayne on Dam.* (8th ed.) p. 134; *Dillon v. Hunt*, 105 Mo. 151, 163, 24 Am. St. 374 quoting the whole paragraph of the text as it stood in the first edition; *Shields v. Cincinnati T. Co.*, 13 Ohio N. P. (N. S.) 133.

⁴⁴ *Brabham v. Baltimore & O. R. Co.*, L.R.A.1915E, 1201, 136 C. C. A. 117, 220 Fed. 35; *Coulter v. Pine Township*, 164 Pa. 543; *Harding v. Townshend*, 43 Vt. 536, 5 Am. Rep. 308; *Althorff v. Wolfe*, 22 N. Y. 355; *Terry v. Jewett*, 17 Hun, 395; *Sherlock v. Alling*, 44 Ind. 184; *Western & A. R. Co. v. Meigs*, 74 Ga. 857, 11 Am. Neg. Cas. 331; *Grand Trunk R. v. Beckett*, 16 Can. Sup. Ct. 713, 13 Ont. App. 174; *Same v. Jennings*, 13 App. Cas. (1888), 800; *Glume v. Ristine*, 94 Fed. 745, 6 Am. Neg. Rep. 446, 36 C. C. A. 450, citing the text. See § 1265.

inating her loss by the death of her husband, but the extent, if any, to which these ought to be imputed in reduction of damages must depend upon the nature of the provision and the position and means of the deceased. When the deceased did not earn his own living, but had an annual income from property, one-half of which has been settled upon his widow, a jury might reasonably come to the conclusion that, to the extent of that half, the widow was not a loser by his death, and might confine their estimate of her loss to the interest which she might probably have had in the other half. Very different considerations occur when the widow's provision takes the shape of a policy on his own life effected by a man in the position of the deceased, whose earnings were \$75 a month, and who left no estate. "The pecuniary benefit which accrued to the respondent from his premature death consisted in the accelerated receipt of a sum of money, the consideration for which had already been paid by him out of his earnings. In such a case the extent of the benefit may fairly be taken to be represented by the use or interest of the money during the period of acceleration; and it was upon that footing that Lord Campbell⁴⁵ suggested to the jury that, in estimating the widow's loss, the benefit which she derived from acceleration might be compensated by deducting from their estimate of the future earnings of the deceased the amount of premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy." On the same principle it would be no defense in an action by an annuitant or any other creditor that the value of the annuity had been recovered against the plaintiff's attorney in an action for negligence in its negotiation, or that the sheriff had been forced to pay the debt in an action for an escape.⁴⁶ And where a number of plaintiffs sued for damages resulting from delaying their ship it was no ground for reducing the amount that

⁴⁵ In *Hicks v. Newport, etc. R. Co.*, 4 B. & S. 403n. For a consideration of the authority of this case see *Harding v. Townshend*, 43 Vt. 536, 541, 5 Am. Rep. 308. A contrary conclusion has been arrived at under a statute similar to that

under which the English case was ruled. *Althorf v. Wolfe*, 22 N. Y. 355.

⁴⁶ *Mayne on Dam.* (8th ed.), p. 134; *Hunter v. King*, 4 B. & Ald. 209.

some of these plaintiffs had been benefited by getting an increase of passengers in another ship; the result would have been the same if there had been only one plaintiff who owned both ships.⁴⁷ So general benefits resulting to the plaintiff from the erection and proximity to his property of the defendant's mill are no ground for a reduction of the damages the plaintiff suffers by the overflowing of his land from the defendant's dam,⁴⁸ and so the damages caused by the breach of a contract as to the use of property employed in making an improvement are not lessened because of its enhancement, in connection with other local property, by the improvement.⁴⁹ In an action by the master for seduction of his servant evidence that the defendant offered to marry the girl is not admissible in mitigation.⁵⁰ In an action against one of several co-trespassers evidence of payments by any one of them, though not received in full satisfaction, is admissible; they are payments made on account of the injury by those primarily liable; full satisfaction from either would discharge all and partial compensation should have this effect *pro tanto*.⁵¹ An offer by a wrong-doer to purchase property which has been injured at a price put upon it by a third person cannot be proven.⁵² In a suit to recover for the breach of a contract to furnish employment the defendant may show that wages have been obtained from other parties.⁵³ The release of the plaintiff from liability for a demand against him

⁴⁷ Mayne on Dam. (8th ed.), p. 134; Jebson v. East & W. India D. Co., L. R. 10 C. P. 300.

⁴⁸ Arminius C. Co. v. Landrum, 113 Va. 7, 38 L.R.A.(N.S.) 272, citing the text; Mayrant v. Columbia, 82 S. C. 273 (property damaged by general causes); Covington v. Berry, 120 Ky. 582; Ackerman v. True, 175 N. Y. 353. See Jones v. Royster G. Co., 6 Ga. App. 506; Francis v. Schoelkopf, 53 N. Y. 152; Marcy v. Fries, 18 Kan. 353; Harrison v. Brega, 20 Up. Can. Q. B. 324.

⁴⁹ Cherry v. Christian County, 146 Ky. 330.

⁵⁰ Ingersoll v. Jones, 5 Barb. 661;

First Nat. Bank v. Rush, 29 C. C. A. 333, 85 Fed. 539, citing the text. See White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100.

⁵¹ Chamberlin v. Murphy, 41 Vt. 110.

⁵² Mayor v. Harris, 75 Ga. 761.

⁵³ Owen v. Union M. Co., 48 Mich. 348.

An agent entitled to a commission for the sale of an article specially manufactured for a special customer and use, mitigates the recovery for lost commission thereon by selling it to another after refusal of the customer to accept it. Canton-H. P. Co. v. Llera, 205 Fed. 209.

by bankruptcy proceedings does not affect the liability of a tortfeasor.⁵⁴

§ 159. Fuller proof of the *res gestæ* in trespass, negligence, etc. Mitigation of damages frequently results from fuller proof of the *res gestæ*, or the disclosure of some peculiar or exceptional feature pertaining to the particular case, making it apparent that the plaintiff's injury is less than it would other-

It has been laid down in a case ruled by the House of Lords that when, in the course of his business, a party has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has sustained may be taken into account in measuring his recovery against the other party to the contract which was the basis of his action. The facts, in brief, were that turbines supplied were not in accordance with the contract; after using them for a time the purchaser replaced them by others, which was a reasonable and prudent course to take to mitigate the damages; the substituted turbines, even if the others had met the prescribed conditions, would have been to the pecuniary advantage of the purchaser if he had obtained them at his own cost. *British Westinghouse E. & Mfg. Co. v. Underground E. R. Co.*, [1912] App. Cas. 673, reversing [1912] 3 K. B. 128, which affirmed [1911] 1 K. B. 575. The court referred to *Stamforth v. Lyall*, 7 Bing. 169, as illustrative of the rule. There the defendants had chartered a ship to New Zealand, where they were to load her, or by an agent there to give the plaintiff, the owner, notice that they abandoned the adventure, in which case they were to pay 500*l*. The ship went there, but found neither agent nor cargo, and the captain

made a circuitous voyage home by way of Batavia. This voyage, after making every allowance for increased expense and loss of time, was more profitable than the original venture would have been. It was decided that the action was for breach of contract to load the vessel and that the plaintiff was entitled to recover all the damages incurred, but was bound to bring into account, in ascertaining those damages, the advantages resulting to him from the course pursued. It was said that the subsequent transaction to be considered must be one arising out of the consequences of the breach and in the ordinary course of business. This distinction eliminates moneys received from insurers; in such cases it is not the accident, but a contract wholly independent of the relation between the parties which gave the insured his advantage; and so in an action for delay in discharging a ship whereby the plaintiff lost passengers he had contracted to carry and they took passage in another vessel of his; the recovery was not affected because the mitigation did not arise out of the transactions which were the subject-matter of the contract. *Jackson v. East & West India D. Co.*, L. R. 10 C. P. 300.

⁵⁴ *Sibley v. Nason*, 196 Mass. 125, 12 L.R.A.(N.S.) 1173, 124 Am. St. 520.

wise appear to be, or that the defendant is less culpable. A defendant in mitigation of damages for assault and battery may rely on the *res gestæ* although if pleaded it would amount to a justification and require a special plea.⁵⁵ In an action for breach of a marriage promise it may be shown that the defendant's family disapproved of the match on the ground that this would diminish the happiness of the union,⁵⁶ and that the defendant was afflicted with an incurable disease at the time of the breach;⁵⁷ but the jury cannot consider the possible consequences of marrying the defendant arising from a want of that love and affection which a husband should have for his wife.⁵⁸

In trespass, under a plea of not guilty, the defendant has been permitted to show title in himself to confine the plaintiff's recovery to the quantity of his interest,⁵⁹ and in an action to recover for damages done by cattle it may be shown that the animals got upon the plaintiff's land by reason of the defectiveness of his fence.⁶⁰ An officer against whom an action is brought for entering the plaintiff's house and assaulting him may show in mitigation, but not to prove the entry lawful, that he entered for the purpose of making, and did in fact make, service under an attachment, although the attachment was unlawful by reason of the writ not having been returned into court.⁶¹ Where, in consequence of the defendant's embankment, the flood waters of a river were pent up and flowed over the plaintiff's land, and it appeared that had the embankment not been constructed the waters would have flowed a different way but would have reached his land and done damage to a lesser extent, the measure of damages was the difference between the two amounts;⁶² and in an action for a nuisance in erecting mills and maintaining a

⁵⁵ Byers v. Horner, 47 Md. 23; Russell v. Barrow, 7 Port. 106. But see Watson v. Christie, 2 Bos. & P. 224.

⁵⁶ Irving v. Greenwood, 1 C. & P. 350.

⁵⁷ Sprague v. Craig, 51 Ill. 586.

⁵⁸ Piper v. Kingsbury, 48 Vt. 480.

⁵⁹ Ballard v. Leavell, 5 Call, 531.

In trespass for killing a dog evi-

dence of his bad habits, other than such as are pleaded in justification, may be proven in mitigation. Reynolds v. Phillips, 13 Ill. App. 557; Dunlap v. Snyder, 17 Barb. 561.

⁶⁰ Young v. Hoover, 4 Cranch C. 187.

⁶¹ Paine v. Farr, 118 Mass. 74.

⁶² Workman v. Great Northern R. Co., 32 L. J. (Q. B.) 279.

steam-engine and furnaces in the vicinity of the plaintiff's dwelling the defendant was entitled to show the general character of the neighborhood, the various kinds of business carried on there, and the class of tenants by whom the dwelling-houses were in general occupied, and also the probable disadvantage and loss to the plaintiff from an inability to rent his houses, if, in consequence of the destruction or removal of the defendant's mills, there were no longer workmen to whom they could be leased.⁶³ The concurrence of other causes with the defendant's acts in creating a nuisance may also be shown in mitigation.⁶⁴

On an assessment of damages after a default in an action for negligence the defendant, for mitigation and to reduce them to a nominal sum, may show that there was no negligence; for this purpose it is immaterial whether the charge is of injury to person or property or that the damages are entire and indivisible.⁶⁵ A total or partial want or failure of consideration, on the same principle, may be shown in an action upon contract,⁶⁶ or any defense arising out of the plaintiff's cause of action itself, as where the action is for the price of labor or of a commodity and defects are proved.⁶⁷ And in many English cases this defense is recognized where, according to the general course of American decisions, the broader defense of recoupment would be allowed.⁶⁸

§ 160. Official neglect. In actions for neglect of duty or misconduct of ministerial officers affecting parties entitled to call on them for service, or for whom such officers are required

⁶³ *Call v. Allen*, 1 Allen, 137. See *Francis v. Schoellkopf*, 53 N. Y. 152.

⁶⁴ *Sherman v. Fall River I. Works*, 5 Allen, 213.

⁶⁵ *Batchelder v. Bartholomew*, 44 Conn. 494.

⁶⁶ *Darnell v. Williams*, 2 Stark. 166; *Simpson v. Clarke*, 2 Cr., M. & R. 342.

⁶⁷ *Crookshank v. Mallory*, 2 Greene, 257; *Basten v. Butter*, 7 East, 479; *Farnsworth v. Garrard*, 1 Camp. 38; *Denew v. Daverell*, 3

Camp. 451; *Baillie v. Kell*, 4 Bing. N. C. 638; *Cutler v. Close*, 5 C. & P. 337; *Sinclair v. Bowles*, 9 B. & C. 92; *Thornton v. Place*, 1 M. & Rob. 218; *Kelly v. Bradford*, 33 Vt. 35; *McKinney v. Springer*, 3 Ind. 59; *Allen v. McKibbin*, 5 Mich. 449; *Wood v. Schettler*, 23 Wis. 501.

⁶⁸ *Street v. Blay*, 2 B. & Ad. 456; *Parson v. Sexton*, 4 C. B. 899; *Poulton v. Lattimore*, 9 B. & C. 259; *Mondel v. Steel*, 8 M. & W. 858; *Dawson v. Collis*, 10 C. B. 523.

by law to perform duties, as well as in like actions by employers against agents and attorneys, the general rule is that the injured party is entitled to compensation commensurate with his actual loss.⁶⁹ Where such neglect or misconduct results in a failure to collect a debt or impairs an existing security and the *prima facie* loss is the amount of the debt, ordinarily any evidence is properly defensive or receivable in mitigation which negatives that loss either wholly or in part.⁷⁰ A sheriff in an action for escape or any neglect in respect to an execution may show that the execution debtor was wholly or partially insolvent, that if due diligence had been used the whole judgment or some part would have remained unsatisfied.⁷¹

There is an apparent exception to the general proposition that the party injured shall only recover his actual loss in the case of ministerial officers through whose diligent action the party interested must realize a debt or come into possession of a right. Where a sheriff suffers an escape on final process or fails to collect and return an execution, or to perform a peremptory duty to levy a tax or the like, the fact that the debt

⁶⁹ Hupe v. Sommer, 88 Kan. 561, 43 L.R.A.(N.S.) 565; Amy v. Supervisors, 11 Wall. 136, 20 L. ed. 101; Swan v. Bridgeport, 70 Conn. 143; Harris v. Murfree, 54 Ala. 161; Meehem on Public Officers, § 766.

⁷⁰ Van Wart v. Woolley, 3 B. & C. 439; Allen v. Suydam, 20 Wend. 321, 32 Am. Dec. 555; Russell v. Turner, 7 Johns. 189, 5 Am. Dec. 254; Russell v. Palmer, 2 Wils. 325; Stowe v. Bank of Cape Fear, 3 Dev. 408; Swan v. Bridgeport, *supra*; Townsend v. Libbey, 70 Me. 162; Wilson v. Strobach, 59 Ala. 488; Meehem on Public Officers, § 766. In § 759 Meehem it is said that if the escape is voluntary the officer is liable for the whole amount of the debt whether the debtor be solvent or insolvent (State v. Hamilton, 33 Ind. 502), while if the escape is the result of negli-

gence, though the whole judgment is *prima facie* the measure of the damages, the officer may show in mitigation that the debtor had no property with which he could have paid or secured the debt in whole or in part. State v. Mullen, 50 Ind. 598.

⁷¹ Kellogg v. Manro, 9 Johns. 300; Patterson v. Westervelt, 17 Wend. 543; Hootman v. Shriner, 15 Ohio St. 43; Ledyard v. Jones, 7 N. Y. 550; Brooks v. Hoyt, 6 Pick. 468; Shackford v. Goodwin, 13 Mass. 187; Lush v. Falls, 63 N. C. 188; West v. Rice, 9 Mete. (Mass.) 564; State v. Baden, 11 Md. 317; State v. Mullen, 50 Ind. 598; Coe v. Peacock, 14 Ohio St. 187; Cooper v. Wolf, 15 id. 523; Bank v. Curtiss, 1 Hill, 275; Pardee v. Robertson, 6 id. 550; Dunphy v. Whipple, 25 Mich. 10.

is still safe and collectible by a repetition, of the resort to the defendant officially is no defense;⁷² otherwise, as Watson, J., said:⁷³ "If the officer is sued for a neglect of duty he can say the defendant had no property out of which he could collect the money, and that, it is conceded, is a good defense; or he can say he has property out of which you can still collect it, and therefore nothing but nominal damages can be recovered. The second execution issued upon the same judgment would admit of the same defense, and so on as often as they might be issued, provided the judgment debtor did not in the meantime get rid of his property."⁷⁴ In an action against a supervisor of a town who was required by law to assess the damages which had been allowed the plaintiff for property taken for public use, and who had omitted to do so, the supervisor was personally liable for the whole amount which the plaintiff had been unable to obtain by reason of the refusal to perform his duty.⁷⁵ "It cannot be assumed that the defendant would be taught by the result of one action and proceed to do his duty, and thus avoid another. The plaintiff is not to be thus put off. The defendant's misconduct has deprived him of obtaining his money, and the defendant must answer to the whole injury which he has occasioned."⁷⁶ This rigorous severity is exceptional and based

⁷² *Ledyard v. Jones*, 7 N. Y. 550; *Bank v. Curtiss*, 1 Hill, 275; *Pardee v. Robertson*, 6 id. 550; *Kellogg v. Manro*, 9 Johns. 300; *Arden v. Goodaere*, 11 C. B. 371; *Moore v. Moore*, 25 Beav. 8; *Hemming v. Hale*, 7 C. B. (N. S.) 487; *Macrae v. Clarke*, L. R. 1 C. P. 403; *Goodrich v. Starr*, 18 Vt. 227; *State v. Hamilton*, 33 Ind. 502; *Hodson v. Wilkins*, 7 Me. 113, 20 Am. Dec. 347; *Weld v. Bartlett*, 10 Mass. 470.

⁷³ *Ledyard v. Jones*, 7 N. Y. 550.

⁷⁴ But see *Tempest v. Linley*, Clayton, 34; *Norris' Peake*, 608; *Stevens v. Rowe*, 3 Denio, 327.

⁷⁵ *Clark v. Miller*, 54 N. Y. 528.

⁷⁶ In the overruled case of *Stevens v. Rowe*, 3 Denio, 327, which was

an action against a sheriff for neglecting to return an execution, *Beardsley, J.*, said: "At common law no action lay for such violation of duty, although the sheriff might be attached and punished for it. I admit, however, that under the statute an action may be maintained for such misconduct, and in which the party aggrieved is entitled to recover 'for the damages sustained by him' (2 R. S. 440, § 77; *Pardee v. Robertson*, 6 Hill. 550). The amount to be recovered is thus prescribed by the statute, which is 'the damage sustained' by such violation of duty, whatever the amount may be. The full amount to be levied and made on the execution is not necessarily recoverable, although

on considerations of policy to insure the active diligence of such

prima facie that may be the just measure of reparation where nothing is shown to induce a belief that the real loss of the aggrieved party is less than that amount." After referring to the point decided in *Pardee v. Robertson*, *supra*, and in *Bank v. Curtis*, 1 Hill, 275, he continued: "I must say that I should find great difficulty in following either of these cases as authority, even where the facts and circumstances were identically the same; and I am by no means disposed to extend them as authority to cases which admit of a plain distinction in matter of fact. The decision in *The Bank v. Curtiss* was said to be in accordance with the rule laid down in two cases adjudged in Massachusetts; but as I read those cases they have no application to such a state of facts as was shown to exist in *The Bank v. Curtiss*. In that case it appeared that the debt had not been lost, although its collection had been delayed by the neglect of the sheriff; for the proof shows that the debt was still safe and collectible. Yet the court held that the sheriff was liable for the full amount of the execution in his hands. I am unable to see any such rule laid down in either of the Massachusetts cases. In the first of these cases in order of time (*Weld v. Bartlett*, 10 Mass. 474), Parker, J., said: 'that where an officer had neglected to do his duty, so that the effect of the judgment appears to be lost, the judgment in the suit so rendered ineffectual is *prima facie* evidence of the measure of injury which the plaintiff has sustained; but it may be met by evidence of the inability of the debtor to pay.' The other case (*Young v. Hosmer*, Suth. Dam. Vol. I.—32.

11 Mass. 89) is equally explicit, and makes the sheriff liable for the entire debt; because 'the benefit of the judgment to the whole amount of it is to be presumed lost by the negligence of the officer.' This principle can surely have no bearing on a case in which it appears that the judgment had not been lost, but was still safe and collectible. In *Kellogg v. Manro*, 9 Johns. 300, which was also cited as sustaining *The Bank v. Curtiss*, the rule is stated as in the Massachusetts cases. It was said to be too plain for discussion that the plaintiff might recover beyond nominal damages. 'He is entitled,' say the court, '*prima facie*, to recover his whole debt, which is presumed to be lost by the escape.' I make no objection to this rule in any action brought against an officer for the violation of such a duty. *Prima facie* it may well be taken that the whole debt has been lost by the negligence of the officer; and if such be the fact, it is most just that he should pay the full amount. But when the proof shows that the debt has not been lost, although the collection has been delayed, and that it is still safe and collectible, it seems to me entirely clear that the rule laid down in the Massachusetts cases and in *Kellogg v. Manro* is wholly inapplicable. . . . In *Pardee v. Robertson* it was proved that the sheriff had actually collected the full amount of the execution; the money still remaining in his hands. But in the case now to be decided the fact was otherwise. The proof showed that the money had not been collected; although, if the judgment was a lien on real estate in the county of Oswego, as the plain-

officers; it is in fact punitive in its nature and object.⁷⁷ In the case next referred to, however, the rule was applied to an officer who, by an error of judgment, omitted to assess a tax for a sum due. He omitted to do it because he believed the law requiring it was unconstitutional. The court say honest ignorance does not excuse a public officer for disobeying the law.⁷⁸ It will exempt him from punitive damages. In a case for escape Jarvis, C. J., said: "The rule might be supposed to operate unjustly towards the sheriff where the execution debtor has the means of paying the debt at the moment of the escape and still continues notoriously in solvent circumstances. In this case the value of the custody was the amount of the debt, and the plaintiff will be entitled to recover substantial damages. It is true that the recovery of such damages will not satisfy the execution, and the debtor may be retaken by the plaintiff; for the debtor cannot take advantage of his own wrong and avail himself of the recovery against the sheriff. On the other hand, the sheriff is not damnified, for he may retake the debtor or

tiff offered to show, the sheriff might have made the amount as required by the execution. . . . If the sheriff should be compelled to pay the full amount of the execution, for the reason that the judgment was a lien on real estate out of which the money might have been collected, as was offered to be proved on the part of the plaintiffs, he would be entirely remediless. He could not enforce the judgment and execution for his own indemnity, but must stand the entire loss. This would be too severe where the debt is still safe and the only injury sustained has resulted from mere delay. It is just that the sheriff should make the party good by paying all the damages sustained by him; and so is the statute on which the action is founded; but to go beyond this seems to me quite too rigorous. *Prima facie* the sheriff is liable for the full amount

of the execution debt, as it is presumed to have been lost by his neglect. This, in my estimation, is not a very violent presumption, but still may be just in regard to the officer who is in default. But when it is shown that the debt has not been lost, there is no room for presumption, and the *prima facie* case no longer exists. By the statute the measure of recovery is the 'damages sustained,' which, presumptively, I admit is the full amount of the execution. But the sheriff may mitigate the amount not simply by showing his inability to collect the money, but by proof that the debt is still safe and collectible."

⁷⁷ Hupe v. Sommer, 88 Kan. 561, 43 L.R.A.(N.S.) 565, quoting the criticism in the text.

⁷⁸ Clark v. Miller, 54 N. Y. 528. See Dow v. Humbert, stated in § 161.

recover against him by action the amount he has been compelled to pay.”⁷⁹ Where the officer fails to collect an execution from a debtor who is “notoriously in solvent circumstances,” and continues so, there is no wrong done the execution debtor, as in an escape, to give the sheriff any action against him; nor do the authorities in this class of actions proceed on the theory that such a recovery against the sheriff transfers the judgment debt to him. Hence the recovery of the full amount of the judgment or other demand against an officer who has neglected to do some act which would have enabled the party interested to realize at once, the debtor being still solvent, or the debt not being wholly lost by the default, is not a measure of damages which is strictly compensatory. To the extent of the actual value of the debt in respect to which the negligence occurred at the time of the recovery against the officer, the plaintiff is overcompensated when he has recovered from the officer the full amount. Exclusion of proof of that value in mitigation cannot rest on the argument that its reception and consideration would deprive the creditor of any compensation for actual loss.

§ 161. Same subject; modification of the old rule. The supreme court of the United States⁸⁰ has limited the application of this rigorous rule against officers. The action was for neglect of duty by the defendants as supervisors in refusing to place upon the tax list as required by statute the amount of two judgments recovered by the plaintiff. The debtor being a township, it was presumed that its taxable property continued the same as when the levy should have been made. Miller, J., said: “The single question presented is whether these officers, by the mere failure to place on the tax list when it was their duty to do so, the judgment recovered by the plaintiff against the town, became thereby personally liable to the plaintiff for the whole amount of said judgment without producing any other evidence of loss or damage growing out of such failure. It is not easy to see upon what principle of justice the plaintiff can recover from the defendants more than he has been injured by

⁷⁹ *Arden v. Goodaere*, 11 C. B. 23 L. ed. 368; *School Dist v. Bur-*
371.

⁸⁰ *Dow v. Humbert*, 91 U. S. 294, 2 Neb. (Unof.) 554.

their misconduct. If it were an action of *trespass* there is much authority for saying that the plaintiff would be limited to actual and compensatory damages unless the act were accompanied with malice or other aggravating circumstances. How much more reasonable that for a failure to perform an act of official duty, through mistake of what that duty is, that the plaintiff should be limited in his recovery to his actual loss, injury or damage. Indeed, where such is the almost universal rule for measuring damages before a jury there must be some special reason for a departure from it. . . . The expense and cost of the vain effort to have the judgment placed on the tax list, the loss of the debt, if it had been lost, any impairment of the efficiency of the tax levy, if such there had been, in short, any conceivable actual damage,—the court would have allowed if proved. But plaintiff, resting solely on his proposition that defendants by failing to make the levy had become his debtors for the amount of his judgment, asked for that, and would accept no less.” The court reached the conclusion “that in the absence of any proof of actual damage . . . the defendants were liable to nominal damages and to costs, and no more.” In a later case, which was very aggravated, the defendants having refused to obey a *mandamus* to collect the amount of a judgment by adding it to the tax roll, the court allowed the plaintiff his counsel fees and costs.⁸¹

§ 162. **Plaintiff's consent.** The previous consent of the plaintiff to the act which he complains of, though not given in a form to bar him or support a plea of justification, may yet be proved in mitigation of damages. Thus in trespass for an alleged injury to the plaintiff's wall by inserting joists in it, evidence that the wall was so used by the defendant in the erection of an adjoining building under an express parol agreement with the plaintiff is admissible under the general issue in mitigation.⁸² So it may be proved that the injury in question was

⁸¹ Newark Savings Inst. v. Panhorst, 7 Biss. 99. See Branch v. Davis, 29 Fed. 888.

⁸² Hamilton v. Windolf, 36 Md. 301, 11 Am. Rep. 491; Leverenz v.

Stevens, 124 Ill. App. 401 (act of the plaintiff in drinking with her husband in a saloon and giving the defendant an order to sell her husband liquor); McLeod v. Russell,

inflicted in a fight by mutual consent.⁸³ In a suit by several heirs at law, who are cotenants, to recover for injury to their interests by cutting timber on the estate, the consent of one of them is a good defense; all suing in the same right, they must all be entitled to recover or none can.⁸⁴

§ 163. **Injuries to character and feelings.** Any exceptional conduct or character of the plaintiff which impairs his title to compensation or diminishes the injury in question is provable in mitigation. In those actions where the wrong complained of involves injury to character the defendant may show, in order to reduce damages, the general bad character of the plaintiff.⁸⁵ The weight of New York authority favors the proposition that in an action by a female for an indecent assault, the injury to her feelings being an element of damages, specific acts of lewdness with others than the defendant may be shown in mitigation without being specially pleaded.⁸⁶ Where damages are sought for shame and humiliation it may be shown that the plaintiff had often been arrested upon like charges as that on which the pending action was brought.⁸⁷ Evidence that the plaintiff's marriage with his reputed wife was void is admissible in an action for seduction of his reputed daughter to rebut the presumption of actual service by showing that the plaintiff was not legally entitled thereto and in mitigation of damages.⁸⁸ In an action for criminal conversation it may be shown that the plain-

59 Wash. 676. See sec. 1285 for the rule as to alienation of affections.

⁸³ *Adams v. Waggoner*, 33 Ind. 531, 5 Am. Rep. 230; § 151; *Cooley on Torts* (2d ed.), pp. 187, 188. Compare *Bishop on Non-Contract Law*, § 196. For cases holding that consent bars an action for a tort, see *Goldnamer v. O'Brien*, 98 Ky. 569, 56 Am. St. 378, 36 L.R.A. 715; *Courtney v. Clinton*, 18 Ind. App. 620. The only effect of consent is to confine the recovery to compensatory damages. *Evans v. Waite*, 83 Wis. 286. See § 151.

⁸⁴ *Lowery v. Rowland*, 104 Ala. 420.

⁸⁵ *Schultz v. Frankfort Marine A. & P. G. Ins. Co.*, 151 Wis. 537, 43 L.R.A.(N.S.) 520 (action for openly shadowing the plaintiff by detectives); *Fitzgibbon v. Brown*, 43 Me. 169. See § 152.

⁸⁶ *Guillette v. McKinley*, 27 Hun, 320, reviewing the cases in New York; *Young v. Johnson*, 46 Hun, 164.

⁸⁷ *Texas M. R. v. Dean*, 98 Tex. 517, 70 L.R.A. 943, citing this section.

⁸⁸ *Howland v. Howland*, 114 Mass. 517, 19 Am. Rep. 381.

tiff was wanting in affection for his wife to support the inference that his loss was trifling,⁸⁹ or that there was but slight intercourse between them;⁹⁰ and in an action for breach of promise of marriage that the plaintiff was utterly unfit to appreciate the person to whom he engaged himself.⁹¹ Declarations by the plaintiff, pending the action, that she would not marry the defendant except for his money have been admitted.⁹² The fact of a female plaintiff having had an illegitimate child, though known to the defendant at the time of the promise, may be proved,⁹³ and her intercourse with another man before and after the promise.⁹⁴ In actions for seduction proof of the plaintiff's careless indifference to the defendant's opportunities for criminal intercourse with her daughter may be shown in mitigation;⁹⁵ actual connivance by the plaintiff would be a bar.⁹⁶ The fact that a check was unintentionally dishonored is material, as are the attempts made by the defendant to repair the injury to the reputation of the depositor.⁹⁷ The previous intoxication of the plaintiff's minor son may be shown in mitigation of the recovery for injury to her feelings in an action under a civil damage statute.⁹⁸

§ 164. Reduction of loss or benefit. Whatever diminishes the loss of the injured party,⁹⁹ or where the recovery is influenced

⁸⁹ *Bromley v. Wallace*, 4 Esp. 237.

⁹⁰ *Calcraft v. Harborough*, 4 C. & P. 499.

⁹¹ *Leeds v. Cook*, 4 Esp. 256.

⁹² *Miller v. Rosier*, 31 Mich. 475. *Contra*, *Miller v. Hayes*, 34 Iowa, 496, 11 Am. Rep. 154.

⁹³ *Denslow v. Van Horn*, 16 Iowa, 476.

⁹⁴ *Burnett v. Simpkins*, 24 Ill. 264.

⁹⁵ *Zerfing v. Mourer*, 2 Greene, 520; *Parker v. Elliott*, 6 Munf. 587.

⁹⁶ *Bunnell v. Greathead*, 49 Barb. 106; *Smith v. Masten*, 15 Wend. 270; *Sherwood v. Titman*, 55 Pa. 77.

⁹⁷ *Spearing v. Whitney-Cent. Nat. Bank*, 129 La. 607.

⁹⁸ *Bailey v. Briggs*, 143 Mich. 303.

⁹⁹ *Robinson v. Moark-Nemo Consol. Min. Co.*, 178 Mo. App. 531; *Alderson v. Houston*, 154 Cal. 1; *Chappell v. Western R.*, 8 Ga. App. 787; *Pope v. Graniteville Mfg. Co.*, 1 Ga. App. 176; *Mendel v. Boyd*, 3 Neb. (Unof.) 473; *Bovee v. Barrett*, 116 App. Div. (N. Y.) 20; *Rhyne v. Rhyne* 151 N. C. 400; *Caplen v. Cox*, 42 Tex. Civ. App. 297; *Curtley v. Security Sav. Soc.*, 46 Wash. 50; *Wertheim v. Chicoutimi, P. Co.*, [1911] App. Cas. 301; *Rantoul Co. v. Claremont P. Co.*, 116 C. C. A. 125, 196 Fed. 305; *Frankfort & C. R. Co. v. Jackson*, 153 Ky. 534.

Payments received by an injured servant from the master's relief de-

by the amount of benefit derived from the act complained of by the defendant, whatever decreases the value of that benefit may be proved in mitigation, where the matter diminishing the loss in the former case, or impairing the benefit in the other, is part of the transaction.¹ Thus in an action against a contractor for failing to fulfil his contract he may show that the agreed price has not been paid,² and an employer may show that another contract was so profitable to, and so fully occupied the time of, the contractor that the loss from the breach of the contract in question was offset by the benefit thus obtained.³ Where A. took wrongful possession of premises on the 2d of June, and a sum of money became due for ground rent on the 24th for the month ending on that day, which A. paid, it was held in an action for *mesne* profits that he was entitled to deduct the money so paid from the damages. In that case the payment of the ground rent diminished the value of the occupation to the defendant, and having paid what the plaintiff must otherwise have paid, his injury, for which *mesne* profits were compensation, was, to the amount paid, mitigated.⁴ So a tenant has a right to deduct from rent all expenses or taxes which he has been compelled to pay for the lessor.⁵ If a mortgagee who has brought an action for damage done to the mortgaged premises by a removal of fixtures has sold the premises intermediate the injury and the action for more than enough to pay his debt and all prior incumbrances, this fact may be proven in mitigation of damages.⁶

partment mitigate the latter's liability where they do not amount to an accord and satisfaction. *King v. Atlantic C. L. R. Co.*, 157 N. C. 44, 48 L.R.A.(N.S.) 450; *Wacksmuth v. Same*, 157 N. C. 34; *Pennsylvania Co. v. Chapman*, 220 Ill. 428.

The plaintiff is not to be charged with expenses incurred on his behalf unless they have produced the result stipulated for. *Pattison v. Seattle, etc. R. Co.*, 64 Wash. 370, 35 L.R.A.(N.S.) 660.

Money received by a minor in consideration for a release is to be considered in awarding him compensa-

tion in so far as he used it for purposes the court would sanction as being for his advantage. *Worthy v. Jonesville O. Mill*, 77 S. C. 69, 11 L.R.A.(N.S.) 690.

¹ *Ottowa v. Milroy*, 144 Iowa, 631.

² *Reedy v. Tuskaloosa*, 6 Ala. 327; *Gabay v. Doane*, 77 App. Div. (N. Y.) 413.

³ *Harrington-W. Co. v. Blomstrom Mfg. Co.*, 166 Mich. 276.

⁴ *Doe v. Hare*, 2 Cr. & M. 145.

⁵ *Sapsford v. Fletcher*, 4 T. R. 511; *Taylor v. Zamira*, 6 Taunt. 524; *Carter v. Carter*, 5 Bing. 406.

⁶ *King v. Bangs*, 120 Mass. 514.

The immediate landlord is bound to protect his tenant from all paramount claims, and when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect to which the rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorized by the landlord so to apply his rent due or accruing due.⁷ Of this nature are not only payments of ground rent to the superior landlord, but interest due upon a mortgage prior to the lease,⁸ an annuity charged upon the land,⁹ and rates and taxes.¹⁰ But where the payment of the ground rent or other like charge gives no right of action against the party suing for the rent, this right of deduction does not exist.¹¹

§ 165. **Pleading in mitigation.** It has sometimes been held as a general rule that matters which would have gone in bar of the action cannot be given in evidence to reduce damages unless pleaded.¹² Lord Abinger, C. B., said: ¹³ "It is a principle as old as my recollection of Westminster Hall that matter of justification cannot be given in evidence in an action in order to mitigate damages." The case was an action for wrongfully discharging the plaintiff from the defendant's service; the latter pleaded only payment of money into court. It was contended in his favor that he should be allowed to show in mitigation that the discharge was for misconduct, as under this issue there was merely an inquiry of damages; that the same evidence was admissible as upon a writ of inquiry after a judgment by default. It was held properly rejected. Alderson B., said: "The question is whether it is competent to the defendant in mitigation of damages to give evidence to contradict a fact admitted on the record. If it were, the grossest injustice might be done, because the other party does not, of course, come prepared to

The cost of raising and of harvesting crops mitigates the liability of a party charged with their loss. *Biggs v. Maulding*, — Tex. Civ. App. —, 147 S. W. 681.

⁷ *Graham v. Allsopp*, 3 Ex. 186.

⁸ *Johnson v. Jones*, 9 A. & E. 809.

⁹ *Taylor v. Zamira*, 6 Taunt. 524.

¹⁰ *Baker v. Davis*, 3 Camp. 474; *Andrew v. Hancock*, 1 B. & B. 37.

¹¹ *Graham v. Allsopp*, *supra*.

¹² *Harmont v. Sullivan*, 128 Iowa, 309.

¹³ *Speck v. Phillips*, 5 M. & W. 279.

prove the fact so admitted." And Maule, B., said: "No question was made that the plaintiff was wrongfully discharged; and I think it was not competent to the defendant to give evidence to negative that which is admitted by the plea. If it were, the consequence would follow that no defendant would ever plead specially; he would pay a shilling into court and set up as many defenses as he pleased, and succeeding in any one of them, would get a verdict and his costs. This would be setting aside not only the new rules, but all the old rules which required special pleadings in actions of this nature."¹⁴

In trespass against a constable for arresting the plaintiff and imprisoning him the declaration stated it to have been without reasonable or probable cause; the court said a constable may justify an arrest for reasonable cause on suspicion alone; and in this respect he stands on more favorable ground than a private person, who must show, in addition to such cause, that a felony was actually committed; that the difficulty was to determine whether circumstances of suspicion which might have been pleaded in justification were competent to go to the jury under the general issue in mitigation. They say the objection

¹⁴ In *Watson v. Christie*, 2 B. & P. 224, tried before Lord Eldon, C. J., the action was for assault and battery, and not guilty pleaded. It was offered to be shown that the beating was given by way of punishment for misbehavior on ship-board. The jury were directed that the only questions for their consideration were whether the defendant was guilty of the beating, and what damages the plaintiff had sustained in consequence of it; that although the beating in question, however severe, might possibly be justified on the ground of the necessity of maintaining discipline on board the ship, yet such a defense could not be resorted to unless put upon the record in the shape of a special justification; that the defendant had not aid on the record that this was

discipline, or justified it on any ground; that much evil beyond the mere act had been actually suffered, which evil had been occasioned by a cause which the defendant admitted he could not justify; that in his lordship's judgment, therefore, the evil actually suffered in consequence of what was not justified ought to be compensated for in damages; that the jury should give damages to the extent of the evil suffered without lessening them on account of the circumstances under which it was inflicted; that if they gave damages beyond compensation for the injury actually sustained they would give too much; but if they gave less they would not give enough. See *Pujolas v. Holland*, 3 Irish C. L. 533; *Gelston v. Hoyt*, 13 Johns. 561.

rests on the rule which requires matter of justification to be pleaded specially. At the first blush one would not perceive a reason to preclude a party who had waived the benefit of a full defense from showing the purity of his motives to shield him from exemplary damages; and there is in truth none except that the plaintiff is not apprised by the pleadings of the defendant's intention. Yet where the defendant is not at liberty to apprise him by pleading in justification the matter is for that very reason allowed to be given in evidence. But whatever inconsistency there may seem to be in point of principle the defendant when charged with making an arrest without probable cause may rebut the charge.¹⁵

§ 166. **Same subject.** In actions for slander this rule was adopted long ago and has since been generally adhered to for special reasons. These have more or less force in other actions where the matter sought to be proved in mitigation would be a serious surprise to the plaintiff if introduced at the trial without any notice in the pleadings. Under the common-law system matter of mitigation which could not be used in bar of the plaintiff's cause of action, nor of any severable part of it, was for that reason provable without being pleaded. But under this rule matter which could have been made available in bar by plea was not necessarily admissible in mitigation. The admission of such defense was not within the reason and necessity of that rule. Courts may therefore properly exercise a discretion to require notice of some sort as they do of defenses by way of recoupment. It is believed, however, not to be a general rule, at least in this country, except in actions for libel and slander, that matter which might be set up in bar and is not so pleaded cannot be proved in mitigation. The existence of such rule has been denied in New York.¹⁶ Judge Selden said: "It was never any objection to evidence in mitigation that under a different state of the pleadings it would amount to a full defense." And again: "It seems to have been supposed that there was some sound legal objection to admitting proof of facts under the general issue *in mitigation merely* which, if

¹⁵ Russell v. Shuster, 8 W. & S. 398.

¹⁶ Bush v. Prosser, 11 N. Y. 347, 362, 365.

specially pleaded, would amount to a full defense. But there is not, and never was, any such objection.¹⁷ In Vermont it has been held in trover, after a default, that matter which shows that the plaintiff had no right to recover, and which might have been given in evidence under the general issue, may avail in mitigation of damages.¹⁸ In a case in Connecticut, in a hearing for the ascertainment of damages after a default in an action for negligence in setting a fire by which property of the plaintiff was injured to the amount of \$400, the defendants were allowed to introduce evidence, for the purpose of reducing the damages to a nominal sum, that they were guilty of no negligence whatever. The plaintiff objected to the reception of the evidence on the ground that the defendants by their neglect to traverse the declaration and by suffering a default conclusively admitted that they were guilty of negligence sufficient for the plaintiff to maintain his action, and that, in a case of damage to property incapable of division, the least sum the court could assess as damages, consistent with the declaration, was the actual damage done. The court said: "From a time early in the history of the jurisprudence of this state the law has been that where, in an action on the case for the recovery of unliquidated damages, the defendant has suffered a default, that is, has omitted to make any answer, the assessment of damages has been made by the court without the intervention of a jury; also that by his omission to deny them the defendant is held to have admitted

¹⁷ *Mug v. Ostendorf*, 49 Ind. App. 71; *Indiana T. Co. v. Finitzer*, 160 Ind. 647; *Schwartzel v. Karnes*, 2 Kan. App. 782; *Creighton v. Water Com'rs*, 143 N. C. 171; *Houston & T. Cent. R. Co. v. Batchler*, 37 Tex. Civ. App. 116; *Hardin v. Hodges*, 33 Tex. Civ. App. 155.

In *McKyring v. Bull*, 16 N. Y. 297, 304, the same judge said: "As the code contains no express rule on the subject of mitigation, except in a single class of actions, this question cannot be properly determined without a recurrence to the principles of the common law. By those

principles defendants in actions sounding in damages were permitted to give in evidence in mitigation, not only matters having a tendency to reduce the amount of the plaintiff's claim, but in many cases facts showing that the plaintiff had in truth no claim whatever. It was not necessarily an objection to matter offered in mitigation that if properly pleaded it would have constituted a complete defense." See *Smithies v. Harrison*, 1 Ld. Raym. 727; *Abbot v. Chapman*, 2 Lev. 81; *Nicholl v. Williams*, 2 M. & W. 758.

¹⁸ *Collins v. Smith*, 16 Vt. 9.

the truth of all well-pleaded material allegations in the declaration, and the consequent right of the plaintiff to a judgment for a limited sum for nominal damages and costs, without the introduction of evidence. The defendant standing silent, the law imputes the admission to him; but it does it with this limitation upon its meaning and effect, it does it for this special purpose and no other; and our courts have repeatedly explained that the admission founded on a default is not an admission of which the writers upon the law of evidence treat. The silent defendant, having been subjected to a judgment for nominal damages from which no proof can relieve him, the default has practically exhausted its effect upon the case; for if the plaintiff is unwilling to accept this judgment, evidence is received on his part to raise the damages above and on the part of the defendant to keep them down to that immovable base of departure, the nominal point, precisely as if the general issue had been pleaded; and although the evidence introduced by the latter has so much force that it would have reduced them to nothing but for the barrier interposed by the default, it cannot avail to deprive the plaintiff of his judgment; in keeping that the law perceives that he has all that the truth entitles him to and therefore refuses to hear any objection from him. . . . The plaintiff argues that his case differs from . . . all others which have gone before it, in that his damages are entire and indivisible and arise from a single act of the defendants. But the destruction of a life would seem to be an entire and indivisible wrong¹⁹ in as complete a sense as the destruction of the plaintiff's grass, fence and wood; a single blow killed the man, a single spark fired the grass. The rule cannot be at all affected by the question as to whether the injury is inflicted upon person or property. In either case, at the outset, the damages are uncertain; in both they are made certain by the same tribunal, governed by the same rules, informed by evidence of the same character, received in the same order. An injury to the person may be the breaking of a finger or the tearing of both arms from the body; an injury to property may be the destruction of a tree or of a forest. It is of course a much more diffi-

¹⁹ *Carey v. Day*, 36 Conn. 152.

cult and delicate task to reduce to the standard of coin the value of a leg or an arm than to determine the market price of a cord of wood, or for a standing tree of given dimensions; nevertheless, probably in every week, some one of the numerous courts of the country find for some plaintiff, presumably the money value of a lost limb. The judicial system has but one balance; in this is weighed every loss, even that of life."²⁰

In trespass for an injury to the plaintiff's wall by inserting joists into it evidence is admissible under the general issue of a previous license in mitigation, which would have been a bar if specially pleaded;²¹ and a defendant in mitigation for assault and battery may rely on the *res gestæ*, although if pleaded it would amount to a justification and require a special plea.²² In trespass for taking a slave from the plaintiff's close, on a plea of not guilty, evidence was received in mitigation that the title to the slave was in the defendant.²³ Under the codes of some states matter in mitigation must be pleaded.²⁴ The plaintiff may allege the means taken by him to ameliorate the effects of the wrong.²⁵

§ 167. **Payments.** Payments made either before or after suit brought may be proved in mitigation, but not in bar without plea nor under the general issue.²⁶ If full payment is made

²⁰ Batchelder v. Bartholomew, 44 Conn. 494; Saltus v. Kipp, 12 How. Pr. 342.

²¹ Hamilton v. Windolf, 36 Md. 301, 11 Am. Rep. 491.

²² Byers v. Horner, 47 Md. 23.

²³ Bullard v. Leavell, 5 Call 531; Harstad v. Olson, 57 Wash. 264; Bartlett Est. Co. v. Fairhaven L. Co., 56 Wash. 434. See Moore v. McNairy, 1 Dev. 319.

²⁴ Springer v. Jenkins, 47 Ore. 502; Ramsay v. Meade, 37 Colo. 465; Cincinnati, etc. R. Co. v. Crabtree, 30 Ky. 1000. A carrier must plead a limitation of his common-law liability. Louisville & N. R. Co. v. Woodford, 152 Ky. 398.

²⁵ Atlantic C. L. R. Co. v. Powell, 127 Ga. 805, 9 L.R.A.(N.S.) 769.

²⁶ Travis v. Louisville & N. R. Co., 183 Ala. 415; Dana v. Sessions, 46 N. H. 509; Shirley v. Jacobs, 2 Bing. N. C. 88; Lediard v. Boucher, 7 C. & P. 1; Britton v. Bishop, 11 Vt. 70; Bischof v. Lucas, 6 Ind. 26; Moore v. McNairy, 1 Dev. 319; Nicholl v. Williams, 2 M. & W. 758; Wetmore v. San Francisco, 44 Cal. 294, 300. See McKyring v. Bull, 16 N. Y. 297.

In Plevin v. Henshall, 10 Bing. 24, after a verdict for the plaintiff in trover, the goods were seized in the hands of the defendant for rent which the plaintiff was liable to pay; the defendant having paid the rent, the court allowed him to deduct the amount from the verdict. But see Buell v. Flower, 39 Conn. 462, 12 Am. Rep. 414.

after suit brought and is accepted for the debt and costs, the defendant will be entitled to a verdict.²⁷ It is necessary that the payment be made to cover the costs which have accrued,²⁸ and it should be pleaded to the further maintenance of the action.²⁹

SECTION 4.

RECOUPMENT AND COUNTER-CLAIM.

§ 168. **Definition and history of recoupment.** The term *recoupment*, derived from the French word *recouper*, to cut again, signifies in the law a cutting off and keeping back a part of the plaintiff's claim in satisfaction, by set-off, of cross-demands of the defendant growing out of the same contract or transaction on which the claim is founded. The same thing is meant by defalcation and discount. Literally understood, recoupment would include mere mitigation of damages, and the instances of this defense in the old books are mostly of that nature.³⁰ In the endeavor to reduce the controversy to a single point or issue very little scope was given by the early common law to defenses which rested on the principle of allowing cross-claims in favor of the defendant.

At one time it was doubted that in an action on a *quantum meruit* for services the defendant was entitled to reduce the damages by showing that the work had not been well done.³¹

²⁷ Thame v. Boast, 12 Q. B. 808; Bendit v. Annesley, 27 How. Pr. 184.

²⁸ Belknap v. Godfrey, 22 Vt. 288.

²⁹ Thame v. Boast, *supra*; Dana v. Sessions, 46 N. H. 509; Bank v. Brackett, 4 id. 558; § 232.

³⁰ Dyer, 2; 8 Vin. Abr. 556-7; Croke's Eliz. 631; Taylor v. Beal, Croke's Eliz. 222; Shetelworth v. Neville, 1 T. R. 454. See Medart P. Co. v. Dubuque T. & R. M. Co., 121 Iowa, 244.

The Illinois court must have had in mind the older meaning of the

word when it said that "recoupment, in its strict common-law sense, is a mere reduction of the damages claimed by the plaintiff by proof under the general issue of mitigating circumstances connected with or growing out of the transaction upon which the plaintiff's claim is based, showing that it would be contrary to equity and good conscience to suffer the plaintiff to recover the full amount of his claim." Wadhams v. Swan, 109 Ill. 46, 62.

³¹ Farnsworth v. Garrard, 1 Camp. 38.

The allowance of such defenses was the result of a consultation of the judges in England. In an action of that character Lord Ellenborough said: "This is an action founded on a claim for meritorious services. The plaintiff is to receive what he deserves. It is therefore to be considered how much he deserves, or if he deserves anything. If the defendant has derived no benefit from his services he deserves nothing, and there must be a verdict against him. There was formerly considerable doubt on this point. Mr. Justice Buller thought (and I, in deference to so great an authority, have at times ruled the same way) that in cases of this kind a cross-action for the negligence was necessary; but that if the work be done the plaintiff must recover for it. I have since had a conference with the judges on the subject, and now I consider this as the correct rule: that if there has been no beneficial service there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the extent of the plaintiff's demand, leaving the defendant to his action for the negligence."³² He also remarked that where a specific sum has been agreed to be paid by the defendant "the plaintiff may have some ground to complain of surprise if evidence be admitted to show that the work and materials provided were not worth so much as was contracted to be paid because he may only come prepared to prove the agreement for the specified sum and the work done, unless notice be given to him that the payment be disputed on the ground of the inadequacy of the work done. But where the plaintiff comes into court upon a *quantum meruit* he must come prepared to show that the work done was worth so much, and therefore there can be no injustice in suffering the defense to be entered into even without notice."³³ The right to make such defenses is no longer in question; the plaintiff must show his performance of a condition precedent as a basis of the recovery

³² Basten v. Butter, 7 East, 479.

"The doctrine of recoupment is in general applicable whenever in the trial of the plaintiff's action an investigation of the facts on which the claim of the defendant depends is necessary. The law does not com-

pel parties to bring two actions when, with equal convenience, their rights can be settled in one." Johnson v. White Mountain C. Ass'n, 68 N. H. 437, 73 Am. St. 610.

³³ Basten v. Butter, *supra*.

either of an agreed sum or on a *quantum meruit*, and there is included in the mere right to make a defense the right to rebut the evidence of performance, and where the value is not fixed by agreement the amount reasonably due for such performance. In such cases, to the extent that the plaintiff's recovery proceeds on proof of performance or its reasonable value, the defendant, if he dispute either as shown by the plaintiff, must defend, or lose all right to contest the conclusions so arrived at or to redress for the deficiencies of the performance.³⁴ The direct defense by negating the facts which the plaintiff assumes to prove to measure his compensation, or those which, on the theory of his action, enter into the price and fix the amount of damages, is not recoupment,³⁵ nor is a defense which consists of a denial of facts which the plaintiff must prove to maintain his action, as the performance of a condition precedent.³⁶ The defense which is allowed under the name of recoupment is not a keeping back a part of the plaintiff's *prima facie* damage on the case he seeks to establish by evidence of the character explained under the title "mitigation of damages," but a reduction of the plaintiff's recovery by the allowance against him in his action of damages due the defendant on a substantive cause of action in his favor, growing out of the same transaction on which the plaintiff's claim or demand arises.

§ 169. **Same subject.** Until near the close of the eighteenth century the strict rules of the common law as to the independency of covenants and the entirety of conditions were rigidly enforced. A defendant sustaining damages from the breach of any counter or reciprocal obligation in the contract sued upon was put to his cross-action, unless he had made the performance of such obligation strictly a condition precedent to his undertaking to the plaintiff.³⁷ These rules were often attended with hardship, as where the plaintiff was insolvent and unable to

³⁴ Kellogg v. Denslow, 14 Conn. 411; Davis v. Tallcot, 12 N. Y. 184.

³⁵ Steamboat Wellsville v. Geisse,

3 Ohio St. 333.

³⁶ Thompson v. Richards, 14 Mich. 172; Stoddard v. Treadwell, 26 Cal. 294.

³⁷ 7 Am. L. Review, 392.

respond afterwards or in a separate action. Thus, in an action for breach of a covenant to recover unliquidated damages the defendant pleaded set-off of like damages for the plaintiff's breach of his covenants in the same instrument. This defense was urged on grounds which now support recoupment. It, however, was rejected without any allusion to the right of recoupment because the statute of set-offs only applied to mutual debts, which did not include demands for unliquidated damages.³⁸ Until this species of defense had become firmly established the severe adherence to the old practice was in no cases more marked than in actions between landlord and tenant;—the former was allowed to collect his rent, notwithstanding his covenant to repair remained unperformed, even if he was himself insolvent.³⁹ The doctrine of recoupment has attained its growth since the revolution; but the courts of this country and of England have not given it the same expansion; nor has it made the same progress in all the states of the Union.⁴⁰

In New York the defense was at first admitted in mitigation of damages where there was fraud in respect to the consideration;⁴¹ next where there was breach of warranty without fraud.⁴² At this time it elicited increased discussion and received more emphatic judicial recognition. Marey, J., said: "From an examination of the cases I am satisfied that in those where the damages arising from a breach of warranty in the sale of chattels have been allowed to be given in evidence by the defendant to reduce the amount of recovery below the stipulated price, the decisions of the court have not proceeded upon the ground that the express contracts were void by reason of fraud, and a recovery had upon a *quantum meruit* or *quantum valebat* upon implied contract; but upon a principle somewhat different from those adverted to in this case in the

³⁸ Howlet v. Strickland, 1 Cowp. 56.

³⁹ Taylor's Landlord & T., § 373; 7 Am. L. Review, 392.

⁴⁰ See Johnson v. White Mountain C. Ass'n, 68 N. H. 437, 73 Am. St. 610.

⁴¹ Becker v. Vrooman, 13 Johns. 302.

⁴² Spalding v. Vandercook, 2 Wend. 431; McAllister v. Reab, 4 Wend. 483.

court below; upon a principle which has of late years been gaining favor with courts and extending the range of its operations. Such a defense is admitted to avoid circuity of action." Hence he insisted, and the court decided, that damages arising from breach of warranty should be allowed to reduce the recovery as well where there was no fraud as where there was. So true was it that this new principle of avoiding circuity of action "was *gaining* favor with the courts and *extending* the range of its operations," that the discrepancies at any given time to be noticed between the decisions of courts of different states have indicated a relative progress rather than a permanent disagreement.⁴³

§ 170. *Nature of defense.* This defense is founded on the natural equity that mutual demands growing out of the same transaction should compensate each other by deducting the less from the greater and treating the difference as the sum justly due.⁴⁴ It is also founded on the policy and convenience of settling an entire controversy in one action where it can be justly done, thus saving needless delay and litigation. By proper pleading, in the application of the doctrine of recoupment, the court may look through the whole contract, treating it as an entirety, and the things done and stipulated to be done on each side as the consideration for the things done and stipulated to be done on the other. When either party seeks redress for the breach of stipulations in his favor the grievances on each side are summed up, instead of those only on the plaintiff's side; a balance is struck, and the plaintiff can recover only when that balance is in his favor.⁴⁵ Some confusion has arisen from treating this defense as one of failure of

⁴³ The principle of recoupment, under various names, has been adopted in the general jurisprudence of this country. And it is believed that it is now universally in force either by statute or otherwise; though in some states, in controversies at law where title to real estate is involved, the doctrine is not applied.

⁴⁴ *Hoover Commercial Co. v. Humphrey*, — Miss. —, 66 So. 214; *Green v. Farmer*, 4 Burr. 2214, 2220; *Reab v. McAlister*, 8 Wend. 109, 115; *Myers v. Estell*, 47 Miss. 4, 17-21.

⁴⁵ *Lufburrow v. Henderson*, 30 Ga. 482; *Myers v. Estell*, 47 Miss. 4; *Michigan Y. & P. Co. v. Busch*, 75 C. C. A. 109; 143 Fed. 929; *Penn L. Co. v. McPherson*, 133 N. C. 287.

consideration.⁴⁶ In an Alabama case⁴⁷ the plaintiff sued on a note which had been given for a clock sold by him to the defendant with warranty that it would keep good time. The clock was shown to be worthless as a time-piece; but the case alone was worth more than a nominal sum, and it was held that the defendant might claim an abatement on the note to the amount of damage that he had sustained. Having kept the clock, however, judgment must go against him for what it was actually worth. By this decision the breach of warranty avoided the special contract and recovery proceeded on a *quantum meruit*.⁴⁸ This is in accordance with the English rule; the damages are reduced by showing how much less the article is worth by reason of the breach of warranty; in other words, the plaintiff having failed to perform the agreement which was the consideration of the defendant's promise, the judicial inquiry is what is the property or service which the defendant has received worth. Thus, A. sold B., for 95*l.*, two pictures, representing them to be "a couple of Poussins;" they were in fact not originals, but very excellent copies. B. did not offer to return them, and it was held that if the jury thought that he

⁴⁶ The courts of Illinois indorse the view of Mr. Freeman as expressed in his note to *Van Epps v. Harrison*, 40 Am. Dec. 323: "In its modern application the foundation of recoupment is failure of consideration. The defendant in effect admits his failure to perform the contract upon which he is sued, and seeks to extenuate his default by showing that the plaintiff has failed in some particular to do that which was the consideration of the defendant's promise, and to that extent, therefore, the plaintiff has no right to hold the defendant liable; hence it is essential that the wrong of which the defendant complains should in some way impair the consideration of his contract—in other words, it must appear that the express or implied promise broken by the plaintiff was the consideration

for the defendant's promise." *Keegan v. Kinnare*, 123 Ill. 280; *Lyon v. Bryant*, 54 Ill. App. 331. See *Watkins v. Hopkins*, 13 Gratt. 743. Compare *Perley v. Balch*, 23 Pick. 283, 34 Am. Dec. 56; *Compere v. Johnson*, 6 Blackf. 59; *Herbert v. Ford*, 29 Me. 546; *Drew v. Towle*, 27 N. H. 412, 59 Am. Dec. 380; *Wheat v. Dotson*, 12 Ark. 699; *Van Buren v. Digges*, 11 How. 461, 13 L. ed. 771; *Van Epps v. Harrison*, 5 Ill. 63; *Withers v. Greene*, 9 How. 213; *Wynn v. Hiday*, 2 Blackf. 123; *Elminger v. Drew*, 4 McLean, 388; *Washburn v. Picot*, 3 Dev. 390; *Pulsifer v. Hotchkiss*, 12 Conn. 234; *Avery v. Brown*, 31 Conn. 398; *Peden v. Moore*, 1 Stew. & Port. 71.

⁴⁷ *Davis v. Dickey*, 23 Ala. 848; *Grisham v. Bodman*, 111 Ala. 194.

⁴⁸ *Harman v. Sanderson*, 6 Sm. & M. 41, 45 Am. Dec. 272.

believed from the representation of A. that they were originals, he was not bound to pay the price agreed; but that, as he kept them, he was liable to pay such sum as the jury might consider to be their value.⁴⁹ In an English case⁵⁰ Parke, B., said: "Formerly it was the practice where an action was brought for an agreed price of a specific chattel sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the article or of the work done, as any consequential damage, might have been recovered; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant who received the chattel warranted has thereby the property vested in him indefeasibly, and is incapable of returning it back; he has all he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it and seek his remedy on the plaintiff's contract of warranty. In the other case the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise, the least deviation would have deprived the plaintiff of the whole price; and therefore the defendant is obliged to pay it, and recover for any breach of contract on the other side. But after the case of *Basten v. Butter*,⁵¹ a different practice, which had been partially adopted before in the case of *King v. Boston*,⁵² began to prevail, and being attended with much practical convenience has been since generally followed; and the defendant is now permitted to show that the chattel, by reason of the noncompliance with the warranty in the one case, and the work in consequence of

⁴⁹ *Lomi v. Tucker*, 4 C. & P. 15; 456; *Mondel v. Steel*, 8 M. & W. 858.

De Sewhanbery v. Buchanan, 5 C. & P. 343; *Poulton v. Lattimore*, 9 B. & C. 259; *Street v. Blay*, 2 B. & Ad.

⁵⁰ *Mondel v. Steel*, *supra*.

⁵¹ 7 East, 479.

⁵² 7 East, 481, note.

the non-performance of the contract in the other, were diminished in value.⁵³ The same practice has not, however, extended to all cases of work and labor, as for instance that of an attorney,⁵⁴ unless no benefit whatever has been derived from it; nor in an action for freight.⁵⁵ It is not so easy to reconcile these deviations from the ancient practice with principle in those particular cases above mentioned as it is in those where an executory contract, such as this, is made for a chattel to be manufactured in a particular manner or goods to be delivered according to a sample;⁵⁶ where the party may refuse to receive or may return in a reasonable time if the article is not such as bargained for; for in these cases the acceptance or non-return affords evidence of a new contract on a *quantum valebat*; whereas, in a case of delivery with a warranty of a specific chattel there is no power of returning and consequently no ground to imply a new contract; and in some cases of work performed there is difficulty in finding a reason for such presumption. It must, however, be considered that in all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant in all of these not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of contract; and to the extent that he obtains or is capable of obtaining an abatement of price on that account he must be considered as having received satisfaction for the contract and is precluded from recovering in another action to that extent, but no more.” The defendant was not entitled to show damages resulting from such breach nor the breach of any other stipulation.⁵⁷

⁵³ Kist v. Atkinson, 2 Camp. 63;
Thornton v. Place, 2 M. & Rob. 218.

⁵⁴ Templer v. McLachlan, 2 N. R.
136.

⁵⁵ Sheels v. Davies, 4 Camp. 119.

⁵⁶ Germaine v. Burton, 3 Stark.
32.

⁵⁷ Francis v. Baker, 10 Ad. & E.
642; Bartlett v. Holmes, 13 C. B.
630; Davis v. Hedges, L. R. 6 Q. B.
687.

§ 171. **Same subject.** It is true that the plaintiff's breach of stipulations in favor of the defendant impairs the consideration

In *McAllister v. Reab*, 4 Wend. 490, the theory of reconpment is thus discussed by Marey, J.: "Upon what principle are the damages for the breach of warranty allowed in a case where there is fraud to be given in evidence to reduce the recovery below the stipulated price? Not on the ground of (statutory) set-off, because these damages are unliquidated. Is it upon the ground that the contract is destroyed by the fraud? If it is rendered void, upon what principle can the vendor recover at all? I know it has been said he recovers upon a *quantum meruit* or *quantum valcbat*; but if there was no contract by reason of his fraud, there was no sale; no passing of title. Can an implied sale be set up in lieu of the express one? This, I think, may well be doubted, although the express contract may be void. The case of *Beecker v. Vrooman* (13 Johns. 302) seems to have been put on the ground that the sale is valid. The language of the court does not countenance the idea that the question in that case was the mere value of the horse. It is there intimated that a different rule now prevails from what formerly governed, which commends itself to the court, because it is calculated to do *final* and complete justice between the parties, most expeditiously and least expensively; but if the parties were proceeding without regard to the express contract upon an implied one, and were only establishing the true value of the horse, there was no new rule, and the language of the court was not very appropriate to the question before them. In the case of *Leggett v. Cooper* (2 Starkie N.

P. 103), where the counsel for the defendant resisted the recovery on the contract for the sale of hops on account of fraud, Lord Ellenborough said, 'if there is no contract for the sale of the goods at the stipulated price, there is no contract upon the *quantum meruit* for goods sold and delivered.' The action in the case of *Frisbee v. Hoffnagle* (11 Johns. 50) was on a note for the consideration of a deed with warranty for land. The defense was that the vendor had no title, and it was allowed to prevail, not upon the ground that the contract of sale was invalid by reason of fraud, but for the purpose of avoiding circuity of action. The decision in the case of *Spalding v. Vandercook* (2 Wend. 431) does not, I apprehend, proceed on the ground of fraud alone. The consideration of the note was the fulfillment of the contract to deliver barrels. If the whole contract was cut up by the fraudulent conduct of the plaintiff, the note was entirely without consideration; but it was not so considered. So in the case of *Burton v. Stewart* (3 Wend. 236, 20 Am. Dec. 692), there was fraud in the sale of the horse, yet the note given on the sale was not adjudged to be without consideration. The contract was broken, but it had a valid existence; and the court entertained no doubt in that case that if there had been a proper notice the amount of recovery would have been greatly abated by the proof of what was offered; it was, however, rejected for the want of such notice." He concludes that the recovery of the plaintiff is based on the express contract, and the amount of it reduced by the allowance of damages on the

of his agreement in favor of the plaintiff; but the defense of recoupment is not based on the principle of treating the defendant as relieved from his obligation to perform his undertaking because the consideration is impaired. On the contrary, it is based on the opposite principle, namely, the enforcement of the contract on both sides, and that the damages which the plaintiff has sustained from the breach of the engagements in his favor shall, in whole or in part, be compensation, by allowance in favor of the defendant, and application thereto of such damages as he has suffered from the infraction of the correlative duties and stipulations of the plaintiff which were the consideration. The law will *cut off* so much of the plaintiff's claim as the cross-damages may come to.⁵⁸ Wherever recoupment, strictly such, is allowed, distinct causes of action are set off against each other.⁵⁹ It is not a bar to the plaintiff's action like the technical plea in avoidance of circuity of action, but in pursuance of the same policy of the law it seeks to satisfy and discharge the whole or a part of the plaintiff's claim with damages for which he is liable in respect of the same transaction.⁶⁰

§ 172. Constituent features of recoupment. For the purpose of discussing the principal constituent features of recoupment the following propositions are sufficiently comprehensive: 1. The claim or demand for which the defendant seeks to recoup must be a valid cause of action upon which a separate suit might be maintained against the party beneficially interested in the plaintiff's action, or his assignor. 2. It must arise from the same subject-matter or spring out of the same contract or transaction on which the plaintiff relies to maintain his action. 3. It is immaterial whether it be in itself or is set up

defendant's cross-claim to save a multiplicity of actions, and as a substitute for a cross-action by the defendant.

⁵⁸ *Hoover Commercial Co. v. Humphrey*, — Miss. —, 66 So. 214; *Ives v. Van Epps*, 22 Wend. 155, 156; *McAllister v. Reab*, 4 Wend. 483; *Reab v. McAllister*, 8 Wend. 109; *Batterman v. Pierce*, 3 Hill, 171.

⁵⁹ *Minnaugh v. Partlin*, 67 Mich.

391; *Grant v. Button*, 14 Johns. 377; *Gillespie v. Torrance*, 25 N. Y. 306, 309, 82 Am. Dec. 355; *Price v. Reynolds*, 39 N. J. L. 171.

⁶⁰ *McCullough v. Cox*, 6 Barb. 387; *Andrus v. Dyckman Hotel Co.*, 126 Minn. 406; *La Mesa Community Ditch v. Applezoeller*, — N. M. —, 140 Pac. 1051; *Hooker v. Groom* (*Stenben Co. Ct.*, N. Y.) 148 N. Y. Supp. 268.

as a defense against a claim for liquidated or unliquidated damages. Nor is it necessary that the claims on both sides be of the same nature. 4. Generally it is available only as defense, for, except by statute, it can have no further effect than to answer the plaintiff's damages in whole or in part; the defendant cannot recover any balance or excess.⁶¹ 5. A defendant has an election to use such a cross-demand as a defense or bring a separate action upon it; but he will not have the election to set up his claim by way of recoupment unless it would be just and practicable to adjust it in the plaintiff's action. 6. When made the subject of recoupment the defendant assumes the burden of proof in respect to it, and the same rule or measure of damages applies, subject to the limitation just stated, as would be applicable if the defendant had brought a separate action. 7. When submitted as a subject of recoupment the judgment will be a bar to any other suit or recoupment upon it.

§ 173. Remedy by counter-claim. The counter-claim of the code includes recoupment and is more comprehensive; and the remedy by both has been made more useful and complete by statutory provision against voluntary discontinuance of the action by the plaintiff without the defendant's consent after this defense has been interposed, and for judgment on the adverse claim, if any amount is established after satisfying the plaintiff's claim, or where no claim in favor of the plaintiff is adjudged.

§ 174. Validity of claim essential. The claim or demand to be recouped must be a valid cause of action for which a separate suit could be maintained.⁶² Hence it is essential that the

⁶¹ *McConnell v. Stubbs*, 124 Ga. 1038.

By statute in New Hampshire the defendant may recover an affirmative judgment against the plaintiff if he shows he is entitled to it. *Johnson v. White Mountain C. Ass'n*, 68 N. H. 437, 73 Am. St. 610.

⁶² *Heite v. Cowgill*, — Del. —, 91 Atl. 652; *Hillman v. Luzon Cafe Co.*, 49 Mont. 180; *Bostrom v. Becker*, 172 Ill. App. 410; *Leigh v.*

Graysburg Mfg. Co., 132 N. C. 167; *Finnie v. Montreal*, 32 Can. Sup. Ct. 335; *Reilly v. Lee*, 85 Hun, 315, affirmed without opinion, 155 N. Y. 691; *Walker v. Millard*, 29 N. Y. 375; *Woodward v. Fuller*, 80 N. Y. 312; *Lennon v. Smith*, 124 N. Y. 578; *Peck v. McCormick H. Mach. Co.*, 94 Ill. App. 586, 196 Ill. 295; *Osgood v. Bauder*, 82 Iowa 171; *Howell v. Dimock*, 15 App. Div. (N. Y.) 102; *Cincinnati Daily Tribune Co. v.*

subject of it be such as the court in which it is pleaded has jurisdiction of; ⁶³ that the damages set up were not incurred through the defendant's fault or negligence, ⁶⁴ that the contract sued upon and out of which the claim arises is valid; ⁶⁵ that the plaintiff is a party subject to suit; ⁶⁶ that the allowance of the counter-claim will not deprive the plaintiff of the exemptions given him by statute, ⁶⁷ or affect his rights as assignee, which are governed by the statute existing when the assignment was made. ⁶⁸ •

Reduction of damages may often be claimed upon facts which do not constitute a cause of action in favor of the defendant. Of this class and nature are those provable in *mitigation of damages*. The distinction is important; for it is necessary to use the latter in defense; the benefit of such facts will be lost if they are not then introduced. But if the defense consists of a substantive cause of action it will not be lost or barred by the defendant failing to put it forward when

Bruck, 61 Ohio St. 489, 76 Am. St. 433; Harper v. Moffat C. Co., 151 Ill. 84, 100; Van Winkle v. Wilkins, 81 Ga. 93, 12 Am. St. 299 (the damages claimed must be the proximate result of the wrong; Hess Co. v. Dawson, 149 Ill. 138; Davidson v. Rountree, 69 Wis. 655; Sylte v. Nelson, 26 Minn. 105; Rhymney R. Co. v. Rhymney I. Co., 25 Q. B. Div. 146; Barnes v. McMullins, 78 Mo. 260; Widrig v. Taggart, 51 Mich. 103, and cases cited to this section. See § 177 as to the effect of the statute of limitations.

⁶³ People v. California Safe Deposit & Trust Co., 168 Cal. 241, L.R.A.1915A, 299; In re Bell's Estate, 168 Cal. 253; Cragin v. Lovell, 88 N. Y. 258.

⁶⁴ Provenzano v. Thayer Mfg. Co., 9 Daly, 90.

⁶⁵ Ryan v. Dumphy, 4 Mont. 342, 354; American T. Co. v. Siegel, 221 Ill. 145.

⁶⁶ A tax is not a debt or obliga-

tion to pay money founded upon contract and cannot be counter-claimed against. Gatling v. Commissioners, 92 N. C. 536, 53 Am. Rep. 432; Cobb v. Elizabeth City, 75 N. C. 1; Finnegan v. Ferdinandina, 15 Fla. 379.

A defendant cannot plead a counter-claim against the state without its consent. State v. Bradley, 37 La. Ann. 623; People v. Dennison, 84 N. Y. 272; Battle v. Thompson, 65 N. C. 406.

A set-off cannot be maintained on a debt contracted by the plaintiff during infancy and not ratified by him after becoming of full age. Rawley v. Rawley, 1 Q. B. Div. 460; Widrig v. Taggart, 51 Mich. 103; McCarthy v. Henderson, 138 Mass. 310.

⁶⁷ Bauer v. Teasdale, 25 Mo. App. 25; Curlee v. Thomas, 74 N. C. 51; Wilson v. McElroy, 32 Pa. 82.

⁶⁸ Fourth Nat. Bank v. City Nat. Bank, 68 Ill. 398, 18 Am. Rep. 556.

there is an opportunity to make it available. The fact that the defendant has the option to avail himself of matter of recoupment or bring a cross-suit upon it necessarily implies that such matter constitutes a cause of action.⁶⁹ In an action to recover for labor, if the benefit of the labor is lost by causes for which the plaintiff would be answerable in a cross-action, the same matter which would support a cross-action may be given in evidence in defense of the suit to recover payment.⁷⁰ "That doctrine (of recoupment) does not rest on the nature of the right which the plaintiff has in the contract which he seeks to enforce, nor on the fact that his interest in it is the same at the time of suit brought as when it was originally entered into. The essential elements on which its application depends are two only. The first is that the damages which the defendant seeks to set off shall have arisen from the same subject-matter or sprung out of the same contract or transaction as that on which the plaintiff relies to maintain his action. The other is that the claim for damages shall be against the plaintiff, so that their allowance by way of set-off, or defense to the contract declared on, shall operate to avoid circuity of action, and as a substitute for a distinct action against the plaintiff to recover the same damages as those relied on to defeat the action."⁷¹

§ 175. **Parties.** The cause of action set up for recoupment must be one against the party beneficially interested in the plaintiff's action; a claim against the nominal plaintiff personally, when he sues in a fiduciary capacity or for the benefit of another, is not available. Thus, where property attached by an officer upon *mesne* process was replevied from him, and on the failure of the plaintiff in that suit to comply with the judgment for return of the property suit was brought on the bond by the officer, the other party could not recoup the damages adjudged in his favor against such officer for false return on the process upon which he originally attached the property

⁶⁹ *Brown v. Gallaudet*, 80 N. Y. 413; *Gillespie v. Torrance*, 25 id. 309. See *Houston v. Young*, 7 Ind. 200; *Clark v. Wildridge*, 5 id. 176.

⁷⁰ *Austin v. Foster*, 9 Pick. 341; *Heite v. Cowgill*, — Del. —, 91 Atl. 652.

⁷¹ *Sawyer v. Wiswell*, 9 Allen, 39.

because the damages recovered by the officer on the bond would be held in trust for the benefit of the attaching creditor and his debtor, and the damages sought to be recouped were assessed against him personally for a wrong committed by him.⁷² So in an action by executors, as such, for the recovery of purchase-money of land sold by them the purchaser, making no offer or attempt to rescind the contract, cannot avail himself of false and fraudulent representations made by them at the time of the sale in respect to the subject-matter either as a defense or by way of recoupment or counter-claim. His remedy, if he has any, is against the executors personally.⁷³

It is not essential to the exercise of the right of recoupment that the suit in which the right is asserted should be brought in the name of the party who is liable for the cross-claim, nor need it be against the party who is entitled to the benefit of such claim. It is enough that the suit is substantially between them; that the claim sued on is subject to this defense, or that the proceeding be of such a nature that the mutual claims can be adjusted in it; that whatever is recovered is enforceable against the property of the party seeking to recoup, and whatever is deducted upon the cross-claim properly inures to his benefit.⁷⁴ By the water-craft law of some states demands

⁷² Wright v. Quirk, 105 Mass. 44. See Beckman v. Manlove, 18 Cal. 388.

⁷³ Westfall v. Dungan, 14 Ohio St. 276; Cumberland Island Co. v. Bunkley, 108 Ga. 756.

A plaintiff who sues an assignee for the benefit of creditors to recover the price of goods is not subject to a counter-claim for damages resulting from the malicious prosecution by him of a former suit for the same cause of action unless it is shown that his *cestuis que trust* participated in or approved his wrongful act.

Gelshenen v. Harris, 26 Fed. 680.

If the beneficial interest in a claim or demand remains in the assignor the assignee cannot set it

off against the debtor. Olmstead v. Seutt, 55 Conn. 125.

⁷⁴ See Munroe v. Adamo, 136 Ky. 252; Crawford v. McDonald, 84 Ark. 415; Vaugh v. Walsh, 122 Wis. 486.

The owner of property may defend against the claim of a subcontractor for a lien if the contractor fails to do so and reduce it to the extent defects in the work or material have diminished the benefit of performance. Wichita S. & D. Co. v. Weil, 80 Kan. 606; West Allis L. Co. v. Wiesenthal, 141 Wis. 460; Fossett v. Rock Island L. & Mfg. Co., 76 Kan. 428, 14 L.R.A.(N.S.) 918; Julia v. Poths Mfg. Co., 54 Ill. App. 460; Cheney v. Tory H. Ass'n, 65 N. Y. 282; McBean v. Kinnear, 23 Ont. 313. See Crosby v. Scott-G.

of certain descriptions are liens upon and enforceable against the water-craft, which may be discharged by bond or some form of undertaking in behalf of the owners conditioned for the payment of amounts found to be liens. In actions upon such security, or against the water-craft not bonded, any matter of recoupment in respect to the demand alleged to be a lien may be set up.⁷⁵ The surety of a principal entitled to recoupment may, as a general rule, avail himself of that defense because of the natural equity that mutual debts and liabilities growing out of the same transaction shall compensate each other.⁷⁶ In New York, however, this application of recoupment is refused;⁷⁷ and so under a Tennessee statute unless the principal gives consent.⁷⁸ The prevailing view is that a counter-claim or cross-claim must be against all the plaintiffs and them only and in favor of all the defendants and no others.⁷⁹ In an action upon

I. Co., 93 Minn. 475. In an action by A. against B. and C. they sought to recoup his demand. It appeared that D., who was not a party to the record, was a partner of the defendants in the original contract was interested in the reduction of A's claim and suffered in common with them the damages sought to be recouped. A recoupment was allowed. *Baltimore United O. Co. v. Barber*, 2 Mackey (D. C.) 4. But compare *Flynn v. Seale*, 2 Cal. App. 665.

If, contemporaneously with the execution of notes for the purchase-money of land, the parties agree in writing that the vendor shall furnish the vendee a complete chain of title to the land purchased, for the performance of which it is stipulated that the notes shall be bound, the damages resulting from the non-performance of such agreement may be recouped against the notes although the latter were, at the vendor's request, made payable to a third party, no consideration moving from him. *Hooper v. Armstrong*, 69 Ala. 343. See last note.

⁷⁵ *Steamboat Wellsville v. Geisse*, 3 Ohio St. 333; *Ward v. Willson*, 3 Mich. 1.

⁷⁶ *Reeves v. Chambers*, 67 Iowa, 81; *McHardy v. Wadsworth*, 8 Mich. 349; *Waterman v. Clark*, 76 Ill. 428; *Janett v. Martin*, 70 N. C. 459. See *Hobbs v. Duff*, 23 Cal. 596.

⁷⁷ *Lasher v. Williamson*, 55 N. Y. 619; *Gillespie v. Torrance*, 25 id. 306. See *Queen City Bank v. Brown*, 75 Hun, 259.

⁷⁸ *Phenix I. Works Co. v. Rhea*, 98 Tenn. 461.

⁷⁹ *Harrell v. Neill*, 56 Ind. App. 547; *Reveruzzi v. Caruso*, 86 N. J. L. 556; *Doyle v. Nesting*, 37 Colo. 522; *Flynn v. Seale*, 2 Cal. App. 665; *Carr v. Tucker*, 42 Tex. 330; *Brown v. Morris*, 83 N. C. 221; *Sloteman v. Thomas & W. Mfg. Co.*, 69 Wis. 499; *Chase v. Evoy*, 58 Cal. 348; *Jenkins v. Barrows*, 73 Iowa 438; *Hopkins v. Lane*, 81 N. Y. 501; *McCulloch v. Vibbard*, 51 Hun 227; *Tomlinson v. Nelson*, 49 Wis. 679; *Kirby v. Spiller*, 83 Ala. 481; *Wood v. Brush*, 72 Cal. 224; *Thalheimer v.*

a contract a balance due the defendant upon an unsettled partnership account between the parties, the firm having been dissolved prior to the commencement of the action, is a proper counter-claim.⁸⁰ Damages may be recouped against a partnership where the contract out of which they arose was made with one of the partners prior to the formation of the firm.⁸¹ If some of the defendants set up that the contract sued upon was made with them they may plead a counter-claim though the other defendants have no interest in it.⁸² Where the plaintiff's conduct indicates that he considered the defendants as the parties with whom he was dealing and he has sued them both he cannot controvert their right to establish a counter-claim.⁸³ In an action brought by an executor or administrator upon a contract made by him after the death of his testator or intestate or to recover assets belonging to the estate in the hands of a third person a claim due from the deceased to the defendant cannot be counter-claimed. "The reason of the rule is that in all such cases the allowance of such set-off or counter-claim would necessarily destroy the equal and just distribution of the assets belonging to the estate among the creditors in every case where the assets were insufficient to pay all the debts of the deceased."⁸⁴ An administrator who is sued upon personal claim

Crow, 13 Colo. 397; Roberts v. Donovan, 70 Cal. 108; City Council v. Montgomery Water-works, 79 Ala. 233; Copeland v. Young, 21 S. C. 275; Casey v. Hanrick, 69 Tex. 44; King v. Wise, 43 Cal. 628; Lemon v. Stevenson, 36 Ill. 49; Spofford v. Rowan, 124 N. Y. 108.

An individual demand cannot be used as a counter-claim to a joint indebtedness unless the insolvency of the plaintiff is shown. Collier v. Erwin, 3 Mont. 142; Kemp v. McCormick, 1 id. 420.

An agent liable on a contract because he did not disclose his agency may not plead a recoupment available to his principal. Gibboney v. Wayne, 141 Ala. 300.

⁸⁰ Waddell v. Darling, 51 N. Y.

327; Fish v. Sundahl, 82 Neb. 541. See Pendergast v. Greenfield, 40 Hun, 494.

⁸¹ Posey v. West C. Co., 92 Miss. 736.

⁸² Clegg v. Cramer, 32 Hun, 162.

⁸³ Drew v. Edmunds, 60 Vt. 401, 6 Am. St. 122.

⁸⁴ Per Taylor, J., in McLaughlin v. Winner, 63 Wis. 120, 124, 53 Am. Rep. 273, citing Aldrich v. Campbell, 4 Gray, 284; Smith v. Boyer, 2 Watts, 173; Aiken v. Bridgman, 37 Vt. 249; Woodward v. McGaugh, 8 Mo. 161; Newhall v. Turney, 14 Ill. 338; Patterson v. Patterson, 59 N. Y. 574, 17 Am. Rep. 384; Lawrence v. Vilas, 20 Wis. 381, 389-391; Lombard v. Older, 17 Beav. 542; Wront v. Dawes, 25 id. 369; Root v. Tay-

cannot counter-claim a debt which is due from the plaintiff to him in his representative capacity.⁸⁵ Under a statute which provides that in an action brought by an executor or administrator in his representative capacity a demand against the decedent belonging at the time of his death to the defendant may be set up as a counter-claim, the wrongful acts of an executor cannot give the defendant a right to counter-claim against a demand owing to the testator in his life-time.⁸⁶

§ 176. *Same subject.* The question arose in *Newfoundland v. Newfoundland R. Co.*⁸⁷ whether a right of set-off existing in favor of the government was available against such of the plaintiffs as were assignees of the original corporation. The facts were that the plaintiff was incorporated for the purpose of constructing and working a railway in pursuance of a contract with the government, for which the latter was to pay a subsidy and grant lands. The assignees took whatever right the company had to the subsidy and the grants of land in respect to a particular portion of the road. The contention of the plaintiff was that the government was bound to pay a certain amount of subsidy and to make grants of land for a completed portion of the road, though it was not finished as a whole. This was disputed, but if such liability existed it was asserted that the government could set up counter-claims against the company for its breach of contract in not completing the road. It was held by the privy council that the counter-claim was good as against the assignees of the company, it and the claim having their origin in the same portion of the contract and the obligations which gave rise to them being closely intertwined. "The claim of the government does not arise from any fresh transaction freely entered into by it after notice of assign-

lor, 20 Johns. 137; *Steel v. Steel*, 12 Pa. 64; *Shipman v. Thompson*, Willes, 103. *Thompson v. Whitmarsh*, 100 N. Y. 36, is to the same effect.

But an administratrix who has deposited funds of the estate in a trust company may set off her deposit claim against an allowed

claim in favor of the receiver of the trust company against the estate, it being solvent. *People v. California Safe Deposit & Trust Co.*, 168 Cal. 241.

⁸⁵ *Gourley v. Walker*, 69 Iowa, 80.

⁸⁶ *Wakeman v. Everett*, 41 Hun, 278.

⁸⁷ 12 App. Cas. 199.

ment by the company. It was utterly powerless to prevent the company from inflicting injury on it by breaking the contract. It would be a lamentable thing if it were found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefit, wholly discharged of any counter-claim by the other party in respect of the rest of the contract, which may be burdensome. There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances. But their lordships have no hesitation in saying that in this contract the claims for subsidy and for non-construction ought to be set against one another.”⁸⁸ Where the plaintiff sues an assignee and is not entitled to protection as a *bona fide* holder of negotiable paper, his action is subject to any defense by way of recoupment which would be good against the party to whom the plaintiff’s demand accrued.⁸⁹ Where a note for the price of property sold was made payable to the vendor’s wife, and no portion of the consideration moved from her, the note was subject to the same defense by way of recoupment for the vendor’s fraud in the sale as if it had been made payable to himself.⁹⁰ A counterclaim may be maintained against the state though it could not have been sued on without the state’s consent.⁹¹

§ 177. Maturity of claim or demand; statute of limitations.

Must the matter of recoupment be a mature cause of action at the time of the commencement of the plaintiff’s action, or will it be sufficient that it is such at the time of pleading? Campbell, J.,⁹² said: “The purpose of recoupment would be defeated if the party cannot be allowed to plead what he might, at the

⁸⁸ American B. Co. v. Boston, 202 Mass. 374, approving Rockwell v. Daniels, 4 Wis. 432.

If the party who agrees to perform makes an assignment of the entire contract before any money is due under it the other party may recoup his damages for a breach thereof by the assignors. Smith v. Wall, 12 Colo. 363.

⁸⁹ Wood v. Brush, 72 Cal. 224, McKnight v. Devlin, 52 N. Y. 399,

11 Am. Rep. 715; Hinsdell v. Weed, 5 Denio, 172; Rockwell v. Daniels, 4 Wis. 432.

⁹⁰ Kelly v. Pember, 35 Vt. 183.

⁹¹ Commonwealth v. Barker, 126 Ky. 200.

⁹² In Platt v. Brand, 26 Mich. 175. To the same effect: California C. Co. v. Pacific S. M. Works, 164 Fed. 978, 91 C. C. A. 106; Smith v. French, 111 N. C. 1; Slaughter v. Standard Mach. Co., 148 N. C. 471.

time of pleading, have declared upon. The object of this practice is to diminish litigation by consolidating controversies into one action. The whole doctrine is one of the equitable outgrowths of the improvement of legal practice, and no obstacle should be thrown in the way of its encouragement. Our legislation has indicated this design by enlarging the defense and permitting defendants to recover damages beyond the plaintiff's claim. We do not feel disposed to accept any technical doctrines which would prevent its full efficacy unless compelled by a weight of authority which we do not find here." But it was said by Jarvis, C. J.,⁹³ "It seems to me we should carry the doctrine respecting the avoiding of circuity of action very much further than any case has yet carried it if we were to hold that the damages may be reduced by showing a breach of the contract on the plaintiff's part subsequently to the commencement of the plaintiff's action. There are many cases where circumstances existing before action brought have been allowed to be given in evidence to mitigate or reduce the damages; but none that I am aware of where matters arising after action brought have been so received." Under the English judicature act of 1873⁹⁴ relief can be given on a counter-claim in respect of a cause of action accrued to the defendant subsequently to the issue of the writ in the original suit.⁹⁵ It had previously been ruled otherwise.⁹⁶ The later case is rested on the generality of the language of the statute, the orders made pursuant thereto and the nature of a counter-claim which had been before spoken of as being an wholly independent suit from the claim.⁹⁷ It is

⁹³ *Bartlett v. Holmes*, 13 C. B. 630.

⁹⁴ Sec. 24, subsec. 3: "The said courts respectively, and every judge thereof, shall also have the power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his plead-

ing, and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner."

⁹⁵ *Beddall v. Maitland*, 17 Ch. Div. 174.

⁹⁶ *Original Hartlepool C. Co. v. Gibb*, 5 Ch. Div. 713.

⁹⁷ *Winterfield v. Bradnum*, 3 Q. B. Div. 324; *Stooke v. Taylor*, 5 id. 569.

now settled in England that a counter-claim must be treated as if it were a proceeding in an action, though it is not the latter because it is not commenced by a writ or summons, and that the plaintiff cannot after a counter-claim has been delivered discontinue his action so as to prevent the defendant from enforcing his cause of action.⁹⁸ The weight of authority in America is that a demand which is not due at the time the action was brought cannot be counter-claimed or set off.⁹⁹ The codes of some states express that the right to counter-claim must exist at the commencement of the action.¹ This means that it must then exist in the hands of those who plead it.² In New York in an action for rent the tenant cannot recoup his damages for a breach of covenant on the part of the plaintiff after the commencement of the suit.³ But in a later case the court of appeals affirmed a judgment on a counter-claim for conversion of property after the commencement of the action.⁴ The court say: "Strictly speaking, the act of the plaintiff in procuring and serving the injunction would, ordinarily, be an act at or after the commencement of the action, and therefore one the damages for which could not be set up as a counter-claim in a pleading which is presumed to state the claims of the parties as existing at the time of bringing the suit; but as the act of the plaintiff related to the very property which was the subject of the action and materially affected the defendant's rights and defense therein, I do not see why it could not have been set up in a subsequent or supplemental answer and have thus been rendered effectual to the defendant."

The connection between a plaintiff's cause of action and a defendant's cross-claim is so close that until the former is barred by the statute of limitations the latter is available.⁵

⁹⁸ *McGowan v. Middleton*, 11 Q. B. Div. 464, overruling *Vavasseur v. Krupp*, 15 Ch. Div. 474.

⁹⁹ *Ellis v. Cothran*, 117 Ill. 458; *Orton v. Noonan*, 29 Wis. 541; *Simpson v. Jennings*, 15 Neb. 671; *Tessier v. Englehart*, 18 Neb. 167; *Hogan v. Kirkland*, 64 N. C. 250; *Lee v. Eure*, 93 id. 5, 9.

Suth. Dam. Vol. I.—34.

¹ *Davis v. Frederick*, 6 Mont. 300.

² *Mayo v. Davidge*, 44 Hun. 342; *D'Amelio v. Abraham*, 54 N. Y. Misc. 386, citing local cases.

³ *Harger v. Edmonds*, 4 Barb. 256.

⁴ *Ashley v. Marshall*, 29 N. Y. 494.

⁵ *Beecher v. Baldwin*, 55 Conn. 419, 3 Am. St. 57; *Brumble v. Brown*, 71 N. C. 513; *Stillwell v.*

"Not only does the bringing of an action stop the operation of the statute as to a proper matter of set-off, but it also seems that it revives a claim which is actually barred out, which is the proper subject of recoupment in the action, as damage growing out of the same transaction. Thus, in an action to recover the price of goods sold, unsoundness may be set up by way of defense although an action to recover damages is barred."⁶ In an action on a note a total failure of consideration and a parol warranty of the property for which the obligation was given were pleaded in defense, and the latter was sustained, although the period for bringing an action upon the parol agreement had passed.⁷ If a contract is not satisfactorily performed, the right to recover under it is qualified. To the extent that the contractee has been injured by the method of the contractor's performance or by his neglect to perform he may defeat the latter's demand. If the statute of limitations does not bar the contractor the other party may plead a counter-claim. The statute is tolled by the commencement of an action, and though the counter-claim is not pleaded until more than the statutory period fixed for bringing an action on the contract has gone by, it is in time if it is pleaded within the period fixed for answering the complaint.⁸ In Pennsylvania the running of the statute is not stopped until the defendant pleads his set-off or gives the plaintiff notice of it.⁹

§ 178. Cross-claim must rest on contract or subject-matter of action. It must arise from the same subject-matter, or spring out of the same contract or transaction on which the plaintiff relies to maintain his action.¹⁰ The same thing is substantially

Bertrand, 22 Ark. 375; Eve v. Louis, 91 Ind. 457; Walker v. Clements, 15 Q. B. 1046.

⁶ Wood's Lim., § 282; Riddle v. Kreimbricht, 12 La. Ann. 297; Lastrapes v. Rocquet, 23 id. 68.

⁷ Morrow v. Hanson, 9 Ga. 398, 54 Am. Dec. 346.

⁸ Herbert v. Dey, 15 Abb. N. C. (N. Y.) 172.

⁹ Gilmore v. Reed, 76 Pa. 462.

¹⁰ First Nat. Bank v. John A.

Bryant Piano Co., 185 Ill. App. 119; Raymond v. Varnum, 185 Ill. App. 289; Marrone v. Ehrat, 175 Ill. App. 649; Bostrom v. Becker, 172 Ill. App. 410; Van Zandt v. Hanover Nat. Bank, 149 Fed. 127, 79 C. C. A. 23; Dalton v. Bunn, 152 Ala. 577; Higbie v. Rust, 211 Ill. 333, 103 Am. St. 204; Robidoux v. Baltz, 153 Ill. App. 100; Turnbull Joice L. Co. v. Chicago L. & C. Co., 152 Ill. App. 347; Weatherbee v. Lillybeck, 86

necessary to constitute one branch of the counter-claim of the modern codes in which it is required that it arise out of the same transaction set forth in the complaint as the foundation of the plaintiff's claim or be connected with the subject of the action.¹¹ In a tort action the pleading must show on its face

Miss. 156; Roth v. Reiter, 213 Pa. 400; Snyder v. Lingo, 30 Pa. Super. 651; Sawyer v. Wiswell, 9 Allen, 39; Logie v. Black, 24 W. Va. 1, 20; Bozarth v. Dudley, 44 N. J. L. 304, 43 Am. Rep. 373; Gilchrist v. Part-ridge, 73 Me. 214; Washington v. Timberlake, 74 Ala. 259; Keegan v. Kinnare, 123 Ill. 280; Forrest v. Johnson, 100 Mich. 321; Bartlett v. Holmes, 13 C. B. 630 (matter arising after suit brought).

¹¹Inland Box & Label Co. v. Richie, 57 Colo. 532; Wills v. Young, 15 Ga. App. 352; Atlantic Coast Line R. Co. v. A. T. Snodgrass & Co., 14 Ga. App. 668; Strickland v. Bank of Cartersville, 111 Ga. 565; Sleepy Eye Milling Co. v. Hartman, 184 Ill. App. 308; Harrell v. Neill, 56 Ind. App. 547; W. W. Kimball Co. v. Massey, 126 Minn. 461; La Mesa Community Ditch v. Applezoeller, — N. M. —, 140 Pac. 1051; George v. Murray, 87 Misc. (N. Y.) 175; Brady-Neely Grocer Co. v. De Foe, — Tex. Civ. App. —, 169 S. W. 1135; Dodge v. Brown & Hill, 74 W. Va. 466; Sydney v. Mngford Printing & Engraving Co., 214 Fed. 841; Ajax-Grieb R. Co. v. Byars, — Tex. Civ. App. —, 153 S. W. 921; Epstein v. Buckeye C. O. Co., 106 Ark. 241; Dowdy v. Calvi, 14 Ariz. 148; Baer v. Slicher, 153 Fed. 129, 82 C. C. A. 281; Louisville & N. R. Co. v. Empire State C. Co., 189 Fed. 174; California C. Co. v. Pacific S. M. Works, 144 Fed. 886; Greene v. Hereford, 12 Ariz. 85; Stevens v. Whalen, 95 Ark. 488; Davis v. Davis, 93 Ark. 93; Mitchell v.

Moore, 87 Ark. 166; Daniel v. Gordy, 84 Ark. 218; Harron v. Wilson, 4 Cal. App. 488; Goldberger v. Leibowitz, 42 Colo. 99; Downing v. Wilcox, 84 Conn. 437; Blackshear Mfg. Co. v. Stone, 8 Ga. App. 661; Jester v. Bainbridge State Bank, 4 Ga. App. 469; Gem K. Mills v. Empire P. & B. Co., 3 Ga. App. 709; Powers v. Woolfolk, 132 Mo. App. 354; Kaufman v. Cooper, 39 Mont. 146; Excelsior C. Works v. DeCamp, 40 Ind. App. 26; Cartan v. Tackaberry, 139 Iowa, 586; Hinchman v. Johnson, 108 Md. 661; Thomssen v. Ertz, 93 Minn. 280; Curlee v. Rogan, (Tex. Civ. App.) 136 S. W. 1126; McCormick v. Schtrenck (Tex. Civ. App.) 130 S. W. 720; Brooks T. Mach. Co. v. Shields, 48 Tex. Civ. App. 531; Orriek v. Dawson, 67 W. Va. 403; Grills v. Farah, 21 Ont. L. R. 457; Xenia Branch Bank v. Lee, 7 Abb. Pr. 372; Epperly v. Bailey, 3 Ind. 72; Slayback v. Jones, 9 Ind. 472; Barhyte v. Hughes, 33 Barb. 320; Bazemore v. Bridgers, 105 N. C. 191; Demartin v. Albert, 68 Cal. 277; Allen v. Coates, 29 Minn. 46; Schmidt v. Bickenbach, 29 Minn. 122; Standley v. Northwestern Mut. L. Ins. Co. 95 Ind. 254; Lee v. Eure, 93 N. C. 5; Wilkerson v. Farnham, 82 Mo. 672; Clark's Cove G. Co. v. Appling, 33 W. Va. 470; Logie v. Black, 24 W. Va. 1; Wigmore v. Buell, 116 Cal. 24.

If the plaintiff fails to prove the contract upon which he sues the defendant cannot prove another and different contract and recoup damages for the breach thereof. Halde-

or in connection with the complaint that it so arose.¹² A partial satisfaction of the demand sued upon does not prevent the defendant from recovering to the full extent of his injury.¹³

§ 179. **Recoupment for fraud, breach of warranty, negligence, etc.** If a party in negotiating a contract commits an actionable fraud upon the other contracting party touching the subject of their negotiation the latter, though he has not exercised his privilege to repudiate the contract on the discovery of the fraud, may recoup his damages therefor in any action brought by the guilty party upon the contract. Such a cross-claim does not grow out of the contract, but it is part of the same transaction and is connected with the subject of the action.¹⁴ A. executed in February a memorandum under seal stating that he had hired of W. a certain lot for one year from the 1st of May following, at a rent of \$1,000. He

man v. Berry, 74 Mich. 424; Morehouse v. Baker, 48 Mich. 335; Holland v. Rea, 48 Mich. 218; Brighton Bank v. Sawyer, 132 Mass. 185; Bozarth v. Dudley, 44 N. J. L. 304, 43 Am. Rep. 373; The Zouave, 29 Fed. 296; The C. B. Sanford, 22 id. 863.

The pleading may be good as against a demurrer in so far as the subject matter of it is so connected. Wild Rice L. Co. v. Benson, 114 Minn. 92.

A counterclaim for damages arising out of the wrongful issuance of an attachment cannot be pleaded in answer to a complaint in the original action although it was filed after the dissolution of the attachment. Tacoma M. Co. v. Perry, 32 Wash. 650; Veysey v. Thompson, 49 Wash. 571. Compare Reed v. Chubb, 9 Iowa, 178.

¹² Winkler v. O'Donovan, 142 Wis. 412; Finney v. Raudabaugh, 182 Mo. App. 246.

¹³ McAlester v. Landers, 70 Cal. 79.

¹⁴ Burroughs v. Selleck, 185 Ill.

App. 446; Gross v. Hochstim, 72 N. Y. Misc. 343; Steckbauer v. Leykom, 130 Wis. 438; Tilley v. Bowman, (1910) 1 K. B. 745.

Barbour v. Flick, 126 Cal. 628; Bell v. Sheridan, 21 D. C. 370; Johnson v. St. Louis Butchers' S. Co., 60 Ark. 387; Walker v. France, 112 Pa. 203; Dowagiac Mfg. Co. v. Gibson, 73 Iowa, 525, 6 Am. St. 697; Birdsey v. Butterfield, 34 Wis. 52; Van Epps v. Harrison, 5 Ill. 63; Myers v. Estell, 47 Miss. 4, 17, 21; Estell v. Myers, 54 id. 174, 56 id. 800; Kelly v. Pember, 35 Vt. 183; Kennedy v. Crandall, 3 Lans. 1; Rotan v. Nichols, 22 Ark. 244; Perley v. Balch, 23 Pick. 283, 34 Am. Dec. 56; Timmons v. Dunn, 41 Ohio St. 680; Avery v. Brown, 31 Conn. 398; Caldwell v. Sawyer, 30 Ala. 283; Cage v. Phelps, 38 Ala. 383; Moberly v. Alexander, 19 Iowa, 162; Johnson v. Miln, 14 Wend. 195; President, etc. v. Wadleigh, 7 Blackf. 102, 41 Am. Dec. 214; Light v. Stoeve, 12 S. & R. 431; Haynes v. Harper, 25 Ark. 541; Wardell v. Fosdick, 13 Johns. 325,

was induced to make the contract by the fraudulent representations of W. that the lot embraced a certain other parcel of land which belonged to the corporation. A. discovered the fraud before the 1st of May, and on that day, having obtained a lease of the parcel owned by the corporation, took possession of the whole and occupied it during the year. It was held in an action by W. for the rent that A. was entitled to a deduction by reason of the fraud of at least what he was obliged in good faith to pay for the corporation lease.¹⁵ And in action for fraudulent representations made on the exchange of property the defendant may recoup his damages resulting therefrom.¹⁶ Where an action was brought to recover a balance due on a contract of sale of two separate patented processes, described and contracted for in a single written agreement for an entire sum payable in instalments, the vendee was entitled to set off damages arising out of the vendor's fraudulent representations as to one of the processes, although the other proved to be more valuable than the amount paid for both.¹⁷ If several distinct purchases are made at the same time, though by different instruments, they will be regarded for the purposes of re-

78 Am. Dec. 383; *Brown v. Tuttle*, 66 Barb. 169; *Hogg v. Cardwell*, 4 Sneed, 151; *Nelson v. Johnson*, 25 Mo. 430; *Withers v. Greene*, 9 How. 213, 13 L. ed. 109; *Estep v. Fenton*, 66 Ill. 467; *Sawyer v. Wiswell*, 9 Allen 39; *Bradley v. Rea*, 14 id. 20; *Mixer v. Cohnrn*, 11 Mete. (Mass.) 561, 45 Am. Dec. 230; *Westcott v. Nims*, 4 Cush. 215; *Cook v. Castner*, 9 Cush. 266; *Harrington v. Stratton*, 22 Pick. 510; *Hall v. Clark*, 21 Mo. 415; *Rawley v. Woodruff*, 2 Lans. 419; *More v. Rand*, 60 N. Y. 208; *Price v. Lewis*, 17 Pa. 51, 55 Am. Dec. 536; *Graham v. Wilson*, 6 Kan. 489; *Allen v. Shackelton*, 15 Ohio St. 145; *Sumpter v. Welsh*, 2 Bay, 558; *Wheat v. Dotson*, 12 Ark. 699; *Tunno v. Fludd*, 1 McCord, 121; *Abererombie v. Owings*, 2 Rich. 127; *Adams v. Wylie*, 1 Nott & McC. 78; *McFarland v. Carver*, 34

Mo. 195; *Christy v. Ogle*, 33 Ill. 295; *Reynolds v. Cox*, 11 Ind. 262; *Cox v. Reynolds*, 7 id. 257; *House v. Marshall*, 18 Mo. 369; *Shute v. Taylor*, 5 Mete. (Mass.) 61; *Owens v. Rector*, 44 Mo. 389; *James v. Lawrenceburgh Ins. Co.*, 6 Blackf. 525; *Burton v. Stewart*, 3 Wend. 236, 20 Am. Dec. 692; *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598; *White v. Sutherland*, 64 Ill. 181; *Gibson v. Marquis*, 29 Ala. 668; *Isham v. Davidson*, 52 N. Y. 237; *Simmons v. Cutreer*, 12 Sm. & M. 584; *Holton v. Noble*, 83 Cal. 7.

¹⁵ *Allaire v. Whitney*, 1 Hill, 484; *Whitney v. Allaire*, 1 N. Y. 305; *Holton v. Noble*, 83 Cal. 7.

¹⁶ *Carey v. Guillow*, 105 Mass. 18, 7 Am. Rep. 494; *Chandler v. Childs*, 42 Mich. 128.

¹⁷ *Rawley v. Woodruff*, 2 Lans. 419.

coupment as being connected.¹⁸ So, in actions for the price of property sold, damages for breach of any warranty made by the vendor of the property, whether it be express or implied, may be recouped,¹⁹ so far as he is not otherwise reimbursed for his loss, as by insurance paid in consequence of the destruction of the property.²⁰

If there is a sale and delivery of property *in praesenti* which

¹⁸ Benjamin v. Richards, 51 Mich. 110. *Contra*. Barlow Mfg. Co. v. Stone, 200 Mass. 158.

It is held that it is a question of fact whether sales are so independent as to prevent recoupment. Gem K. Mills v. Empire P. & B. Co., 3 Ga. App. 709.

If several suits are brought in an inferior court on notes given for property which is not of the quality bargained for, the defendant may set up the breach of warranty in each suit until the damages are neutralized, and on appeal and consolidation of the actions the whole damage suffered may be recouped. Hurst v. Everett, 91 N. C. 399.

¹⁹ Buss v. Allison W. G. Co., 146 Mo. App. 71; Wilson v. Hughes, 94 N. C. 182; Bitting v. Thaxton, 72 id. 541; Walsh v. Hall, 66 id. 233; Hurst v. Everett, 91 id. 399; Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810; Spalding v. Vanderecock, 2 Wend. 431; Hoover v. Peters, 18 Mich. 51; McAllister v. Reab, 4 Wend. 483; Reab v. McAlister, 8 Wend. 109; Herbert v. Ford, 29 Me. 546; Kellogg v. Denslow, 14 Conn. 411; Hitchcock v. Hunt, 28 Conn. 343; Mercer v. Hall, 2 Tex. 284; Mears v. Nichols, 41 Ill. 207, 89 Am. Dec. 381; Miller v. Smith, 1 Mason, 437; Love v. Oldham, 22 Ind. 51; Getty v. Rountree, 2 Pin. 379; McAlpin v. Lee, 12 Conn. 129, 30 Am. Dec. 609; Withers v. Greene, 9 How. 214, 13 L. ed. 109;

Van Buren v. Digges, 11 How. 461, 13 L. ed. 771; Fisk v. Tank, 12 Wis. 276, 78 Am. Dec. 737; Deen v. Herrold, 37 Pa. 150; Ketchum v. Wells, 19 Wis. 25; Steigleman v. Jeffries, 1 S. & R. 477, 7 Am. Dec. 626; Murphy v. Gay, 37 Mo. 535; Barth v. Burt, 43 Barb. 628; Brown v. Tuttle, 66 Barb. 169; Westcott v. Nims, 4 Cush. 215; Miller v. Gaither, 3 Bush. 152; Culver v. Blake, 6 B. Mon. 528; McMillion v. Pigg, 3 Stew. 165; Lemon v. Trull, 13 How. Pr. 248; Plant v. Condit, 22 Ark. 454; Jemison v. Woodruff, 34 Ala. 143; Hoe v. Sanborn, 3 Abb. Pr. (N. S.) 189; Harman v. Sanderson, 6 Sm. & M. 41, 45 Am. Dec. 272; Rumsey v. Sargent, 21 N. H. 397; Williams v. Miller, 21 Ark. 469; Goodwin v. Morse, 9 Mete. (Mass.) 278; Harrington v. Stratton, 22 Pick. 510; Flint v. Lyon, 4 Cal. 17; Dennis v. Belt, 30 Cal. 247; Hodgkins v. Moulton, 100 Mass. 309; Burnett v. Smith, 4 Gray, 50; Allen v. Furbish, id. 504, 64 Am. Dec. 87; Staey v. Kemp, 97 Mass. 166; Darnell v. Williams, 2 Stark. 166; Parish v. Stone, 14 Pick. 198; Judd v. Denison, 10 Wend. 513; Murray v. Carlin, 67 Ill. 286; Owens v. Sturges, id. 366; Nixon v. Carson, 38 Iowa, 338; Walker v. Hoisington, 43 Vt. 608; Parker v. Pringle, 2 Strobb. 242; Babcock v. Trice, 18 Ill. 420, § 676.

²⁰ Eureka F. Co. v. Baltimore C. S. & R. Co., 78 Md. 179.

is expressly warranted and the warranty is not true, the vendee does not lose his right to recoup the damages by receiving and using the property.²¹ In some states, where the contract of sale is executory and a time is agreed upon for making a test of the property which is the subject of the contract, the acceptance and use of it after the test has been made waives the right to claim a breach of the warranty.²² This is not the rule in Illinois.²³ It is believed "the better doctrine and the one ordinarily prevailing is that while such acceptance and use are evidence from which, with other circumstances, a waiver of the claim may be found, yet, ordinarily speaking, the purchaser may accept the delayed delivery and recoup the damages in an action by the vendor for the price."²⁴ But if payment has been made with knowledge of the right of a third party to claim damages from the vendee the right of recoupment is gone.²⁵ If goods are warranted the purchaser may, after he has admitted

²¹ *Getty v. Romtree*, 2 Pin. 379; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Dailey v. Green*, 15 Pa. 118; *Polhemus v. Heiman*, 45 Cal. 573; *Warder v. Fisher*, 48 Wis. 334; *Vincent v. Leland*, 100 Mass. 432; *Lewis v. Romtree*, 78 N. C. 323; *Gurney v. Atlantic*, etc. R. Co., 58 N. Y. 358; *Day v. Pool*, 52 id. 416, 11 Am. Rep. 719; *Queen City G. Co. v. Pittsburg C. P. Co.*, 97 Md. 629.

In *Locke v. Williamson*, 40 Wis. 377, the property was accepted with knowledge that it was not such as the contract called for. The buyer set up the defect in the quality and the court said: "We have concluded to hold this rule in respect to an executory contract, that when the defects in the goods are patent and obvious to the senses, when the purchaser has a full opportunity for examination and knows of such defects, he must, either when he receives the goods or within a reasonable time thereafter, notify the

seller that the goods are not accepted as fulfilling the warranty, otherwise the defects will be deemed waived." See *Nye v. Iowa City A. Works*, 51 Iowa, 129, 33 Am. Rep. 121; *Reed v. Randall*, 29 N. Y. 358; *McCormick v. Sarson*, 45 id. 256; *Gaylord Mfg. Co. v. Allen*, 53 id. 515. Compare these New York cases with the two cited above.

²² *Fraser v. Ross*, 1 Penn. 348; *Toplitz v. King*, 20 N. Y. Misc. 576; *McParlin v. Boynton*, 8 Hun, 449; affirmed by a majority of one and without opinion, 71 N. Y. 604.

²³ *Underwood v. Wolf*, 131 Ill. 425, 19 Am. St. 40, citing and discussing local cases.

²⁴ *Medart P. Co. v. Dubuque T. & R. M. Co.*, 121 Iowa, 244, citing *Jeffrey Mfg. Co. v. Central C. & I. Co.*, 93 Fed. 408; *Ramsey v. Tully*, 12 Ill. App. 463; *Ruff v. Rinaldo*, 55 N. Y. 664; *Merriek Mfg. Co. v. Quintard*, 107 Mass. 127.

²⁵ *Medart P. Co. v. Dubuque Co.*, *supra*.

that they correspond with the contract and promised to pay the purchase price, recoup any damages resulting from a breach of the warranty, or he may, after paying the price, recover such damages in a separate suit.²⁶ Giving a renewal note after knowledge of the breach of a warranty is presumptive, but not conclusive, evidence of a waiver of the claim for damages.²⁷ In suits for labor or goods the warranty of either is not a matter altogether collateral; it forms an essential portion of the consideration for the defendant's undertaking, and therefore the breach of it is proper to be shown in reduction of the stipulated price.²⁸ When damages for the breach of a warranty as to the quality of a chattel are established they are to be applied in reduction of plaintiff's recovery as of the date of the contract.²⁹

§ 180. *Same subject.* Whatever the nature of the contract, however numerous or varied its stipulations, and whether they are all written and embodied in one or several instruments, or only partly written or partly implied, if they are connected, so that what is undertaken to be done on one side altogether is the consideration, or part of the consideration, either in promise or performance, for what is engaged to be done on the other, the range of the right of recoupment is co-extensive with the duties and obligations of the parties, respectively, both to do and to forbear,—as well those imposed at first by the language of the contract as those which subsequently arise out of it in the course of its performance.³⁰ It extends to damages re-

²⁶ *Bretz v. Fawcett*, 29 Ill. App. 319; *Harrington v. Stratton*, 22 Pick. 510; *Hodgkins v. Moulton*, 100 Mass. 309; *Ruff v. Jarrett*, 94 Ill. 474; *Shackelton v. Lawrence*, 65 id. 175; *Reed v. Hastings*, 61 id. 266.

²⁷ *Aultman v. Wheeler*, 49 Iowa, 647; *Cantralt v. Fawcett*, 2 Ill. App. 571. See *Hinchman v. Johnson*, 108 Md. 661.

²⁸ *Schwartz v. Kuhn*, 71 N. Y. Misc. 149; *Allen v. Hooker*, 25 Vt. 137; *Cole v. Colburn*, 61 N. H. 499; *Hoerner v. Giles*, 53 Ill. App. 540; *McCormick H. Mach. Co. v. Robinson*, 60 id. 253; *Zimmerman v.*

Druecker, 15 Ind. App. 512; *National Oak L. Co. v. Armour-C. P. Co.*, 99 Ky. 667.

²⁹ *Wilson v. Reedy*, 33 Minn. 503.
³⁰ *Burnett C. Co. v. Art W. P. Co.*, 164 Ala. 547; *Modern Steel S. Co. v. Van Buren County*, 126 Iowa, 606; *Owensboro W. Co. v. Wilson*, 79 Kan. 633; *Klauck v. Federal Ins. Co.*, 131 App. Div. (N. Y.) 519; *Penn L. Co. v. McPherson*, 133 N. C. 287; *Green v. Batson*, 71 Wis. 54; *Bross v. Cairo & V. R. Co.*, 9 Ill. App. 363; *Wilson v. Greensboro*, 54 Vt. 533; *Babbitt v. Moore*, 51 N. J. L. 229; *Deitz v. Leete*, 28 Mo.

sulting from negligence where care, activity and diligence are required;³¹ where damages accrue from excess of action, as

App. 540; *Logie v. Black*, 24 W. Va. 1, 19; *Brigham v. Hawley*, 17 Ill. 38; *Lee v. Clements*, 48 Ga. 128; *Satchwell v. Williams*, 40 Conn. 371; *Fowler v. Payne*, 49 Miss. 32; *Branch v. Wilson*, 12 Fla. 543; *Mell v. Moony*, 30 Ga. 413; *Rogers v. Humphrey*, 39 Me. 382; *Winder v. Caldwell*, 14 How. 434, 14 L. ed. 487; *Cherry v. Sutton*, 30 Ga. 875; *Bowker v. Hoyt*, 18 Pick. 555; *Fabbricotti v. Launitz*, 3 Sandf. 743; *Van Buren v. Digges*, 11 How. 461, 13 L. ed. 771; *Dennis v. Belt*, 30 Cal. 247; *Logan v. Tibbott*, 4 Greene, 389; *Heaston v. Colgrove*, 3 Ind. 265; *Keyes v. Western Vermont S. Co.*, 34 Vt. 81; *Willey v. Fractional School Dist.*, 25 Mich. 419; *Elliot v. Heath*, 14 N. H. 131; *Bloodgood v. Ingoldsby*, 1 Hilt. 388; *Walker v. Millard*, 29 N. Y. 375; *Guthman v. Castleberry*, 49 Ga. 272; *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506; *Eldred v. Leahy*, 31 Wis. 546; *Whitney v. Meyers*, 1 Duer, 267; *Peden v. Moore*, 1 Stew. & Port. 71, 21 Am. Dec. 649; *Wilder v. Boynton*, 63 Barb. 547; *Cook v. Soule*, 56 N. Y. 420, 45 How. Pr. 340; *Holzworth v. Koch*, 26 Ohio St. 33; *Myers v. Burns*, 33 Barb. 401, 35 N. Y. 269; *Ives v. Van Epps*, 22 Wend. 155; *Warfield v. Booth*, 33 Md. 63; *Mayor v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538; *Rogers v. Ostrom*, 35 Barb. 523; *Westlake v. De Graw*, 25 Wend. 669; *Goodwin v. Morse*, 9 Mete. (Mass.) 278; *Sanger v. Fincher*, 27 Ill. 346; *Bee P. Co. v. Hiehorn*, 4 Allen 63; *Turner v. Gibbs*, 50 Mo. 556; *Dermott v. Jones*, 2 Wall. 1, 17 L. ed. 762; *Overton v. Phelan*, 2 Head 445; *Bloom v. Lehman*, 27 Ark.

489; *Berry v. Diamond*, 19 Ark. 262; *Desha v. Robinson*, 17 Ark. 228; *Springdale Ass'n v. Smith*, 32 Ill. 252; *Porter v. Woods*, 3 Humph. 56, 39 Am. Dec. 153; *Crouch v. Miller*, 5 Humph. 586; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Lufburrow v. Henderson*, 30 Ga. 482; *Molby v. Johnson*, 17 Mich. 382; *Stow v. Yarwood*, 14 Ill. 424; *Stewart v. Bock*, 3 Abb. Pr. 118; *Hoopes v. Meyer*, 1 Nev. 433; *Caldwell v. Pennington*, 3 Gratt. 91; *Burroughs v. Clancey*, 53 Ill. 30; *Lunn v. Gage*, 37 Ill. 19; *Evans v. Hughey*, 76 Ill. 115; *Hubbard v. Rogers*, 64 Ill. 434; *Eckles v. Carter*, 26 Ala. 563; *Ewart v. Kerr*, 2 McMull. 141; *Moore v. Caruthers*, 17 B. Mon. 669; *Whitbeck v. Skinner*, 7 Hill, 53; *Chatterton v. Fox*, 5 Duer, 64; *Hill v. Southwick*, 9 R. I. 299, 11 Am. Rep. 250; *Fitchburg, etc. R. Co. v. Hanna*, 6 Gray, 539, 66 Am. Dec. 427; *Allen v. McKibbin*, 5 Mich. 449; *Key v. Henson*, 17 Ark. 254; *Hutt v. Bruckman*, 55 Ill. 441; *McDowell v. Milroy*, 69 Ill. 498; *Latham v. Sumner*, 89 Ill. 233; *Cooke v. Preble*, 80 Ill. 381; *Bishop v. Price*, 24 Wis. 480.

³¹ *Bell v. Mutual Mach. Co.*, 150 N. C. 111; *Spears v. DuRant*, 76 S. C. 19; *Huntsville Elks' Club v. Garritty-H. B. Co.*, 176 Ala. 128; *Sinker v. Diggins*, 76 Mich. 557; *Macgowan v. Whiting*, 9 Daly, 86; *Whitellegge v. De Witt*, 12 Daly, 319; *Lee v. Clements*, 48 Ga. 128; *Fowler v. Payne*, 49 Miss. 32; *Phelps v. Paris*, 39 Vt. 511; *Still v. Hall*, 20 Wend. 51; *Briggs v. Montgomery*, 3 Heisk. 673; *Denew v. Daverell*, 3 Camp. 451; *Grant v. Button*, 14 Johns. 377; *Shipman v. State*, 43 Wis. 381; *Garfield v. Huls*, 54 Ill. 427; *For-*

where it injuriously transcends the limits of duty or authority;³² from ignorance, where knowledge and skill are due;³³ and honesty and good faith, being always obligations upon contracting parties, all damages which result from any covinous practice or tort within the scope of the transaction which the plaintiff's action involves may be the subject of recoupment.³⁴ Thus money paid to contractors by government officers without authority, or in violation, of law may be recovered on a counter-claim in a suit on the contract under which such payment was made.³⁵ An employer may recoup against a servant's wages not only the damages arising from his negligence and want of skill and knowledge, but for any fraudulent or tortious waste, conversion or destruction of property intrusted to him or placed in his care in the course of his employment.³⁶ If a servant lives in the family of his employer and while

man v. Miller, 5 McLean 218; Doan v. Warren, 11 Up. Can. C. P. 423; McCracken v. Hair, 2 Speer, 256; Marshall v. Hann, 17 N. J. L. 425; Eaton v. Woolly, 28 Wis. 628; Cloyd v. Steiger, 139 Ill. 41, 1 Am. Neg. Cas. 447; Hattin v. Chase, 88 Me. 237, quoting the text.

³² Northwestern Port Huron Co. v. Iverson, 22 S. D. 314, 133 Am. St. 920; McEwen v. Kerfoot, 37 Ill. 530.

³³ De Witt v. Cullings, 32 Wis. 298; Stoddard v. Treadwell, 26 Cal. 294; Goslin v. Hodson, 24 Vt. 140; Hunt v. Pierpont, 27 Conn. 301; Shipman v. State, 43 Wis. 381; Robinson v. Mace, 16 Ark. 97; Hop-ping v. Quin, 12 Wend. 517; Gleason v. Clark, 9 Cow. 57; Hill v. Featherstonehaugh, 7 Bing. 569; Cardell v. Bridge, 9 Allen. 355; Eaton v. Woolly, 28 Wis. 628; Whitesell v. Hill, 101 Iowa, 629, 2 Am. Neg. Rep. 134, 37 L.R.A. 830.

³⁴ Modern Steel S. Co. v. Van Buren County, 126 Iowa, 606.

³⁵ Barnes v. District of Columbia, 22 Ct. of Cls. 366; McElrath v.

United States, 102 U. S. 426, 440, 26 L. ed. 189, 192; Morse v. Moore, 83 Me. 473, 13 L.R.A. 224; Sapp v. Bradfield, 137 Ky. 308; Aultman Co. v. McDonough, 110 Wis. 263 (in action of replevin by nonresident mortgagee to recover the subject of the contract).

³⁶ Flat Lick S. Co. v. Kinningham, 140 Ky. 306; Shick v. Suttle, 94 Minn. 135; Slaughter v. Standard Mach. Co., 148 N. C. 471; Johnson v. White Mountain C. Ass'n, 68 N. H. 437, 73 Am. St. 610; Barretts, etc. Dyeing Est. v. Wharton, 101 N. Y. 631; Gibson v. Carlin, 13 Lea 440; Wilder v. Stanley, 49 Vt. 105; Heck v. Shener, 4 S. & R. 249, 8 Am. Dec. 700; Allaire Works v. Guion, 10 Barb. 55; Coit v. Stewart, 50 N. Y. 17; Hatchett v. Gibson, 13 Ala. 587; Pierce v. Hoffman, 4 Wis. 277; Brigham v. Hawley, 17 Ill. 38; Brady v. Price, 19 Tex. 285. See § 695.

In Ward v. Willson, 3 Mich. 1, where it was held that proof that the plaintiff, while employed as a cook on board a boat, wilfully de-

there seduces the latter's daughter, the damages resulting may be recouped in an action to recover wages.³⁷ The same remedy is available where the employee quits the service without giving the notice required by his contract;³⁸ and against a pledgee suing for the debt secured by the pledge where he has converted it.³⁹ So in an action by the pledgor against the pledgee for conversion of the pledge the latter may recoup the amount of the debt secured thereby;⁴⁰ and a broker may recoup his advances, interest and commissions in an action for the conversion of stocks held on margin, regardless of whether the action is for the tort or breach of contract.⁴¹ Where a carrier injures or loses goods, or any of them, or incurs a liability for negligent delay in transportation and delivery, the damage therefor may be recouped in an action for freight;⁴² damages for the cul-

stroyed the hose belonging to the boat should be excluded in an action to enforce the payment of his wages, the tort not appearing to have any connection with his duties as cook. *Nashville R. Co. v. Chumley*, 6 Heisk. 325. See also, *Chamberlain v. Townsend*, 72 Ore. 207.

³⁷ *Bixby v. Parsons*, 49 Conn. 483.

³⁸ *Stockwell v. Williams*, 40 Conn. 371.

³⁹ *Bulkeley v. Welch*, 31 Conn. 339; *Ainsworth v. Bowen*, 9 Wis. 348; *Harrell v. Citizens' B. Co.*, 111 Ga. 846; *Waring v. Gaskill*, 95 Ga. 731.

Where the defendant deposited a bond as collateral security for the payment of his note, and the bond was stolen after the note became due and before it was paid, the value of the bond could not be recouped in a suit on the note. To make the defense of recoupment available some stipulation in the contract sued upon must have been violated by the plaintiff. The deposit of the bond was perhaps a part of the transaction of giving the

note, but it was not the same transaction. The note was a contract independently of the pledging of the bond in itself. *Winthrop Bank v. Jackson*, 67 Me. 570, 24 Am. Rep. 56. The same rule was applied where the pledgee sold notes given him to secure the payment of the note in suit, which made no reference to the collateral. *Fletcher v. Harmon*, 78 Me. 465.

⁴⁰ *Belden v. Perkins*, 78 Ill. 449; *Jarvis v. Rogers*, 15 Mass. 389; *Stearns v. Marsh*, 4 Denio, 227, 47 Am. Dec. 248; *Fowler v. Gilman*, 13 Mete. (Mass.) 267; *Work v. Bennett*, 70 Pa. 484; *Brown v. Phillips*, 3 Bush. 656.

The right to recoup does not rest upon the principle of lien; it exists after the lien has been destroyed by a tortious act of the party in whose favor it was originally obtained. *Ludden v. Buffalo B. Co.*, 22 Ill. App. 415.

⁴¹ *Barber v. Ellingwood*, 137 App. Div. (N. Y.) 704.

⁴² *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 104 Am. St. 819, 67 L.R.A. 111 (damages caused by fail-

pable negligence of a physician who carries infection from patients having small-pox to the defendant's family, when called to prescribe for other diseases, may be recouped against his charges for services.⁴³ The remedy extends to the vendor of rags sold as clean and free from infection and fit to be manufactured into paper if in fact they are infected with small-pox and cause that disease to break out in the paper mill of the vendee, whereby some of his workmen lose their lives and others are disabled, causing a loss of business and increase of expense to the purchaser of the rags.⁴⁴ A borrower sued by the lender for conspiracy in failing to satisfy certain prior mortgages with the borrowed funds may set up that the lender had sold his note before due and that his agent converted the borrowed money before its delivery to the borrower, and that the lender is indebted to the borrower to the extent of the value of the note converted.⁴⁵

§ 181. What acts may be the basis of recoupment. If the contract has been executed on the part of the plaintiff and, therefore, the defendant's contract sued on is based upon an executed consideration, then any tortious act of the former subsequently impairing, in fact, that consideration has been deemed an independent tort, and not a part of the transaction, or not connected with the subject of the action for breach of the defendant's undertaking.⁴⁶ Thus, it has been held to be no defense to an action on a bill of exchange given for the price

ure to furnish telephonic communication); *Empire T. Co. v. Boggiano*, 52 Mo. 294; *Ewart v. Kerr*, 2 McMull. 141; *Sears v. Wingate*, 3 Allen, 103; *Boggs v. Martin*, 13 B. Mon. 239; *The Nathaniel Hooper*, 3 Sumn. 542; *Jordan v. Warren Ins. Co.*, 1 Story, 352; *Bradstreet v. Heron*, 1 Abb. Adm. 209; *Fitchburg, etc. Co. v. Hanna*, 6 Gray, 539, 66 Am. Dec. 427; *Davis v. Pattison*, 24 N. Y. 317; *Edwards v. Todd*, 2 Ill. 463; *Leech v. Baldwin*, 5 Watts, 446; *Humphrey v. Reed*, 6 Whart. 435; *Hinsdell v. Weed*, 5 Denio, 172. But see *Bornman v. Tooke*, 1 Camp.

377, and *Sheels v. Davies*, 4 Camp. 119.

⁴³ *Piper v. Menifee*, 12 B. Mon. 465, 54 Am. Dec. 547.

⁴⁴ *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810.

⁴⁵ *Bowman v. Lickey*, 86 Mo. App. 47.

⁴⁶ See *First Nat. Bank v. Fowler*, 54 Wash. 65.

In an action for wages the employer cannot recoup damages for an injury done by the plaintiff beyond the scope of his employment. *Nashville R. Co. v. Chumley*, 6 Heisk. 327.

of goods sold that two months after their delivery to the vendee the vendor forcibly retook possession.⁴⁷ But where a note was given for a judgment assigned, proof that the assignor afterwards collected part of the judgment was held a defense *pro tanto* to the note.⁴⁸ In an action for the price of specific articles bargained and sold, but not delivered, the defendant may set up by way of recoupment any injury to such articles occasioned by the fault or negligence of the vendor subsequent to the sale and prior to the time of delivery;⁴⁹ for the vendor's duty was to keep the articles sold with ordinary care, and he is responsible for the want of such care or of good faith.⁵⁰ So a vendee, when sued for the price of land sold, may recoup for the vendor's tort which diminishes the value of the property purchased,⁵¹ or which consists of carrying away crops or fixtures before the sale is consummated by deed and delivery of possession.⁵² Where suit was brought on a note given for wood the maker recouped against the note the amount of his loss because the plaintiff refused to permit him to convert the wood into charcoal on the land on which it was when it was sold; it was not necessary that the wood should be returned, it having been removed and coaled elsewhere.⁵³ A tenant in common, in control of the premises held in common for the purpose of renting them, when sued by his co-tenant for his share of the rents may counter-claim the damages sustained by the plaintiff's

Damages for maliciously suing out an attachment are not to be recouped in the same suit because the wrong was in no way connected with the consideration of the contract sued on. *Nolle v. Thompson*, 3 Metc. (Ky.) 121. Nor for slander in an action by the indorsee before maturity of a note. *Lyon v. Bryant*, 54 Ill. App. 331.

⁴⁷ *Stephens v. Wilkinson*, 2 B. & Ad. 320; *Huelet v. Reynolds*, 1 Abb. Pr. (N. S.) 27; *Slayback v. Jones*, 9 Ind. 472. See *Martin v. Brown*, 75 Ala. 442; *Gerding v. Adams*, 65 Ga. 79.

⁴⁸ *Harper v. Columbus Factory*, 35 Ala. 127.

⁴⁹ *Barrow v. Window*, 71 Ill. 214.

⁵⁰ *McCandlish v. Newman*, 25 Pa. 460; *Chinery v. Viall*, 5 H. & N. 288.

⁵¹ *Streeter v. Streeter*, 43 Ill. 155; *Sanderlin v. Willis*, 94 Ga. 171.

⁵² *Gordon v. Bruner*, 49 Mo. 570; *Grand Lodge v. Knox*, 20 Mo. 433; *Patterson v. Hulings*, 10 Pa. 506; *Owens v. Rector*, 44 Mo. 389. But see *Slayback v. Jones*, 9 Ind. 472, 68 Am. Dec. 650.

⁵³ *Harman v. Bannon*, 71 Md. 429.

wrongful acts in inducing lessees to leave the premises before their leases expired.⁵⁴

Where a contract for particular works has been entered into, or for service, or for the sale and delivery of property, and there has been a part performance for which an action in general *assumpsit* is maintainable, the special contract is a part of the transaction in question. Although the plaintiff does not bring his action upon it, it is connected with the subject thereof.⁵⁵ Though the performance of the plaintiff's part of the contract may at first have been a condition, yet the defendant may waive the right to forfeit the contract for nonperformance and retain his right to damages. These he may recoup in an action on a *quantum meruit* or a *quantum valebat*, or in an action upon the contract.⁵⁶ In such cases if the defendant thinks proper to present his cross-claim by way of recoupment the court will consider the whole contract under which the plaintiff's demand arose, and direct a deduction, from what he would otherwise be entitled to recover, of all damages sustained by the defendant in consequence of the plaintiff's failure to fulfill any or all of the stipulations on his side,⁵⁷

⁵⁴ Dale v. Hall, 64 Ark. 221.

⁵⁵ Twitty v. McGuire, 3 Murphy, 501; Grannis v. Linton, 30 Ga. 330; Steamboat Wellsville v. Geisse, 3 Ohio St. 333; Bishop v. Price, 24 Wis. 480; Hayward v. Leonard, 7 Pick. 181; Bowker v. Hoyt, 18 Pick. 555; Barber v. Rose, 5 Hill, 76; Winslow v. Robinson, 173 Ill. App. 84; Burton v. Gee O. Co., id. 548.

⁵⁶ Woodrow v. Hawving, 105 Ala. 240; Madison v. Danville M. Co., 64 Mo. App. 564; Wiley v. Athol, 150 Mass. 426, 6 L.R.A. 342; Reynolds v. Bell, 84 Ala. 496; Bell v. Reynolds, 78 Ala. 511, 56 Am. Rep. 52; Schweickhart v. Stuewe, 71 Wis. 1, 5 Am. St. 190; Fabbriotti v. Launitz, 3 Sandf. 743; Vanderbilt v. Eagle I. Works, 25 Wend. 665; Van Buren v. Digges, 11 How. 461, 13 L. ed. 771; Polhemus v. Hei-

man, 45 Cal. 573; Wheelock v. Pacific, P. G. Co., 51 Cal. 223; Upton v. Julian, 7 Ohio St. 95; Harris v. Rathbun, 2 Keyes, 312; Hayward v. Leonard, 7 Pick. 181; Allen v. McKibben, 5 Mich. 449; McKinney v. Springer, 3 Ind. 59; Bostrom v. Becker, 172 Ill. App. 410; Seretto v. Rockland, etc. R., 101 Me. 140. See Medart P. Co. v. Dubuque T. & R. M. Co., 121 Iowa, 244.

⁵⁷ Id.; Lomax v. Bailey, 7 Blackf. 599; Hollinsead v. Mactier, 13 Wend. 275; Adams v. Hill, 16 Me. 215; Koon v. Greenman, 7 Wend. 121; Ladue v. Seymour, 24 id. 60; Brewer v. Tyringham, 12 Pick. 547; Coe v. Smith, 4 Ind. 79; Major v. McLester, id. 591; Mines v. Vanhorn, 8 Blackf. 198; Fenton v. Clark, 11 Vt. 557; Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713;

and the computation will be brought down to the time of the trial.⁵⁸

On the sale of a quantity of standing wood the vendor agreed to indemnify the vendees against any damage that might happen to the wood in consequence of the burning of an adjoining fallow. The latter gave their notes for the price; and, afterwards, the fallow being burned over, the wood in question was destroyed by the fire; in an action by the vendor upon the note, the vendees reconped their damages arising from the loss of the wood.⁵⁹ The plaintiff in one agreement stipulated to deliver forthwith a quantity of dressed pork to the defendant for a cer-

Seaver v. Morse, 20 Vt. 620; Epperly v. Bailey, 3 Ind. 72; Goodwin v. Morse, 9 Mete. (Mass.) 278; Wilkinson v. Ferree, 24 Pa. 190; Higgins v. Lee, 16 Ill. 495; Van Deusen v. Blum, 18 Pick. 229, 29 Am. Dec. 582; Lee v. Ashbrook, 14 Mo. 378, 55 Am. Dec. 110; White v. Oliver, 36 Me. 92; Merrow v. Huntoon, 25 Vt. 9; Blood v. Enos, 12 Vt. 625, 36 Am. Dec. 363; Preston v. Finney, 2 W. & S. 53; Ligget v. Smith, 3 Watts, 331, 27 Am. Dec. 358; Danville B. Co. v. Pomroy, 15 Pa. 151; Allen v. Robinson, 2 Barb. 341; Rogers v. Humphreys, 39 Me. 382; Philadelphia Veneer & Lumber Co. v. Garrison, 160 Ky. 329; American B. Co. v. Camden R. I. Co., 135 Fed. 323, 68 C. C. A. 131; Hall v. Parsons, 105 Minn. 96.

⁵⁸ Holser v. Skae, 169 Mich. 484.

⁵⁹ Batterman v. Pierce, 3 Hill, 171. This was an early and leading case on the subject of reconpment, and Bronson, J., comprehensively stated the doctrine underlying and governing it. He said: "When the demands of both parties spring out of the same contract or transaction, the defendant may reconp, although the damages on both sides are unliquidated. . . . It was formerly supposed that there could only

be a reconpment where some fraud was imputable to the plaintiff in relation to the contract on which the action is founded: but it is now well settled that the doctrine is also applicable when the defendant imputes no fraud and only complains that there has been a breach of the contract on the part of the plaintiff. For the purpose of avoiding a circuity or the multiplication of actions, and doing complete justice to both parties, they are allowed and compelled, if the defendant so elect, to adjust all their claims growing out of the same contract in one action. It was well remarked by Chancellor Walworth, in Reab v. McAlister, 8 Wend. 109, that 'there is a natural equity, especially as to claims arising out of the same transaction, that one claim should compensate the other, and that the balance only should be recovered.' The defendant has the election whether he will set up his claim in answer to the plaintiff's demand, or resort to a cross-action: and whatever may be the amount of his damages, he can only set them up by way of abatement, either in whole or in part of the plaintiff's demand. He cannot, as in case of set-off, go beyond that, and have a

tain price, and also to sell him, upon their arrival, at a different price, a number of live hogs then on the way and expected in a few days, no stipulation being made as to the time of payment for either. The plaintiff recovered the sum stipulated for the dressed pork, notwithstanding that, after it became due, a breach of the stipulation in respect to the live hogs had accrued, but subject to recoupment of the defendant's damages for such breach.⁶⁰

balance certified in his favor. It is no objection to the defense that the plaintiff is not suing upon the original contract of sale, but upon a note given for the purchase-money. The promise of the defendants to pay the purchase-money has undergone the slight modification of being put into the form of a written obligation, and on that the action is founded; but still the plaintiff is in effect seeking to enforce the original contract of sale, and the question must be settled in the same manner as though the action was, in form, upon that contract. But the objection still remains, and it has been strenuously urged against the defense, that the damages claimed by the defendants do not spring out of the contract of sale, but arise under the collateral agreement of the plaintiff to indemnify against fire. It is undoubtedly true that there can be no recoupment by setting up the breach of an independent contract on the part of the plaintiff. But that is not this case. Here there were mutual stipulations between the parties, all made at the same time, and relating to the same subject-matter; and there can be no difference, in principle, whether the whole transaction is embodied in one written instrument setting forth the cross-obligations of both parties, or whether it takes the form of a separate and distinct undertaking by each party. The plain-

tiff proposed to sell his wood at auction, and as an inducement to obtain a better price he stipulated with the bidders that they should have two winters and one summer to get away the wood, and that in the meantime he would insure them against the consequence of setting fire to his adjoining fallow grounds. Upon these terms the purchase was made by the defendant. . . . The nature of the transaction cannot be changed by putting the several stipulations of the parties into distinct written contracts; nor can it make any substantial difference that the undertaking of one party has been reduced to writing, while the engagement of the other party remains in parol. In substance it is still the case of mutual stipulations between the same parties, made at the same time and relating to the same subject-matter. The forms which the parties may have adopted for the purpose of manifesting their agreement cannot affect their rights so far as this question is concerned. Whether all the mutual undertakings have been embodied in one written instrument, or in several, or whether some have been put upon paper while others rest in parol, the reason still remains for allowing the claims of both parties growing out of the same transaction to be adjusted in one action."

⁶⁰ Tipton v. Feitner, 20 N. Y.

In an action to recover damages for the conversion of a note made by the plaintiff and also of certain collaterals, the defendant may plead a counter-claim setting up the note and its non-payment at maturity and asking to recover the sum due with interest, although, after the note became due, the plaintiff had tendered to the defendant the sum due on it, and demanded the note with the collaterals, which the defendant refused to surrender. The court agreed that it is not enough that the claims set forth in the complaint and alleged in the counter-claim had a common origin and were coincident in the time of their creation. They must be so related that the counter-claim properly tends to diminish or defeat the plaintiff's recovery. But the case was such. The plaintiff attempted to meet this by saying that upon his tender of the amount due upon the note the defendant's lien upon the collaterals was discharged and his right to the latter became absolute. This, however, did not solve the question. We must still go back to the transaction set forth in the complaint. What is that transaction? The plaintiff limits it to the technical conversion; that is, to the legal formula of his action. But that is not the entire transaction set forth in the complaint as the foundation of the plaintiff's claim. It is what that transaction comes to when reduced to the concrete charge. But the transaction itself—that is the entire transaction—consists of all the facts averred in the complaint; the making and delivery of the note; the giving of the collaterals, the tender of the amount due and the refusal thereupon to surrender the securities. The note is a part of the transaction thus set forth. It is interwoven with it. The facts with regard to it are in part the foundation of the plaintiff's claim. If the plaintiff is entitled to the value of his securities, the defendant is equally entitled to the amount of his note. It is entirely just that the plaintiff's claim should be diminished by the amount of the latter debt.⁶¹ On the other hand, the defendant in an action for the value of goods sold and for services rendered cannot recoup damages resulting from an abuse of the writ of attach-

423; *Prairie F. Co. v. Taylor*, 69 Ill. 440, 18 Am. Dec. 621; *Cherry v. Sutton*, 30 Ga. 875.

Suth. Dam. Vol. I.—35.

⁶¹ *Empire D. F. Co. v. Chatham Nat. Bank*, 30 App. Div. (N. Y.) 476.

ment issued by the plaintiff, there being no connection between these and the subject of the action.⁶² The same is true of a claim for storage asserted in an action brought for the conversion of property stored.⁶³ Where accounts containing usurious interest have been closed and settled by note and an action is brought on the note the defendant cannot counter-claim for double the usury.⁶⁴ In an action for the unlawful seizure of exempt property the indebtedness of the plaintiff to the defendant cannot be offset against the damages.⁶⁵

These are instances of cross-claims arising from the same contract or transaction. Stipulations are parts of the same contract for the purpose of this defense though they relate to distinct subjects, and a different time of performance, and a distinct and severable compensation is provided for each; so any implied or express warranty or guaranty which forms part of the consideration of the defendant's undertaking, which is the foundation of the plaintiff's action, is part of the same contract; and all damages to which the defendant is entitled thereon may be recouped in such action. Many examples have been given.⁶⁶ In England the damages which may be recouped are limited to those which directly result from the character of the property or the work done; consequential damages must be recovered in a separate action.⁶⁷ "But in this country the courts, in order to avoid circuity of action, have gone further and have allowed the defendant to recoup damages suffered by him from any fraud, breach of warranty or negligence of the plaintiff growing out of or relating to the transaction in question."⁶⁸

⁶² Jones v. Swank, 54 Minn. 259.

⁶³ Schaeffer v. Empire L. Co., 28 App. Div. (N. Y.) 469. See Bernheimer v. Hartmayer, 50 App. Div. (N. Y.) 316.

⁶⁴ Witte v. Weinberg, 37 S. C. 579.

⁶⁵ Craddock v. Williams, 54 Tex. 578; Cone v. Lewis, 64 Tex. 331, 53 Am. Rep. 767; Pate v. Vandeman, — Tex. Civ. App. —, 141 S. W. 317.

⁶⁶ In an action upon one of several notes given for a chattel, a

breach of warranty being alleged, the defendant may interpose a counter-claim for his entire damage. Geiser T. Mach. Co. v. Farmer, 27 Minn. 428; Minneapolis H. Works v. Bonnallie, 29 Minn. 373. *Contra*, Aultman & T. Co. v. Hetherington, 42 Wis. 622; Same v. Jett, id. 488.

⁶⁷ Mondel v. Steel, 8 M. & W. 858; Davis v. Hedges, L. R. 6 Q. B. 637.

⁶⁸ Carolina P. C. Co. v. Alabama C. Co., 162 Ala. 380; McConnell v.

§ 182. **Cross-claims between landlord and tenant.** As between landlord and tenant they have each the right to recoup damages in the other's action brought on the covenants in the lease or those which are implied from the relation. Although there be a written lease or even an indenture containing express stipulations and covenants if others are implied, the latter belong to and are parts of the same contract.⁶⁹ The landlord, impliedly, in the absence of an express agreement defining his

Stubbs, 124 Ga. 1038; *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810; *Harrington v. Stratton*, 22 Pick. 510; *Withers v. Greene*, 9 How. 213, 13 L. ed. 109; *Van Buren v. Digges*, 11 How. 61, 13 L. ed. 771; *Winder v. Caldwell*, 14 How. 434, 14 L. ed. 487; *Lyon v. Bertram*, 20 How. 149, 15 L. ed. 847; *Railroad Co. v. Smith*, 21 Wall. 255; *Marsh v. McPherson*, 105 U. S. 709, 26 L. ed. 1139; *Maywood v. Logan*, stated in note to § 182.

⁶⁹ *Harmony Co. v. Rauch*, 62 Ill. App. 97; *Culver v. Hill*, 68 Ala. 66, 44 Am. Rep. 134; *Vandegrift v. Abbott*, 75 Ala. 487; *Jones v. Horn*, 51 Ark. 19, 14 Am. St. 17; *Gocio v. Day*, 51 Ark. 46; *Lewis v. Chisholm*, 68 Ga. 46; *Stewart v. Lanier House Co.*, 75 Ga. 582, 598; *Howdyshell v. Gary*, 21 Ill. App. 288; *Burroughs v. Claneey*, 53 Ill. 30; *Dodds v. Toner*, 3 Ind. 427; *Blair v. Claxton*, 18 N. Y. 529; *Caldwell v. Pennington*, 3 Gratt. 91; *Vining v. Leeman*, 45 Ill. 248; *Hobein v. Drewell*, 20 Mo. 450; *Lynch v. Baldwin*, 69 Ill. 210; *Whitbeck v. Skinner*, 7 Ill. 53; *Maek v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506; *Mayor v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538; *Lindley v. Miller*, 67 Ill. 244; *Westlake v. DeGraw*, 25 Wend. 669; *Lunn v. Gage*, 37 Ill. 19; *Guthman v. Castleberry*, 49 Ga. 272; *Tone v. Brace*, 8 Paige, 597; *Graves v. Berdan*, 26 N. Y. 498; *Vernam v. Smith*,

15 N. Y. 328; *Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 N. Y. 561; *Eldred v. Leahy*, 31 Wis. 546; *Morgan v. Smith*, 5 Hun, 220; *Commonwealth v. Todd*, 9 Bush, 708; *Holbrook v. Young*, 108 Mass. 83. See generally, § 876.

If the landlord does not furnish the agreed quantity of land the tenant may recoup his damages in an action brought to recover advances made. *Horton v. Miller*, 84 Ala. 537.

If the tenant makes special inquiry as to the condition of water on the premises he leases, and it is in fact unfit for use, and the landlord, knowing it, fails to remove the cause, the tenant is justified in regarding the condition of the water as an eviction from the premises, and in an action to recover rent may recoup the expenses of sickness, including physician's fees, resulting from the use of such water. *Maywood v. Logan*, 78 Mich. 135, 18 Am. St. 431.

In a statutory contest between landlord and tenant as to the amount of rent due the former may meet violation of the lease with violation, damages with damages, have a full reckoning, and uphold his warrant to the extent of the sum due him for rent after a settlement of the damage account. *Johnston v. Patterson*, 91 Ga. 531.

obligation in that regard, undertakes for the quiet enjoyment of the premises by his tenant as against any hostile assertion of a paramount title, and that, so far as he is concerned, he will do no act to interrupt the tenant's free and peaceable possession during the term granted.⁷⁰ For any violation or breach of this obligation the tenant may recoup his damages in any action by the landlord against him based on his liabilities as a tenant.⁷¹ But for mere tortious acts of interference by the landlord with the demised premises, not done in the assertion of a right nor amounting to an eviction, damages by way of recoupment have been denied,⁷² as for the malicious prosecution of suits for unlawful detainer because they do not arise out of the contract and are not connected with the subject-matter of the suit.⁷³ Where a cross-claim exists in favor of the tenant he may avail himself of it not only in an action against him by the landlord on the contract, but also in replevin of property distrained for rent;⁷⁴

⁷⁰ Keating v. Springer, 146 Ill. 481, 37 Am. St. 175, 22 L.R.A. 544; Mayor v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538; Dexter v. Manley, 4 Cush. 14; Bradley v. Cartwright, 36 L. J. (C. P.) 218; Maule v. Ashmead, 20 Pa. 482; Hart v. Smith, 2 A. K. Marsh. 301; Young v. Hargrave, 7 Ohio, 394.

⁷¹ Weaver v. Roberson, 134 Ga. 149; Smith v. Green, 128 Ga. 90; McAlester v. Landers, 70 Cal. 79; Kelsey v. Ward, 38 N. Y. 83; Mayor v. Mabie, *supra*; Wade v. Halligan, 16 Ill. 507; Lynch v. Baldwin, 69 Ill. 210; Rogers v. Ostram, 35 Barb. 523; Chatterton v. Fox, 5 Duer, 64.

The fact that the lessee has paid the rent for the greater part of the term will not deprive him of the right to counter-claim his damages for the entire term. McAlester v. Landers, *supra*.

⁷² Smith v. Green, *supra*; Edgerton v. Page, 20 N. Y. 281; Hulme v. Brown, 3 Heisk. 679; Bartlett v. Farrington, 120 Mass. 284; Campbell v. Shields, 11 How. Pr. 565;

Drake v. Cockroft, 10 id. 377; Walker v. Shoemaker, 4 Hun, 579; Lounsbery v. Snyder, 31 N. Y. 514; Ogilvie v. Hull, 5 Hill, 52; Vatel v. Herner, 1 Hilt. 149; Cram v. Dresser, 2 Sandf. 120; Crowe v. Kell, 7 Ind. App. 683. But see Kameriek v. Castleman, 23 Mo. App. 481.

⁷³ Dietrich v. Ely, 11 C. C. A. 266, 63 Fed. 413.

⁷⁴ Nichols v. Dusenbury, 2 N. Y. 283; Fowler v. Payne, 49 Miss. 32; Breese v. McCann, 52 Vt. 498; Fairman v. Fluck, 5 Watts, 516; Guthman v. Castleberry, 49 Ga. 272; Phillips v. Monges, 4 Whart. 225; Hatfield v. Fullerton, 24 Ill. 278; Lindley v. Miller, 67 Ill. 244.

Where the board of supervisors allowed a claim for repairing a bridge, and issued a warrant therefor, and afterwards the claimant committed a breach by failing to keep it in repair pursuant to his bond, and he and his sureties became insolvent, held, that the board, in an action of *mandamus* to compel payment of the warrant, could

but not in a summary proceeding for possession based on the determination of the lease by forfeiture.⁷⁵ In an action for rent the defendant may show that the plaintiff has failed to build a fence or make certain repairs or other improvements as agreed.⁷⁶

§ 183. Cause of action, connection between and cross-claim.

Where the basis of the transaction between the parties is a contract and its breach amounts to a trespass or entitles the injured party to an action for negligence or fraud, or to any action *ex delicto*, he is not deprived of his right to set off such a claim, nor the other party to set off a claim arising upon the contract against such a cause of action. In all such cases, there being a contract in fact, the party in default is not allowed to deprive the injured party of the right to take advantage of such default by way of recoupment or counterclaim by alleging that the contract was tortiously violated.⁷⁷ Where there was an exchange of chat-

reoup the breach, occurring before notice of assignment, against the assignee of the warrant. *Jefferson County v. Arrghi*, 51 Miss. 668.

⁷⁵ *McSloy v. Ryan*, 27 Mich. 110; *D'Armond v. Pullen*, 13 La. Ann. 137; *Johnson v. Hoffman*, 53 Mo. 504. See § 876.

⁷⁶ *Miller v. Gaither*, 3 Bush, 152; *Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 N. Y. 561; *Guthman v. Castleberry*, 49 Ga. 272; *Fairman v. Fluck*, 5 Watts, 516; *Lunn v. Gage*, 37 Ill. 19; *Kimball v. Doggett*, 62 Ill. App. 528; *Baker v. Fawcett*, 69 id. 300.

The tenant may rely upon his landlord to repair according to his agreement, and is not barred of the right to recoup because he might have made the repairs at small cost. *Culver v. Hill*, 68 Ala. 66, 44 Am. Rep. 134.

⁷⁷ *Davidson v. Wheeler*, 17 R. I. 433; *Cole v. Colburn*, 61 N. H. 499; *Morrison v. Lovejoy*, 6 Minn. 319; *Hatchett v. Gibson*, 13 Ala. 587; *Williams v. Schmidt*, 54 Ill. 205; *Chamboret v. Cagney*, 2 Sweeny,

378, 41 How. Pr. 125; *Starbird v. Barrons*, 43 N. Y. 200; *Wadley v. Davis*, 63 Barb. 500; *Griffin v. Moore*, 52 Ind. 295; *McArthur v. Green Bay, etc. Co.*, 34 Wis. 139; *Bitting v. Thaxton*, 72 N. C. 541; *Price v. Lewis*, 17 Pa. St. 51, 55 Am. Dec. 536; *Scott v. Kenton*, 81 Ill. 96; *Walsh v. City of Chicago*, 185 Ill. App. 521. See *Schemert v. Kaehler*, 23 Wis. 523; *Sample v. Farson*, 174 Ill. App. 334.

In all cases in which the parties have entered into an express contract and in which a tort has been suffered, which the sufferer may waive and sue in *assumpsit*, a counter-claim may be made under the contract. *Barnes v. McMullins*, 78 Mo. 260. And where the actor elects to sue in tort for a wrong originating in or growing out of a contract which he pleads as an inducement, the defendant may counter-claim for damage sustained by the breach of the contract. *Kamerick v. Castleman*, 23 Mo. App. 481.

The rule in Pennsylvania is that, independently of statute, any mat-

tels the court said: Here are mutual and adverse claims for damages growing out of one transaction. Each party sold to

ter either of contract or of tort, immediately connected with the plaintiff's cause of action, may be set up by way of defense to the action and in abatement of the plaintiff's damages only; any matter of contract may be set up by way of counter-claim under the statute, not only to defeat the action but for the purpose of establishing a liability of the plaintiff to the defendant in excess of the latter's demand. No mere matter of tort can be availed of by the defendant under the statute. *Dushane v. Benedict*, 120 U. S. 630, 644, 30 L. ed. 810, 813, citing many Pennsylvania cases.

In *Conner v. Winton*, 7 Ind. 523, the court defined a counter-claim to be that which might have arisen out of, or could have had some connection with, the original transaction in the view of the parties, and which at the time the contract was made they could have intended might in some event give one a claim against the other for compliance or noncompliance with its provisions.

In *Slayback v. Jones*, 9 Ind. 472, the court, referring to recoupment and counter-claim, said: "They relate more especially to damages for breach of contract which may be recouped in a suit for what may have been done or rendered in part performance of a contract. In such cases the cause of action and defense are part of the same transaction."

In *Lovejoy v. Robinson*, 8 Ind. 399; *Terre Haute & I. R. Co. v. Pierce*, 95 Ind. 496, 15 Am. Neg. Cas. 734, the court say that trespasses cannot be made to compensate each other.

Independent torts cannot be coun-

ter-claimed. *Allen v. Coates*, 29 Minn. 46.

In *Barhyte v. Hughes*, 33 Barb. 320, and *Loewenberg v. Rosenthal*, 18 Ore. 178, the word "transaction" was construed to refer to business dealings, and did not include torts. *Macdougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98.

A counter-claim founded on contract cannot be interposed in an action based on fraud. *People v. Dennison*, 84 N. Y. 272; *Davis v. Frederick*, 6 Mont. 300; *Humbert v. Brisbane*, 25 S. C. 506; *Copeland v. Young*, 21 id. 275.

Where there is no contract relation between the parties touching the subject in question mutual torts committed at the same time or in such succession or sequence as would make them parts of the *res gesta* cannot be made the basis of recoupment or counter-claim. In an action for assault and battery the defendant cannot counter-claim or recoup for a battery committed at the same affray by the plaintiff on the defendant (*Schnaderbeck v. Worth*, 8 Abb. Pr. 37); nor can the defendant in an action for slander counter-claim for slanderous words uttered by the plaintiff. *Kemp v. Amacker*, 13 La. 65.

In *Askins v. Hearn*, 3 Abb. Pr. 184, Justice Emott thought a counter-claim could not be sustained upon the following facts: The plaintiff sued for damages for conversion of a ring. The defendant alleged an exchange of rings, each to be kept until the other should be returned, and averred a tender of the one and demand of the other, and asked judgment for his ring. Such a counter-claim would now be al-

the other a chattel and took another chattel in payment. For misrepresentations of the character alleged each party may

lowed without hesitation. Hoffman, J., said of this case, that "a distinction may be suggested, that where the ground of each claim is really a contract, although the form of action under the old system would be for a wrong, then, when the transaction that gives rise to each is the same, the code is broad enough to include a counter-claim. The exchange alleged of the rings was in fact a mutual agreement." *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 377. In this case Woodruff, J., said: "The great question in controversy is, in an action in the nature of trover by a plaintiff who has indorsed notes or bills of exchange, brought to recover the value thereof from a defendant in whose possession they are, and who claims title thereto through the plaintiff's indorsement, can the defendant set up title in himself, demand of payment, protest and notice, and ask by way of counter-claim a judgment against the plaintiff as indorser?" It was decided in the affirmative. After quoting subdivisions 1 and 2 of section 150 of the New York code, the judge said: "This division of the section shows that there may be a counter-claim when the *action itself does not arise* on contract; for the second clause is expressly confined to actions upon contract and allows counter-claims in such cases of any other cause of action also arising on contract; and this may embrace probably all cases heretofore denominated 'set-off,' legal or equitable, and any other legal or equitable demand, liquidated or unliquidated, whether within the proper definition of set-off or not if it arise on contract. *Gleason v.*

Moen, 2 Duer, 639. The first subdivision would therefore be unmeaning as a separate definition if it neither contemplated cases in which the action was not brought on the contract itself in the sense in which these words are ordinarily used, nor counter-claims which did not themselves arise on contract. The first subdivision by its terms assumes that the plaintiff's complaint may set forth, as the foundation of the action, a contract or a transaction. The legislature in using both words must be assumed to have designed that each should have a meaning; and in our judgment this construction should be according to the natural and ordinary signification of the terms. In this sense every contract may be said to be a transaction, but every transaction is not a contract. Again, the second subdivision having provided for all counter-claims arising on contract—in all actions arising on contract—no cases can be supposed to which the first subdivision can be applied unless it be one of three classes, viz.: 1st. In actions in which a contract is stated as the plaintiff's claim—counter-claims which arise out of the same contract; or, 2d. In actions in which some transaction, not being a contract, is set forth as the foundation of the plaintiff's claim—counter-claims which arise out of the same transaction; or, 3d. In actions in which either a contract, or a transaction which is not a contract, is set forth as the foundation of the plaintiff's claim—counter-claims which neither arise out of the same contract, nor out of the same transaction, but which

generally sue in contract or tort. If the plaintiff had declared in contract, alleging that the defendant agreed that his horse was

are connected with the subject of the action."

In *Glen & H. M. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278, an action was brought to restrain the defendant from using the plaintiff's trade-mark; the defendant claimed it was his, and asked damages for plaintiff's use of it by way of counter-claim, and it was held to be proper.

A claim on the part of the defendant for the price and value of the identical goods which are the subject of the action is a cause of action arising out of the same transaction alleged as the foundation of the plaintiff's claim, or is at least connected with the subject of the action. *Thompson v. Kessel*, 30 N. Y. 383; *Brown v. Buckingham*, 11 Abb. Pr. 387.

The words "subject of the action" refer to the origin and ground of the plaintiff's right to recover rather than to the thing itself in controversy. *Collier v. Erwin*, 3 Mont. 142.

In an action for assault and battery the injury which provoked the defendant to commit the wrong is not connected with the subject of the action. *Ward v. Blackwood*, 48 Ark. 396.

The debauchery of the defendant's daughter is not ground for a counter-claim in an action brought by one guilty thereof to recover money obtained by duress. *Heckman v. Swartz*, 55 Wis. 173.

In an action against a judgment creditor for the unlawful seizure of exempt property the defendant cannot set up the judgment under which the seizure was made as a counter-

claim. *Elder v. Frevert*, 18 Nev. 446.

The "subject of the action" is the facts constituting the plaintiff's cause of action. The mere fact that the defendant sets up acts on the part of the plaintiff which are prejudicial to his rights, and alleges that these acts on his part give the reason the defendant conducted himself as complained of by the plaintiff, does not show such a connection as is necessary to constitute such acts a counter-claim. *Mulberger v. Koenig*, 62 Wis. 558. The word "connected" may have a narrow or broad signification, according to the facts of the case.

"The counter-claim must have such relation to and connection with the subject of the action that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and the counter-claim should be settled in one action by one litigation; and that the claim of the one should be offset against or applied upon the claim of the other." This rule includes a case where a second mortgagee in possession of land committed waste for the alleged purpose of depriving the defendant, the first mortgagee, of his security. In an action for the conversion of wood cut by the second mortgagee the damage sustained by the prior incumbrancer was connected with the subject of the action. *Carpenter v. Manhattan L. Ins. Co.*, 93 N. Y. 552. See *Thomson v. Sanders*, 118 id. 252.

In an equitable action to cancel an insurance policy a counter-claim alleging a cause of action on the policy for the loss of property in-

sound as far as he knew, knowing him to be unsound, it cannot be doubted that the defendant may recoup his damages. The fact that the defendant sues in tort does not complicate the matter. It is not more difficult, or less desirable, in such an action to have the whole litigation adjusted in a single suit.⁷⁸

If the buyer of goods brings an action against the seller for not completing the contract the latter may counter-claim or recoup for the goods already delivered.⁷⁹ And so, in an action by the vendor to recover the price of goods sold and only delivered in part the purchaser may recoup any damages sustained by him by reason of the failure or refusal to deliver the residue;⁸⁰ and in replevin for goods sold with reservation of title until payment, for failure to deliver at the time fixed;⁸¹ and generally for failure to deliver as agreed although the contract is severable and part delivery has been accepted;⁸² and in an action by the seller for the price the buyer may recoup for any deficiency in quantity, delay in delivery or breach of war-

sured is connected with the subject of the action. *Revere F. Ins. Co. v. Chamberlin*, 56 Iowa, 508.

The right to recoup is not affected because the party asserting it was in default in paying the claim made the basis of the action. *Roberts M. Pub. Co. v. Wise*, 140 Ill. App. 443.

The penalty imposed upon a national bank for taking an unlawful rate of interest cannot be counter-claimed in an action upon the instrument discounted by it. *Baruet v. Nat. Bank*, 98 U. S. 555. See, generally, *Keegan v. Kinnare*, 123 Ill. 280; *Evans v. Hughey*, 76 Ill. 115; *Nolle v. Thompson*, 3 Mete. (Ky.) 121; *Kingman v. Draper*, 14 Ill. App. 577; *Cow Run Co. v. Lehmer*, 41 Ohio St. 384; *Tarwater v. Hannibal, etc. R. Co.*, 42 Mo. 193; *McArthur v. Green Bay, etc. Co.*, 34 Wis. 139; *Walsh v. Hall*, 66 N. C. 233; *Walker v. Johnson*, 28 Minn. 147; *Poston v. Rose*, 87 N. C. 279; *Whitlock v. Ledford*, 82 Ky.

390; *Cornelius v. Kessel*, 58 Wis. 237.

⁷⁸ *Carey v. Guillow*, 105 Mass. 18, 7 Am. Rep. 494.

⁷⁹ *Leavenworth v. Packer*, 52 Barb. 132.

⁸⁰ *Harrolson v. Stein*, 50 Ala. 347; *Platt v. Brand*, 26 Mich. 173; *Bowker v. Hoyt*, 18 Pick. 555; *California C. Co. v. Pacific S. M. Works*, 144 Fed. 886; *Wilson v. Alcatraz A. Co.*, 142 Cal. 182.

⁸¹ *Ames I. Works v. Rea*, 56 Ark. 450; *Gilbert Co. v. Husted*, 50 Wash. 61; *Burt v. Garden City S. Co.*, 237 Ill. 473; *Mark v. Williams C. Co.*, 204 Mo. 242.

⁸² *Gomer v. McPhee*, 2 Colo. App. 287; *Raleigh L. Co. v. Wilson*, 69 W. Va. 598; *Booth v. Tyson*, 15 Vt. 515; *Evans v. Chicago, etc. R. Co.*, 26 Ill. 189.

Separate sales constitute different transactions. *Seymour v. Davis*, 2 Sandf. 239. And so of separate deliveries settled for as made. *Deming v. Kemp*, 4 id. 147.

ranty.⁸³ So in an action on a note given for the good will of a business the defendant may recoup his damages resulting from the plaintiff's resumption of that business;⁸⁴ and in an action on an agreement not to set up business in a certain place the defendant may recoup the amount agreed to be paid for the good will.⁸⁵ A contract which gives the sole right to sell an article in a specified place is not so disconnected with a note executed at the same time for the purchase-money of the article to be sold as that the damages resulting from the breach of the former cannot be recouped in a suit on the latter.⁸⁶

§ 184. **Recoupment between vendor and purchaser.** On the same principles recoupment is reciprocally available between vendor and purchaser of real estate as well as of personal property. Recoupment may be had against the vendor for false representations affecting the identity and value of the land.⁸⁷ The purchaser's right to do so is not affected by the fact that the sale included both personal and real property, and that the misrepresentation related to only one class, if the transaction and the consideration were an entirety.⁸⁸ If tenants in common make partition to each other by quitclaim deeds the law implies a warranty that each will make good to the other any loss resulting from a superior title;⁸⁹ hence a counterclaim may be maintained by the tenant who is evicted, on that account, against his co-tenant.⁹⁰ In debt on a bond given for real estate or other action for the price the defendant may recoup his damages for

⁸³ *Cooke v. Preble*, 80 Ill. 318; *Hitchcock v. Hunt*, 28 Conn. 343; *Stigleman v. Jeffries*, 1 S. & R. 477, 7 Am. Dec. 626.

Damages for delivery of inferior quality of goods under one contract of sale cannot be set-off in an action by the vendor for vendee's refusal to accept goods under a subsequent contract. *Sleepy Eye Milling Co. v. Hartman*, 194 Ill. App. 308.

⁸⁴ *Warfield v. Booth*, 33 Md. 63; *Herbert v. Ford*, 29 Me. 546; *Burkhardt v. Burkhardt*, 36 Ohio St. 261.

⁸⁵ *Baker v. Connell*, 1 Daly, 469.

⁸⁶ *Andre v. Morrow*, 65 Miss. 315, 7 Am. St. 658.

⁸⁷ *Burroughs v. Selleck*, 185 Ill. App. 446; *James v. Elliot*, 44 Ga. 237; *Estell v. Myers*, 56 Miss. 800; *Warvelle on Vendors* (2d ed.), § 962; *Mulvey v. King*, 39 Ohio St. 491; *Haynes v. Harper*, 25 Ark. 541; *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598.

⁸⁸ *Baughman v. Gould*, 45 Mich. 481.

⁸⁹ *Nixon v. Lindsay*, 2 Jones' Eq. 230; *Rogers v. Turley*, 4 Bibb, 355; *Morris v. Harris*, 9 Gill, 26.

⁹⁰ *Huntley v. Cline*, 93 N. C. 458.

the plaintiff's breach of an agreement to give possession, as well as for injury to the premises,⁹¹ or for the violation of an agreement to dig a well on the premises sold.⁹² So a vendee's action to recover the purchase-money is subject to recoupment for his negligent destruction of the subject of the purchase.⁹³ Recoupment has been allowed, in a suit for purchase-money, for damages done to the premises by an adverse claimant, pending a litigation with the vendor, in which the latter's title was maintained; because, as plaintiff, he could have indemnified himself against the spoliator by the recovery of *mesne profits*.⁹⁴ In a suit for specific performance, cancellation of deeds, an injunction and damages the defendant may recoup damages caused by the plaintiff's trespass on the land in question and obtain affirmative relief, including damages inflicted since the original plea was filed.⁹⁵

It is well settled that when a deed has been made and accepted and possession taken under it, defects in the title will not enable the purchaser to resist the payment of the purchase-money, or recover more than nominal damages on his covenants for title, except in some states on the covenant of seizin, while he retains the deed and possession, and has been subjected to no inconvenience or expense on account of the defect.⁹⁶ Though if no title or possession passed by the deed it would seem that any undertaking for payment of the purchase-money

⁹¹ *Patterson v. Hulings*, 10 Pa. 506; *Owens v. Rector*, 44 Mo. 389; *Gordon v. Bruner*, 49 Mo. 570; *Grand Lodge v. Knox*, 20 Mo. 433; *Streeter v. Streeter*, 43 Ill. 155; *Fetternecht v. McKay*, 47 N. Y. 426; *Abrahamson v. Lamberson*, 72 Minn. 308.

⁹² *Maguire v. Howard*, 40 Pa. 391.

⁹³ *Hatchett v. Gibson*, 13 Ala. 587.

⁹⁴ *Weakland v. Hoffman*, 50 Pa. 513, 88 Am. Dec. 560.

⁹⁵ *Becker v. Donalson*, 133 Ga. 864.

⁹⁶ *Whisler v. Hicks*, 5 Blackf. 100, 33 Am. Dec. 454; *Delavergne v.*

Norris, 7 Johns. 358, 5 Am. Dec. 281; *Stanard v. Eldridge*, 16 Johns. 254; *Stephens v. Evans*, 30 Ind. 39; *Brandt v. Foster*, 5 Iowa, 287; *McCaslin v. State*, 44 Ind. 151; *Edwards v. Bodine*, 26 Wend. 109; *Abbott v. Allen*, 2 Johns. Ch. 519; *Bumpus v. Platner*, 1 id. 213; *Farnham v. Hotchkiss*, 2 Keyes 9; *Warvelle on Vendors* (2d ed.), § 862. But see *Walker v. Wilson*, 13 Wis. 522; *Hall v. Gale*, 14 Wis. 54; *Akerly v. Vilas*, 21 Wis. 88; *Lowry v. Hurd*, 7 Minn. 356; *Seautlin v. Allison*, 12 Kan. 85; *Tarpley v. Poage*, 2 Tex. 139.

would be void for want of consideration notwithstanding the covenants in the deed.⁹⁷

A vendee is authorized to extinguish an incumbrance or to remedy a defect of title after a breach of the covenant of warranty, without a special request from or the consent of the vendor, and may recoup the amount reasonably paid for that purpose in an action for purchase-money, where there are covenants for title and against incumbrances.⁹⁸ So the vendee may recoup his damages on the covenant of warranty after the title has failed and there has been an eviction, or what is equal thereto.⁹⁹ In some states, however, the defense for partial failure of title to real estate is not allowed at law in actions for the price.¹ Generally no difference is made as to the exercise of the right of reconpment whether the plaintiff's action is brought on the original contract, or on a note, or other security given for the price, and the latter under seal.² Such

⁹⁷ *Dickinson v. Hall*, 14 Pick. 217; *Rice v. Goddard*, id. 293; *Trask v. Vinson*, 20 id. 105; *Key v. Henson*, 17 Ark. 254; *Tillotson v. Grapes*, 4 N. H. 444.

⁹⁸ *Weatherbee v. Lillybeck*, 86 Miss. 156; *Delavergne v. Norris*, *Stanard v. Eldridge*, *supra*; *Johnson v. Collins*, 116 Mass. 393; *Lellingwell v. Elliott*, 10 Pick 204; *Brooks v. Moody*, 20 Pick 474; *Norton v. Babcock*, 2 Mete. (Mass.) 510; *Doremus v. Bond*, 8 Blackf. 368; *Baker v. Railsback*, 4 Ind. 533; *Brandt v. Foster*, 5 Iowa, 287; *McDaniel v. Grace*, 15 Ark. 465; *Lamerson v. Marvin*, 8 Barb. 11; *Detroit & M. R. Co. v. Griggs*, 12 Mich. 45; *Stillwell v. Chappell*, 30 Ind. 72; *Brown v. Crowley*, 39 Ga. 376, 99 Am. Dec. 462; *Deen v. Herrold*, 37 Pa. 150; *Key v. Henson*, 17 Ark. 254; *Brown v. Starke*, 3 Dana, 316; *Burk v. Clements*, 16 Ind. 132; *Schuchmann v. Knoebel*, 27 Ill. 175; *Christy v. Ogle*, 33 Ill. 295; *Kent v. Cantrall*, 44 Ind. 452; *Robinius v. Lister*, 30 Ind. 142, 95 Am. Dec. 674; *Davis*

v. Bean, 114 Mass. 358, 19 Am. Rep. 364; *Scantlin v. Allison*, 12 Kan. 85; *McKee v. Bain*, 11 Kan. 569.

⁹⁹ *McDaniel v. Grace*, 15 Ark. 487; *Tallmadge v. Wallis*, 25 Wend. 107; *Sargeant v. Kellogg*, 10 Ill. 273; *Wilson v. Burgess*, 34 id. 494; *Coster v. Monroe Mfg. Co.*, 2 N. J. Eq. 467; *Tone v. Wilson*, 81 Ill. 529; *McDowell v. Milroy*, 69 id. 498; *Brantley v. Johnson*, 102 Ga. 850.

¹ *Cullum v. Bank*, 4 Ala. 21, 37 Am. Dec. 725; *Starke v. Hill*, 6 Ala. 785; *Tankersly v. Graham*, 8 id. 247; *Helvenstein v. Higgason*, 35 Ala. 259; *Morrison v. Jewell*, 34 Me. 146; *Thompson v. Mansfield*, 43 Me. 490; *Wheat v. Dotson*, 12 Ark. 699; *Bowley v. Holway*, 124 Mass. 395.

² *Harrington v. Stratton*, 22 Pick. 510; *Van Epps v. Harrison*, 5 Hill, 63; *Judd v. Dennison*, 10 Wend. 512; *Payne v. Cutler*, 13 Wend. 605; *Goodwin v. Morse*, 9 Mete. (Mass.) 278; *Purkett v. Gregory*, 3 Ill. 44; *Christy v. Ogle*, 33 Ill. 295; *Hitch-*

a distinction, however, seems to be recognized in New Jersey³ and in England. In an action on a bill of exchange for goods supplied, which were "to be of good quality and moderate price," and to be estimated at about 400*l.*, bills having been given for that amount, it was no defense that the goods turned out to be worth much less than the estimated price. Lord Tenterden said: "The cases cited by the plaintiffs have completely established the distinction between an action for the price of the goods and an action on the security given for them. In the former, only the value can be recovered; in the latter, I take it to have been settled by these cases, and acted upon ever since as law, that a party holding bills given for the price of goods supplied can recover upon them unless there has been a total failure of consideration. If the consideration fails partially, as by the inferiority of the article furnished to that order, the buyer must seek his remedy by cross-action. The warranty relied on in this action makes no difference."⁴

In Wisconsin it has been held that where notes are given for the contract price they are not payment unless so agreed; and in a suit upon one of several such notes it will be presumed, in the absence of evidence, that those not yet due are still in the vendor's hands, and that it is error to render judgment for the defendant on a counter-claim for the excess of his damages for breach of warranty over the note in suit.⁵ It was held to be unjust to allow the defendants full damages for breach of warranty, the same as though they had paid for the property, when these damages largely exceed the amount sued

cock v. Hunt, 28 Conn. 343; Mears v. Nichols, 41 Ill. 207, 89 Am. Dec. 381; Kellogg v. Denslow, 14 Conn. 411; Wilmot v. Hurd, 11 Wend. 585; Dailey v. Green, 15 Pa. 118; Ward v. Reynolds, 32 Ala. 384; Key v. Henson, 17 Ark. 254.

In an action by the vendee upon the covenants in his deed the vendor may recoup the unpaid purchase-money or notes given to represent the same. Beecher v. Baldwin, 55 Conn. 419, 3 Am. St. 57.

³ Price v. Reynolds, 39 N. J. L. 171; Hunter v. Reiley, 43 id. 480.

⁴ Obbard v. Betham, Moo. & M. 483; Morgan v. Richardson, 1 Camp. 40n.; Day v. Nix, 9 Moore 159; Trickey v. Larne, 6 M. & W. 278; Gascoyne v. Smith, McC. & Y. 338; Warwich v. Nairn, 10 Ex. 762.

⁵ Aultman & T. Co. v. Hetherington, 42 Wis. 622; Same v. Jett, id. 488.

for. In Minnesota the decisions are to the contrary and rest upon the principle that the defendant's cause of action is one and indivisible; that a recovery of a part of the damages would bar a subsequent counter-claim to recover for the remainder.⁶

§ 185. **Liquidated and unliquidated damages may be recouped.** It is immaterial whether the damages which a defendant seeks to recoup or counter-claim are liquidated or unliquidated; nor is it material whether the plaintiff's demand is liquidated or not.⁷ The theory of this defense being the setting off of the damages on one cause of action against those recoverable on another to avoid the necessity of other suits, where both arise out of the same transaction, the defendant puts forward a substantive cause of action, becomes an actor to assert and prove it, with no other hampering conditions than would apply to him as plaintiff in a separate action upon his claim. When it appears to be so connected with the subject of the plaintiff's action as to be available as a counter-claim or by way of recoupment, it must be pleaded and proved according to the same rules as when it is made the basis of an action; the damages, if of such nature as to be submitted to the consideration of a jury in a suit brought for their recovery, are equally subject to determination by a jury for the purpose of redress in favor of a defendant. The policy

⁶ Geiser T. Mach. Co. v. Farmer, 27 Minn. 428; Minneapolis H. Works v. Bonmallie, 29 Minn. 373.

⁷ The Standard Brewery v. Sweeney, 185 Ill. App. 430; Richardson Const. Co. v. Whiting Lumber Co., 116 Va. 490; Fitzgerald v. Wiley, 22 App. D. C. 329; Holmes v. McKennon, 20 Ill. App. 320; Wannamaker v. Quinn, 27 Pa. Super. 288; Snererie Centrale Coloso v. Esteves, 4 Porto Rico Fed. 25; Hamilton v. Dismukes, 53 Tex. Civ. App. 129; Tidewater Q. Co. v. Scott, 105 Va. 160, 115 Am. St. 864; Newport News, etc. R. Co. v. Bickford, 105 Va. 182; Commissioner of Public Works v. Hills, [1906] App. Cas. 368; North German Lloyd S. Co. v. Wood, 18 Pa. Super. Ct. 488;

Lierz v. Morris, 19 id. 73; Weaver v. Penny, 17 Ill. App. 628; Batterman v. Pierce, 3 Ill. 171; Ward v. Fellers, 3 Mich. 281; Winder v. Caldwell, 14 How. 434, 14 L. ed. 487; Van Buren v. Digges, 11 How. 461, 13 L. ed. 771; McLure v. Rush, 9 Dana, 64; Bayne v. Fox, 18 La. 80; Stoddard v. Treadwell, 26 Cal. 294; Keyes v. Western Vermont S. Co., 34 Vt. 81; Hubbard v. Fisher, 25 Vt. 539; Dennis v. Belt, 30 Cal. 247; Kaskaskia B. Co. v. Shannon, 6 Ill. 15; Schubert v. Harteau, 34 Barb. 447; Speers v. Sterrett, 29 Pa. 192; Hayne v. Prothro, 10 Rich. 218; Raleigh L. Co. v. Wilson, 69 W. Va. 598. See Fink v. United States C. & C. Co., 72 W. Va. 507.

of admitting this defense to avoid circuity of action obviously embraces all cases where the rights of the parties are of such a character as to be susceptible of adjustment in one action. Accordingly, where the defense has the necessary connection with the subject of the plaintiff's action and the rights of both parties may be finally and justly settled by one adjudication, it is not essential that the damages on either side should be liquidated, nor of the same nature;—they may be liquidated on one side and unliquidated on the other; on one side they may be claimed strictly for violation of contract, and on the other for fraud,⁸ or negligence,⁹ or other tort,¹⁰ or for tort on both sides.¹¹ In Michigan unliquidated damages may not be recouped in replevin, and this seems to be the rule as to other damages.¹²

§ 186. **Affirmative relief not obtainable.** Recoupment is generally available only as a defense; for, except by statute, it can have no further effect than to answer the plaintiff's damages in whole or in part; the defendant cannot recover any balance or excess.¹³ It is not necessary that it be a full defense;¹⁴ it cuts off so much of the plaintiff's damages as the cross-claim

⁸ See § 179.

⁹ § 180.

¹⁰ *King v. Coe Com. Co.*, 93 Minn. 52; *Northwestern Port Huron Co. v. Iverson*, 22 S. D. 314, 133 Am. St. 920; *Tyson v. Jackson*, 41 Tex. Civ. App. 128; *Dowdy v. Calvi*, 14 Ariz. 148; § 180.

¹¹ *Carey v. Guillo*, 105 Mass. 18; *Estell v. Myers*, 54 Miss. 174; *Deagan v. Weeks*, 67 App. Div. (N. Y.) 410; *Pelton v. Powell*, 96 Wis. 473; *Morgan v. Langford*, 126 Ga. 58; *McNatt v. McRae*, 117 Ga. 898. *Contra*, *Roberts v. Jones*, 71 S. C. 404; *Replogle v. Toledo, St. L. & W. Ry. Co.*, 184 Ill. App. 338; *Terre Haute & I. R. Co. v. Pierce*, 95 Ind. 496, 15 Am. Neg. Cas. 734. But compare *Excelsior C. Works v. DeCamp*, 40 Ind. App. 26, which seems to be in accord with the text.

¹² *Dearing W. L. B. Co. v. Thompson*, 156 Mich. 365, 24 L.R.A. (N.S.) 748. See also, *Westminster Metal & Foundry Co. v. Coffman*, 123 Md. 619.

¹³ *Heite v. Cowgill*, — Del. —, 91 Atl. 652; *Burrongs v. Selleck*, 185 Ill. App. 446; *Hay v. Short*, 49 Mo. 139; *Ward v. Fellers*, 3 Mich. 281; *Estell v. Myers*, 54 Miss. 174; *Fowler v. Payne*, 52 Miss. 210; *Daniels v. Wilber*, 60 Ill. 526; *United States v. Gillies*, 144 Fed. 991; *Mark v. Williams C. Co.*, 204 Mo. 242; *Beakey v. Vander Meer-schen*, 78 Kan. 538; *Ashland C. & C. Co. v. Hull C. & C. Co.*, 67 W. Va. 503; *Bostrom v. Becker*, 172 Ill. App. 410. See *Schwartz v. Kuhn*, 71 N. Y. Misc. 149.

¹⁴ *Ross v. Longmuir*, 15 Abb. Pr. 326.

comes to,¹⁵ and when sufficient in amount may, of course, satisfy his claim entirely.¹⁶ The verdict will then be for the defendant. In this respect it is different from mere mitigation, for damages can never be mitigated below a nominal sum. But however large the damages assessable in respect of the defendant's cross-claim set up by way of recoupment, if it exceed the plaintiff's damages only so much is taken into account as is required to annul his demand; the excess is lost.¹⁷ This limitation has been obviated by the defendant bringing a cross-suit as well as setting up the claim by way of recoupment and having the actions consolidated or tried together.¹⁸ If two cross-actions are so tried, one for the price of property sold and the other for fraud in the vendor, the jury, if they find the fraud and that the damages equaled or exceeded the purchase-money, may render a verdict for the defendant in the first action and for the plaintiff in the second for the excess, if any, of such damages.¹⁹ But in such case a party who defends by recoupment and brings a cross-suit, on the trial of both together is not entitled to have damages assessed in both actions for the same breach of contract, nor to divide his claim for damages as he sees fit between the two.²⁰ Both actions being tried together, however, his entire damages for breaches of the contract, or in respect of his cross-demand, must be assessed and applied first, to cancel in whole or in part the damages of the plaintiff in the first action; then, if there be an excess, it should be returned in a verdict for the plaintiff in the cross-action.²¹ Very generally in this country authority has been given to render judgment in favor of the defendant for any excess of damages after satisfying the demand against

¹⁵ *Ives v. Van Epps*, 22 Wend. 155.

¹⁶ *Deagan v. Weeks*, 67 App. Div. (N. Y.) 410.

¹⁷ *Brunson v. Martin*, 17 Ark. 270; *Burlingame v. Davis*, 13 Ill. App. 602; *Kingman v. Draper*, 14 id. 577; *Waterman v. Clark*, 76 Ill. 428; *Stow v. Yarwood*, 14 id. 424; *Charles City P. & Mfg. Co. v. Jones*, 71 Iowa 234.

¹⁸ *Cook v. Castner*, 9 Cush. 266; *Star G. Co. v. Morey*, 108 Mass. 570.

¹⁹ *Cook v. Castner*, *supra*.

²⁰ *Brown v. First Nat. Bank*, 132 Fed. 450, 66 C. C. A. 293, citing the text.

²¹ *Watkins v. American Nat. Bank*, 134 Fed. 36, 67 C. C. A. 110, citing the text; *Star G. Co. v. Morey*, *supra*.

which his cross-claim is preferred.²² But when the plaintiff sues as assignee of the demand, the defendant having a cross-claim against the assignor can only use it for defense; to that extent it is available the same as though the suit were in the name of the assignor.²³

§ 187. **Election of defendant to file cross-claim or sue upon his demand.** A defendant has an election to use such cross-demand as a defense by way of recoupment or to bring a separate action upon it; but he will not have an election to set up his claim by way of recoupment unless it would be just and equitable, and it is practicable to adjust and allow it in the plaintiff's action. The omission to take advantage of matter of recoupment or counter-claim as a defense is no bar to a cross or separate action upon it; so that, though the cross-claim be admissible by way of defense, the defendant has an option to avail himself of it in that form or to sue upon it in another action.²⁴ The reason for allowing the defendant an option is that it would greatly diminish the benefit to which he is entitled and in some cases wholly neutralize it, because, while the right of action exists, the extent to which the breach of warranty or of contract may afford a defense is usually uncertain, it may require some time for the development of all the injury which will result from the plaintiff's misconduct or default. It is unreasonable, therefore, that he should have the right to fix the time at which the money value of his wrongdoing or negligent omission shall be ascertained.²⁵

But the defendant will be denied the right of recoupment when it cannot be justly and equitably allowed.²⁶ It is a de-

²² *Holmes v. McKennan*, 120 Ill. App. 320.

²³ See *Carolina P. C. Co. v. Alabama C. Co.*, 162 Ala. 380; § 176; *Desha v. Robinson*, 17 Ark. 228.

²⁴ *Watkins v. American Nat. Bank*, 134 Fed. 36, 67 C. C. A. 110, citing the text; *Brown v. First Nat. Bank*, 132 Fed. 450, 66 C. C. A. 293, citing the text; *Barth v. Burt*, 43 Barb. 628; *Mimnaugh v. Partlin*, 67 Mich. 391.

Suth. Dam. Vol. 1.—36.

²⁵ *Davis v. Hedges*, L. R. 6 Q. B. 687.

²⁶ Judgment may be ordered for the plaintiff on the pleadings if the answer states a counter-claim for merely nominal damages and the costs will not be affected by doing so. *Hitecock v. Turnbull*, 44 Minn. 475.

Where notes are given on a settlement for a balance found due after all the grounds for claiming a re-

fense on principles borrowed from equity, and if a superior equity intervene it will be denied; and when any equitable barrier exists and the whole controversy cannot be settled in the plaintiff's action a separate suit must be brought. On this ground, in several states, defenses of this kind in suits for the purchase-money of land based on breaches of covenants for title will not be allowed in actions at law.²⁷ The owner of a lot entered into a contract with others for the latter to build a warehouse upon it for a specified sum. The contract also contained a lease to this party for thirteen years from the date fixed for its completion at a stated yearly rent. After the building had been erected the builders and lessees entered a mechanic's lien for the work and materials, and two years afterwards the property was sold, and it had to be determined how the fund should be distributed. The lessees had occupied for two years without paying any rent, and during that time the lessor became indebted to them on account to an amount nearly equal to the rent for that period. The court below excluded the lessee's account as a set-off against the rent, and set off the rent against the lien debt because these latter were part of one transaction. This decision was the subject of review. Thompson, J., said: "There are undoubtedly cases in which the transaction is so entirely a unit that it is most just and proper when litigation arises that matters arising directly out of it should be determined in one suit. These cases are not parallel with this. Here the same paper, it is true, contains the contract out of which the lien arises as well as that out of which the rent accrued; but they are as distinct and separate covenants as if written on separate sheets of paper. There is a complete contract for building, describing the kind of structure, and the time when to be completed and paid for. Then follows a complete lease of the building for a long term, to commence shortly before its completion and to continue for thirteen years. The former, the building contract, was to be finished in about eight months, and to be then paid for. The

couplement are known to their maker he is estopped from urging any such

matters in defense to an action upon them. *Hill v. Parsons*, 110 Ill. 107.

²⁷ See § 184.

first year's rent would not fall due for near a year after. These things show the distinctiveness of the covenants as contracts. Now the lien might have been reduced under the principle invoked by showing defectiveness in the work and the like, and so might the rent if the landlord had been suing for it on account of interference with the tenant's possession, not amounting to eviction, but acts against quiet enjoyment. These would be instances of claims arising in the same transaction being allowed to be given in evidence to extinguish the claim by a liberal construction of our defalcation act. . . . It was impossible to settle the entire covenants in one action. They were of different and distinct natures, and to be performed at different and distinct periods. In applying the rent, therefore, to the extinguishment of the lien, on this principle alone, when the plaintiffs had other claims entitled to its application on equitable principles, was of course error in the absence of appropriation by the debtor and creditor. They, therefore, should have been allowed to put in evidence their book account; if it was unpaid and unsecured, and no appropriation by the parties of the rent, equity would apply it to the book account in preference to the old debt secured by the lien. This is the well settled rule."²⁸

In an action on a note against the executor of an accommodation indorser it appeared that the note was made, indorsed and transferred to the plaintiff in payment of, or as collateral security for, an antecedent debt of a firm of which the maker was a member; that afterwards the firm made an assignment to the plaintiff for the benefit of the creditors, preferring the plaintiff and the defendant's testator. The answer setting up these facts alleged also that the assets were more than sufficient to pay in full all the preferred creditors. But as these facts could not be established without an accounting, and the plaintiff was entitled, when compelled to account, to do so entirely, which could not occur in that action for the want of necessary parties, all evidence touching the counterclaim was properly rejected.²⁹

²⁸ *McQuaide v. Stewart*, 48 Pa. 198. See *Howe Mach. Co. v. Hickox*, 106 Ill. 461.

²⁹ *Bailey v. Bergen*, 67 N. Y. 346. See *Duncan v. Stanton*, 30 Barb. 533.

§ 188. **Burden of proof; measure of damages.** When a defendant sets up a cross-claim by way of recoupment he assumes, like a plaintiff, the burden of proof in respect to it; and the same rule or measure of damages applies as would be applicable in a separate suit upon such claim; subject, however, to the limitation already mentioned, that there can be no recovery by a defendant for any balance found in his favor beyond the damages established on the part of the plaintiff, in the absence of a statute authorizing it. The burden of proof rests upon him because he asserts a claim or right, and must therefore produce the proof necessary to make good his contention.³⁰ That the same rule of damages applies has been repeatedly held,³¹ and it is universally assumed by actually applying it.³² But the rule is the rule of compensatory damages—no recovery on a claim set up for recoupment can be had for malice or any aggravation in the form of exemplary damages.³³ The con-

³⁰ *Carolina P. C. Co. v. Alabama C. Co.*, 162 Ala. 380; *Leifer Mfg. Co. v. Gross*, 93 Ark. 277; *Gem K Mills v. Empire P. & B. Co.*, 3 Ga. App. 709; *Burt v. Garden City S. Co.*, 237 Ill. 473; *Russell v. Executor S. & Mfg. Co.*, 120 Ill. App. 23; *Wyandotte P. C. Co. v. Bruner*, 147 Mich. 400; *Sayles v. Quinn*, 196 Mass. 492; *Franklin Mfg. Co. v. Lamson & G. Mfg. Co.*, 189 Mass. 344; *Sucrerie Centrale Coloso v. Esteves*, 4 Porto Rico Fed. 25; *Mendel v. Fink*, 8 Ill. App. 378; 1 Whart. Ev., § 356.

The defendant has the burden of establishing all the elements of a cause of action (*Heedstrom v. Baker*, 13 Ill. App. 104); and must plead them. *Rawson v. Pratt*, 91 Ind. 9.

³¹ *Goodwin v. Morse*, 9 Mete. (Mass.) 278; *Myers v. Estell*, 47 Miss. 4; *Hitchcock v. Hunt*, 28 Conn. 343; *Timmons v. Dunn*, 4 Ohio St. 680.

³² *Blanchard v. Ely*, 21 Wend. 342; *Tinsley v. Tinsley*, 15 B. Mon.

454; *Rogers v. Ostram*, 35 Barb. 523; *Stoddard v. Treadwell*, 26 Cal. 294; *Satchwell v. Williams*, 40 Conn. 371; *Cook v. Soule*, 56 N. Y. 420; *Warfield v. Booth*, 33 Md. 63; *Bradley v. Rea*, 14 Allen, 20; *Harralson v. Stein*, 50 Ala. 347; *Haven v. Wakefield*, 39 Ill. 509; *Dounce v. Dow*, 57 N. Y. 16; *Aultman & T. Co. v. Hetherington*, 42 Wis. 622; *Van Epps v. Harrison*, 5 Hill, 63; *Overton v. Phelan*, 2 Head, 445; *Timmons v. Dunn*, 4 Ohio St. 680; *Rotan v. Nichols*, 22 Ark. 244; *Harris v. Rathbun*, 2 Keyes, 312; *Railroad Co. v. Smith*, 21 Wall. 255, 22 L. ed. 513.

³³ *Allaire Works v. Guion*, 10 Barb. 55. This case has sometimes been cited as holding that special damages are not the subject of recoupment (*Benard v. Babcock*, 2 Robert. 175); and *Dorwin v. Potter*, 5 Denio, 306, has also been cited as holding the same. Neither case advances any such doctrine. In the latter case a landlord's action for rent was defended by way of recoup-

sideration that this defense is to avoid circuity of action, and when resorted to is a substitute, renders it desirable and necessary to its usefulness that the defendant, to the extent of full defense, should have the benefit of the rule of damages to which he would be entitled if he elected to bring a separate action.

§ 189. **A cross-claim used in defense cannot be sued upon.** When a cross-claim is submitted as a defense by way of recoupment the judgment will be a bar to another action or recoupment. A defendant has an election to avail himself of a cross-claim by way of recoupment, or under the code as a counter-claim, or to bring an action upon it. This choice, however, is only final when submitted for adjudication, and is so to prevent a second recovery. Neither pleading it in defense nor bringing an action upon it will determine the election.³⁴ Where it appeared in a suit in which a cross-claim was set up by way of recoupment that the defendants had previously brought an action for the same damages, which was still pending, and the trial court had rejected the defense, the appellate court said: "The court [below] seemed to have regarded the pendency of the other action as a sort of abatement of the defendants' plea, or to have deemed the bringing of the suit (by the defendants) . . . as a conclusive election to

ment for his neglect to put the barns on the demised premises in that state of repair required by his agreement. The court say, Whittlesey, J.: "The material question here is as to the proper rule of damages for such neglect to repair. We do not know what the referees adopted, but the questions put to the witnesses after objection would only be admissible upon the ground that the defendant was entitled to all the damages which he might have sustained by the injuries to the cows and young cattle, the increase of food required, and the decrease of produce by reason of the state of the barns in question. It strikes me that such damages are altogether too remote and contingent, and that

the true rule of damages is the sum necessary to place the barns in that state of repair in which they were to be put according to the agreement, with interest thereon, if the referees thought proper to allow interest." There is no hint that this rule was adopted because the plaintiff's breach of contract was set up by way of recoupment; but it is laid down as "the proper rule of damages for such neglect to repair;" on that subject see *Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 N. Y. 561.

³⁴ *McDonald v. Christie*, 42 Barb. 36; *Fabbriotti v. Launitz*, 3 Sandf. 743; *Rankin v. Barnes*, 5 Bush, 20; *Gilmore v. Reed*, 76 Pa. 462. See *Cook v. Castner*, 9 Cush. 266; *Miller v. Freeborn*, 4 Robert. 608.

prosecute a cross-action, and not to recoup or use the claim as a defense under any circumstances while that action should continue. There is in this holding a misapprehension of the defendants' position. They are not prosecuting two actions, one of which abates the other. In an endeavor to recover their damages they find themselves prosecuted by their adversary. They may defend by setting up any matter which the law recognizes as a defense, whether it be a cause of action, or whether it be a judgment actually recovered therein—the only difference being that after judgment it must be used as a judgment and by way of set-off. The election made by the defendants was not an election not to recoup. At that time it was an election between prosecuting to establish their claim, or suffering the injury without seeking any redress. And when the plaintiff forced them into court, . . . their opportunity to use their claim by way of defense first arose, and they had a right to embrace it. Until judgment in one of the suits, the right to press the claim in the other continued.”³⁵ But after a judgment in a separate action upon the claim it is merged in the judgment; or, if rejected, barred; if the issue embraces it, the judgment is conclusive.³⁶

³⁵ Naylor v. Schenck, 3 E. D. Smith, 135; Lindsay v. Stewart, 72 Cal. 540.

If the matter pleaded in recoupment can be set up in defense to a suit upon the contract out of which it arose and which is pending it will not be proper to plead it in another suit in the same court. Jefferson L. Co. v. Williams, 68 Tex. 656.

A plaintiff is not estopped from prosecuting a suit for work and labor by reason of the payment of a judgment recovered against him by the defendant pending such suit for damages for the improper performance of the work and labor sued for; the claim is not *res judicata* because one suit sounded in tort and the other in *assumpsit*. Minnaugh v. Partlin, 67 Mich. 391.

³⁶ Davis v. Talleot, 12 N. Y. 184; Kane v. Fisher, 2 Watts, 246; Grant v. Button, 14 Johns. 377; O'Connor v. Varney, 10 Gray, 231; Burnett v. Smith, 4 Gray, 50; Salem India R. Co. v. Adams, 23 Pick. 256; Stevens v. Miller, 13 Gray 283; Huff v. Broyles, 26 Gratt. 283; Beall v. Pearre, 12 Md. 550; McLane v. Miller, 10 Ala. 856; Britton v. Turner, 6 N. H. 481, 495, 26 Am. Dec. 713.

In Davis v. Talleot, *supra*, it was held that a recovery in a suit upon an agreement, wherein the right to recover depended by the pleadings upon the truth of the allegations made in the complaint and denied by the answer, that the plaintiff had fully performed the agreement, is a bar to an action brought subsequently by the defendant in the first suit

In an action for breach of warranty in the sale of personal property these facts appeared: A note given for the purchase-

against the plaintiff therein to recover damages for the alleged non-performance of the same agreement. The record of the recovery estops the defendant from controverting that the plaintiff therein fully performed the contract. The rule is not otherwise, although in the first suit the defendant, in addition to the allegation of performance, alleged breaches by the plaintiff, and claimed to recoup damages, and at the trial expressly withdrew the claim for damages, gave no evidence touching the alleged breaches, and the second suit was to recover damages for such breaches.

Gardiner, C. J., said: "The defendants in that (the former) action, the present plaintiffs, insisted upon the non-performance of the agreement upon the part of Tallcot and Canfield, the manufacturers of the machinery, for two purposes entirely distinct in their nature and objects. First, as a complete defense to the action, by a denial of that which the makers of the machinery had averred and must prove before they could recover anything. Second, as a foundation for a claim in the nature of a cross action for damages to be deducted from the amount which the then plaintiff might otherwise recover. It is obvious that, by withdrawing their claim to damages, the then defendants did not waive the right to insist upon their defense. The plaintiffs, notwithstanding, must have established their title to the price stipulated, by proof that the machinery was made within the time and in the manner called for by the agreement; and the vendees were at liberty to meet and combat these

proofs by counter evidence on their part. Now, this was precisely what was done, or rather the necessity for introducing evidence to sustain the action was superseded by the admission of the then defendants in open court 'that they were indebted to the manufacturers for the causes of action mentioned in their complaint.' As the cause of action and the indebtedness of the defendants were by the complaint made dependent upon a full performance of the contract by the parties who instituted the suit, the concession of the defendants was equivalent to an admission on the record to that effect; and the report of the referee followed by the judgment of the court consequently estops the parties to that suit from ever after questioning that fact in any controversy upon the same agreement (2 Cow. & H. N. 843; 10 Wend. 80, 3 Comst. 173). In the suit now pending, however, the vendees bring their suit upon the same contract against the manufacturers, and aver a non-performance by the defendants as the sole cause of action. They have succeeded in the court below, notwithstanding the objection we have considered; and there are, consequently, two records in the same court between the same parties, each importing absolute verity, one of which affirms that the manufacturers faithfully performed said agreement 'in every respect on or before the 7th of June, 1850; the other, that they did not perform it in any respect at any time.' This flat contradiction is attempted to be reconciled by the assertion that the record in the first suit only shows that this point might have been,

money has been collected by suit; to that the now plaintiff had pleaded *non assumpsit*, and it was agreed that under that plea he might offer the special matter in evidence as fully as if he had specially pleaded the same or given notice thereof; the breach of warranty now sued for the then defendant offered to prove as a defense, but it was rejected by the court because it did not tend to show a total failure of consideration. On these facts the judgment in the former action was held to be a bar.³⁷ The defense being admissible in the former action and erroneously rejected, the judgment had the same effect as though the claim had been admitted. The error of its rejection should have been corrected by proceedings taken in that case; therefore the exclusion of the defense by the court had the same effect as a disallowance by a jury.³⁸ Where, notwithstanding the cross-claim is pleaded, the judgment is afterwards taken by default by the plaintiff, and so appears by the record, such claim is not barred.³⁹ The fact that the judgment was upon default makes it as certain that the counter-claim was not passed upon by an actual adjudication as though the plea had been formally withdrawn. If several notes have been given for a chattel and they become due at different times, and the de-

not that it was, litigated. The answer is that the record in that case proves that that question of performance was directly in issue and must have been litigated; that a recovery without establishing the fact of performance was a legal impossibility. Again, the parol evidence, if admissible, only proves that the vendees did not rely upon a breach of the contract upon the part of the makers of the machinery to support their claim to recoup. This is the course they would naturally adopt if their damages, in their opinion, exceeded the sum to be paid for the machinery. Their only remedy for the excess would depend upon defeating the action then pending, and subsequently suing on the agreement. That this was really the object of their legal

adviser is evidenced by the fact that while the manufacturers recovered in their suit less than \$650, the present plaintiffs have obtained judgment in the case under review for upwards of \$900. The withdrawal of their claim to recoup was therefore not only consistent with the determination to insist upon a breach of the contract on the part of the manufacturers in order to defeat the suit then pending, but this was indispensable to the ultimate recovery of their full damages in a subsequent action." See *Merriam v. Woodcock*, 104 Mass. 326.

³⁷ *Beall v. Pearre*, 12 Md. 550.

³⁸ *Grant v. Button*, 14 Johns. 377; *Smith v. Whiting*, 11 Mass. 445.

³⁹ *Bascom v. Manning*, 52 N. H. 132; *Bodurtha v. Phelon*, 13 Gray, 413.

defendant in an action upon the one which matures first counter-claims for damages arising from the breach of the warranty, judgment in his favor estops him from pleading such defense in an action subsequently brought upon the other notes.⁴⁰

§ 190. **Notice of cross-claim.** This defense being a substitute for an action and to avoid the necessity of another suit, some pleading must be adopted by which the defendant evinces his election to insist on his cross-claim as a defense. It must make the necessary allegations and inform the plaintiff so that he may not be taken by surprise. And it must be set up in the answer under the code.⁴¹ The defendant is as much concluded by the amount of damages he claims in his counter-claim as the plaintiff is by his complaint.⁴² Recoupment cannot extend beyond the specific matters sued upon unless the notice or pleading informs the plaintiff that the defendant will go into others.⁴³ The notice must be sufficiently certain to apprise the plaintiff of the nature of the defendant's claim, and in case of a suit upon contract it must specify the breach com-

⁴⁰ Geiser T. Mach. Co. v. Farmer, 27 Minn. 428; Minneapolis H. Works v. Bonnallie, 29 Minn. 373. Compare Aultman & T. Co. v. Hetherington, 42 Wis. 622; Same v. Jett, id. 488.

⁴¹ West Coast Timber Co. v. Huggitt, 185 Ill. App. 500; Galt v. Provan, 131 Iowa, 277; Central M. Co. v. Thaler, 133 Mo. App. 86; Trowbridge v. Mayor, 7 Hill, 429; Burton v. Stewart, 3 Wend. 236; Barber v. Rose, 5 Hill, 76; Crane v. Hardman, 4 E. D. Smith, 448; Lamson & G. M. Co. v. Russell, 112 Mass. 387; Lansing v. Van Alstyne, 2 Wend. 561; Steamboat Wellsville v. Geisse, 3 Ohio St. 333; Young v. Plumeau, Harp. 543; Maverick v. Gibbs, 3 McCord, 315; McLure v. Hart, 19 Ark. 119; Hill v. Austin, id. 230; Spink v. Mueller, 77 Mo. App. 85; Rawson v. Pratt, 91 Ind. 9; Conway v. Mitchell, 97 Wis. 290;

Detroit River T. Co. v. Aldrich, 176 Mich. 357.

⁴² Annis v. Upton, 66 Barb. 370; Taylor v. Butters & P.'s S. & L. Co., 103 Mich. 1; Sturges & Burn Mfg. Co. v. Root Dairy Supply Co., 186 Ill. App. 52.

In Paragon Ref. Co. v. Lee, 98 Tenn. 643, the excess over the sum claimed by the defendant was abated in the appellate court though no objection was made below.

⁴³ Frederick Mfg. Co. v. Devlin, 127 Fed. 71, 62 C. C. A. 53; Beck D. Co. v. Fulghum, 118 Ga. 836; Truax v. Heartt, 135 Mich. 150; Mark v. Williams C. Co., 204 Mo. 242; Pittsburgh P. G. Co. v. Monroe, 79 S. C. 564; McKevitte v. Feige, 57 Mich. 374.

If the notice counts upon a contract there cannot be a recovery upon a *quantum meruit*. Missouri Pac. R. Co. v. Kansas City & I. A. L., 189 Mo. 538.

plained of.⁴⁴ An averment in a cross-bill claiming a recoupment of special damages for the breach of a contract, the general damages for which appear to be only nominal, should be special; if it only alleges that the defendant has been damnified to a specified amount it is insufficient.⁴⁵ A reduction of damages by way of recoupment cannot be shown under a special plea in bar, but may be obtained under the general issue.⁴⁶ Statutes concerning notice will be liberally construed; the rules in relation to a variance between the pleadings and the proof will not be applied to the notice, which is good if it states the ground and substance of the defense, though it is defective in matters of form.⁴⁷ The only way to make the objection that a cause of action pleaded as a counter-claim is not such in the particular case because it is in no way connected with the subject of plaintiff's action is by demurrer. If there is no demurrer on that ground and issue is taken on the facts alleged the right to object is waived.⁴⁸

SECTION 5.

MARSHALING AND DISTRIBUTION.

§ 191. **Definition.** Marshaling is the setting of debts or assets in a certain order; distribution is the application of funds to the payment of debts marshaled. There are therefore two kinds of marshaling, one of assets, the other of debts. Marshaling is resorted to whenever it becomes necessary practically to answer either the question in what order certain distinct funds or properties shall bear the burden of paying or contributing to pay a debt which is directly or indirectly a charge upon all; or, secondly, when there are several debts directly or indirectly charged upon one fund or property which

⁴⁴ Sayles v. Quinn, 196 Mass. 492;
Sinkers v. Diggins, 76 Mich. 557.

⁴⁵ Hooper v. Armstrong, 69 Ala.
343.

⁴⁶ Wadhams v. Swan, 109 Ill. 46;
Hoerner v. Giles, 53 Ill. App. 540;

McCormick H. Mach. Co. v. Robin-
son, 60 id. 253.

⁴⁷ Merrill v. Everett, 38 Conn. 40.

⁴⁸ Ayres v. O'Farrell, 10 Bosw.
143; Hammond v. Terry, 3 Lans.
186; Walker v. Johnson, 28 Minn.
147.

is insufficient to pay them in full, to determine in what order such fund shall be applied as far as it will go. In answering the first, the court settles the order of liability among the funds that must pay; the second, the priorities of the claims to be paid. Under the first inquiry two classes of persons are liable to be affected: those having proprietary interests in the fund or property marshaled, and creditors having liens thereon.

§ 192. **Sales of incumbered property in parcels to different purchasers.** For the protection of purchasers this rule obtains: if the creditor's lien be upon several parcels of land for the payment of the same debt, and some of those parcels belong to the person who in equity and justice owes, or ought to pay, the debt, and other parcels have been transferred by him to third persons, his part, as between himself and them, shall be primarily chargeable with the debt.⁴⁹ And if there have been successive alienations by him of parts of the incumbered property, and the portion retained is insufficient to discharge the entire incumbrance, the parcels transferred will be subject to sale in the inverse order of alienation.⁵⁰ The operation of this rule

⁴⁹ 2 Story's Eq., § 1233; Clowes v. Dickenson, 5 Johns. Ch. 235, 9 Cow. 403; Cowden's Est., 1 Pa. 267, 274; Mason v. Payne, Walk. Ch. 459; Cooper v. Bigly, 13 Mich. 463; Barnes' Appeal, 46 Pa. 350; Ammerman v. Jennings, 12 B. Mon. 135. See Blanchard v. Naquin, 116 La. 806.

In Clowes v. Dickenson, 9 Cow. 403, it was held that if the creditor or any other person having control of his judgment cause a sale of the aliened part before resorting to that retained by the judgment debtor, the latter part being sufficient to pay his debt, though no order or decree be obtained directing the remaining portion to be first sold, such creditor will be required to restore the real estate so sold; or, if sold to a *bona fide* purchaser, to account to the alienee for the value of the real estate so sold, if the other part

would have satisfied the judgment; or, if not, to restore or account for the value beyond what would, with the other, have satisfied the judgment. That such alienee, having stood by and allowed the legal estate to pass from him, shall not be allowed the land itself, with improvements made subsequent to the execution sale and before he asserted his claim. The true value of the aliened estate in market at the time of the execution sale, not the price bid for it, is the measure of compensation.

⁵⁰ *Id.*; Wieting v. Bellinger, 50 Hun, 324; Gage v. McGregor, 61 N. H. 47; Vogle v. Brown, 120 Ill. 338; 12 id. 252; Gill v. Lyon, 1 Johns Ch. 447; Stevens v. Cooper, id. 425; James v. Hubbard, 1 Paige, 228; Gouverneur v. Lynch, 2 id. 300; Guion v. Knapp, 6 id. 35; Skeel v. Spraker, 8 id. 182; Patty v. Pease, id. 277, 35 Am. Dec. 683; Schryver

may be waived, limited or modified by the instrument executed to the earlier grantee, which will bind all who claim under him.⁵¹

§ 193. **Sale subject to incumbrance.** If a portion of the land covered by mortgage is conveyed subject to the payment of the entire mortgage by the grantee the subsequent purchaser of another parcel,⁵² or the mortgagor,⁵³ has a right to insist that the parcel so conveyed shall be first sold to satisfy the mortgage. The lot so sold becomes, as to the parties to the conveyance, the primary fund for the payment of the mortgage,⁵⁴ and the grantee thereby becomes the party who in justice ought to pay the debt. The mortgagor becomes then a *quasi-surety*,

v. Teller, 9 Paige, 173; New York Life, etc. Co. v. Cutler, 3 Sandf. Ch. 176; Commercial Bank v. Western Reserve Bank, 11 Ohio, 444, 38 Am. Dec. 739; Green v. Ramage, 18 Ohio, 428, 51 Am. Dec. 458; Stuyvesant v. Hone, 1 Sandf. Ch. 419; Stuyvesant v. Hall, 2 Barb. Ch. 151; Averall v. Wade, Lloyd & Gould, 252; Lyman v. Lyman, 32 Vt. 79, 76 Am. Dec. 151; Hurd v. Eaton, 28 Ill. 122; Carter v. Neal, 24 Ga. 346, 71 Am. Dec. 136; Root v. Collins, 34 Vt. 173; Brown v. Simons, 44 N. H. 475; Jenkins v. Freyer, 4 Paige, 53; Howard Ins. Co. v. Halsey, 4 Sandf. 565; La' Farge Ins. Co. v. Bell, 22 Barb. 54; Gates v. Adams, 24 Vt. 71; Chase v. Woodbury, 6 Cush. 143; Black v. Morse, 7 N. J. Eq. 509; Shannon v. Marselis, 1 id. 412; Henkle v. Allstadt, 4 Gratt. 284; Jones v. Myrick, 8 Gratt. 179; Britton v. Updike, 3 N. J. Eq. 125; Wikoff v. Davis, 4 id. 224.

Judge Story (2 Story's Eq. § 1233b) doubts whether this last position is maintainable upon principle: for as between the subsequent purchasers or incumbrancers, each trusting to his own security upon the separate estates mortgaged to him,

it is difficult to perceive that either has, in consequence thereof, any superiority of right or equity over the other. On the contrary, there seems strong ground to contend that the original incumbrance or lien ought to be borne ratably between them, according to the relative value of the estates. And so the doctrine has been asserted in the ancient as well as modern English cases on the subject (Harbert's Case, 3 Co. 12; Barnes v. Raester, 1 Y. & C. New Cas. 401; Lanoy v. Duchess of Athol, 2 Atk. 448; Aldrich v. Cooper, 8 Ves. 391; Averall v. Wade, Lloyd & Gould, 252; Bugden v. Bignold, 2 Y. & C. New Cas. 377; Green v. Ramage, 18 Ohio, 428, 51 Am. Dec. 458); and the law is so settled in Kentucky. Dickey v. Thompson, 8 B. Mon. 312; Morrison v. Beckwith, 4 T. B. Mon. 76; Hughes v. Graves, 1 Litt. 319; Burk v. Chrisman, 3 B. Mon. 50.

⁵¹ Vogel v. Shurtliff, 28 Ill. App. 516; Briscoe v. Powers, 47 Ill. 447.

⁵² Caruthers v. Hall, 10 Mich. 40.

⁵³ Mason v. Payne, Walker's Ch. 461.

⁵⁴ Cox v. Wheeler, 7 Paige, 248; Jumel v. Jumel, id. 591.

and has the right to insist upon the collection of the debt first out of the land.⁵⁵

The rule being intended for the benefit of parties having separate interests in the property or fund on which the debt is a lien, their relation between themselves is considered in determining whether the burden rests upon them equally, or if unequally, in what order their several properties may be resorted to for payment. Where there are several heirs, or where several persons join in a recognizance, one heir, or one cosutor, should not be charged exclusively, for their relations and duties are equal.⁵⁶ And the same principle would apply between several purchasers of the same date. But the property of the party who is in equity bound to pay the debt, as between him and the owner of other property bound for the same debt, is the primary fund; and the court will establish the order, between any number of persons whose property is subject to the debt, in which resort may be had to properties so separated in ownership. Thus, in an action of foreclosure against G. and L. as mortgagors, where it appears that G. is possessed of a portion of the premises in his own right, and L. of another portion, and that a third portion is held jointly, and it also appears that L. personally owes the mortgage debt, or is equitably bound to pay it, the judgment should be so entered that the interest of L. be first sold; secondly, the joint interest; and lastly, the interest of G.⁵⁷

But these equities between co-debtors, by which one part of incumbered premises becomes the primary fund for the payment of the mortgage, may be defeated by the *bona fide* purchase of that part by one without notice of the facts which raise these equities. Where A. and B., owning lands in severalty, joined in mortgaging them to secure the payment of a joint debt, and A. afterwards executed a bond of indemnity to B. agreeing to pay the whole mortgage debt, but subsequently executed on his lands other mortgages for a valuable consideration, to parties who had no notice of the bond or agreement between him and

⁵⁵ Harris v. Jex, 66 Barb. 232; Bearnse v. Lebowich, 212 Mass. 341.

⁵⁶ Harvey v. Woodhouse, Select Cas. in Ch. 80. See Clowes v. Dick-

enson, 5 Johns. Ch. 235, 241.

⁵⁷ Ogden v. Glidden, 9 Wis. 46; Warren v. Boynton, 5 Barb. 13; Cornell v. Prescott, id. 16.

B., it was held on the foreclosure of the mortgage that B. could not, as against the subsequent mortgagees, compel the collection of the whole of the original mortgage debt from the land of A. to their prejudice, and that half of it was collectible from B.'s land.⁵⁸

§ 194. **Effect of creditor releasing part.** A creditor, having notice of such equities between several parties owning property subject to his debt, cannot defeat them by releasing the property first liable. A release by the mortgagee of a portion of the land mortgaged, with knowledge of a prior sale of another portion, will operate as to such prior purchaser as a discharge *pro tanto* of the mortgage debt.⁵⁹ But a release without such knowledge will not be a discharge.⁶⁰

§ 195. **Rights where one creditor may resort to two funds and another to only one.** A rule for the protection of creditors having junior liens exists. If one creditor can resort to two funds and another to but one of those funds, the former will be compelled to seek satisfaction out of the fund which the other cannot reach, if adequate,⁶¹ and it can be done without prejudice to such double fund creditor.⁶² The rule is founded in social duty and is never enforced to the prejudice of such creditor,⁶³

⁵⁸ Hoyt v. Dougherty, 4 Sandf. 462; Root v. Collins, 34 Vt. 173.

⁵⁹ Brown v. Simons, 44 N. H. 475; Guion v. Knapp, 6 Paige, 43; Patty v. Pease, 8 id. 277; La Farge Ins. Co. v. Bell, 22 Barb. 54; Taylor v. Maris, 5 Rawle, 51. See Cooper v. Bigly, 13 Mich. 463; James v. Brown, 11 Mich. 25; Howard Ins. Co. v. Halsey, 4 Sandf. 565; Union Nat. Bank v. Moline, etc. Co., 7 N. D. 201.

⁶⁰ Id.

⁶¹ Ball v. Setzer, 33 W. Va. 444; Hall v. Stevenson, 19 Ore. 153; Glass v. Pullen, 6 Bush, 346; Wise v. Shepherd, 13 Ill. 41; Marshall v. Moore, 36 Ill. 321; Hurd v. Eaton, 28 Ill. 122; Evertson v. Booth, 19 Johns. 492; Hayes v. Ward, 4 Johns. Ch. 132; Dodds v. Snyder,

44 Ill. 53; Goss v. Lester, 1 Wis. 43; Worth v. Hill, 14 Wis. 559; Ogden v. Glidden, 9 Wis. 46; Lloyd v. Galbraith, 32 Pa. 103; Nailor v. Stanley, 10 S. & R. 450; Cowden's Estate, 1 Pa. 267; Bank v. Vance, 5 Litt. 168. See Union Nat. Bank v. Moline, etc. Co., 7 N. D. 201.

⁶² Bagley v. Weaver, 72 Ark. 29; Logan v. Anderson, 18 B. Mon. 114; Jervis v. Smith, 7 Abb. Pr. (N. S.) 217; Wise v. Shepherd, 13 Ill. 41; Cannon v. Hudson, 5 Del. Ch. 112; Hudkins v. Ward, 30 W. Va. 204, 8 Am. St. 22; Leib v. Stribling, 51 Md. 285; Marr v. Lewis, 31 Ark. 203, 25 Am. Rep. 553; McArthur v. Martin, 23 Minn. 75; Gilliman v. McCormack, 85 Tenn. 597.

⁶³ Id.; First Nat. Bank v. Fowler, 54 Wash. 65.

nor where it will work injustice to other parties. Thus where a firm creditor has security on the separate property of one of

In *Worth v. Hill*, 14 Wis. 559, the mortgage being foreclosed covered two distinct tracts in different towns. The defendant Buck, who was the appellant, held a mortgage next to this in point of time, covering one of the tracts contained in this mortgage, and other land not covered by this, in the same town. Defendant Mowry held a mortgage next to Buck's in point of time, but upon the land in the other town covered by the mortgage, and also upon another tract. Hence the Mowry mortgage did not cover any of the land mortgaged to Buck, but their interests conflicted by reason of the mortgage which was being foreclosed, and which was prior to both, covering a part of the land contained in each of them. It further appeared that there was a mortgage prior to all of these, covering the tract in the Buck mortgage, and the parcel in the Mowry mortgage which was not contained in the mortgage being foreclosed; that that mortgage had been foreclosed, and that part which was covered by the Mowry mortgage adjudged to be sold before the part covered by Buck's. It was further proved that the other tract covered by Buck's mortgage was ample security for the amount of the debt secured by that mortgage. Upon this state of facts it had been decreed below that the portion covered by Buck's mortgage should be sold in this foreclosure before that covered by Mowry's, and from that part of the decree Buck appealed.

Referring to the equitable rule that in foreclosure cases where the land has been subsequently conveyed by the mortgagor it shall be sold

in the inverse order of alienation, Paine, J., says: "The justice of this rule has been sometimes questioned, but we regard it as not only well settled, but correct upon principle, and have repeatedly enforced it. But at the same time we think it may be controlled by other established equitable principles, where the facts render them applicable; and such we think was the case here. It is a familiar principle that where one creditor has security upon two funds, and another has security upon one of them only, the latter may compel the former to resort first to that fund which he cannot reach. And although this is not a direct proceeding to accomplish that object, yet it is substantially that, inasmuch as Mowry sets up these facts to rebut the equity Buck would otherwise have as against him. For the result, if the judgment had been otherwise, would have deprived Mowry of his security entirely. The one tract covered by his mortgage having already been adjudged to be sold first for Buck's benefit, now, if the other should be adjudged to be sold first, he would have nothing left. Whereas it appears by the testimony that upon the decree as rendered Mowry is protected and Buck left with ample security for his debt. Suppose A. mortgages a tract to B., then gives a second mortgage on a part of it to C., which mortgage also covers other tracts, and then gives a mortgage on another part to D. On a foreclosure of B.'s mortgage, the ordinary rule, based merely on the order of alienation, would be to sell D.'s part first. But suppose D. could show that the

its members such creditor is not for that reason to be excluded from sharing in the proceeds of the company assets until he has exhausted his security, for that would be a detriment to such creditor where it involved delay, and unjust to the creditors of the separate estate which furnished the security.⁶⁴ Where the rule would be applied in favor of a creditor having a right to resort to but one fund or property, it will be equally available to one claiming through a sale under his lien.⁶⁵

other tracts covered by C.'s mortgage were an ample security for his debt; would not that raise an equity sufficient to overcome the ordinary rule, and require as between C. and D. that C.'s part should be first sold? I think so; and that is substantially the relation which these defendants hold to each other in the present case. I can see no reason why the principle requiring the creditor having two funds to resort first to the one which the other cannot reach is not applicable to such a case. It is true that ordinarily the adequacy of the first fund might be tested by an actual sale, and the creditor who was compelled first to resort to that might still be in a position to resort to the other to supply any deficiency; and here B. may not be left in such a position. I think that is good reason why such a decree as the one made in this case should be made only upon clear proof of the entire adequacy of the remaining security. But I am not prepared to say that courts should not act upon such proof, or that a party so situated has any absolute right to have the adequacy of his remaining security tested in all cases by an actual sale. It is obvious that such a test could not be had in a case like this, and consequently, if that rule was adopted, it would lead to the injustice of cutting off the last mortgagee entirely, though it might not be necessary

for the protection of the second. Courts are constantly adjudicating upon the most important rights of parties upon the theory that human testimony can establish facts with sufficient certainty to justify such adjudication, and I think the question of the adequacy or inadequacy of a security should form no exception."

In *Miller v. Jacobs*, 3 Watts. 477, it was held that one lien creditor can invoke no security taken by another which had not become a lien when he procured his own; hence, a subsequent mortgagee, having taken bonds but without a warrant to confess judgment, has no equity to call on a prior mortgagee to enter up a judgment on a bond which accompanied his mortgage in order to throw him on another fund; nor can the subsequent mortgagee object to the vacation of judgments subsequently confessed on those bonds, though purposely withdrawn to make way for other judgment creditors whose lien funds are consequently posterior in date to his lien on the mortgaged premises.

⁶⁴ *Bell v. Hapworth*, 52 Hun. 616; *Morrison v. Kurtz*, 15 Ill. 193. See *Berry v. Powell*, 18 Ill. 98; *White v. Dougherty*, Mart. & Yerg. 309, 17 Am. Dec. 802; *Breedlove v. Stump*, 3 Yerg. 257.

⁶⁵ *Marshall v. Moore*, 36 Ill. 321. See *Dodds v. Snyder*, 44 Ill. 53; *McCormick's App.*, 55 Pa. 252.

§ 196. Same when the funds belong to two debtors. The rule, however, does not apply when one of the creditors has a lien for his debt upon two funds belonging to two separate debtors, and the other has a lien upon a fund belonging to one of them, so as to compel the first creditor to make his claim wholly out of that debtor whom the other cannot reach, unless there be some peculiar relations between these debtors which would make it equitable that the debtor having but one creditor should pay the whole demand against him and his co-debtor.⁶⁶ A creditor who has a double security, or a right to go upon more than one fund for payment, may go on all or either one of them for his whole debt. His interest under each is several and independent of the other, and cannot be diminished by reference to the value of the other.⁶⁷ A creditor who has several securities, neither one of which is sufficient for the payment of his debt, has a right to look to each one of them for its payment in the same manner and to the same extent that he could do if he had no other. It is only when it may happen that a creditor, who has no more securities than one may not require for the payment of his debt the entire proceeds of all his securities that any marshaling of them can take place for the benefit of other creditors who are only subsequently entitled to a lien on a part of the same fund or property.⁶⁸ If, for example, property sufficient for the payment of fifty cents on the dollar be mortgaged to two or more creditors, and the mortgagor afterwards mortgages other property to the same and other creditors to secure the payment of the same debts, and also the debts due to the other creditors, and the fund arising from the last mortgage is also sufficient to pay fifty cents on the dollar of all the debts therein named, the creditors in the first mortgage have a right to their full proportion thereof on the whole amount of their debts without regard to what has been or may be received by them on the first mortgage. The two securities are sufficient for the payment of those creditors who are entitled to the benefit of both;

⁶⁶ *Wise v. Shepherd*, 13 Ill. 41; *Dorr v. Shaw*, 4 Johns. Ch. 17, 20; 1 Story's Eq., § 642; *Ebenhardt's App.*, 8 W. & S. 327. See *Ex parte Kendall*, 17 Ves. 520.

Suth. Dam. Vol. I.—37.

⁶⁷ *Gwynne v. Edwards*, 2 Russ. 289. See *Kendall v. New England C. Co.*, 13 Conn. 383.

⁶⁸ *Logan v. Anderson*, 18 B. Mon. 114.

and yet, if the other creditors in the second mortgage have a right to reduce their debts by applying as a credit thereon the amount of their dividend under the first mortgage, and to restrict them to a *pro rata* of the proceeds of the last mortgage on the balance of their debt, when thus reduced, one-fourth part of it would still remain unpaid, although either security taken separately was sufficient for the payment of one-half of the debt.⁶⁹ Whenever, then, a mortgage or assignment is executed to secure the payment of certain specified debts and it contains nothing to show that it was intended only to secure the payment of a part of the debt of some of the creditors, and not the whole amount thereof, the mortgagees or beneficiaries under the assignment have each a right to a full ratable share of the fund on the whole amount of their respective debts. This share cannot be diminished by the existence of another security, where both securities are necessary for the payment of the debt. Equity refuses to interfere or to marshal the securities to the prejudice of the creditor entitled to a double fund. And it makes no difference in such a case whether the benefit of one of the funds has been realized or still remains as a mere security for the payment of the debt.⁷⁰

⁶⁹ Logan v. Anderson, *supra*.

⁷⁰ Id.; Morris v. Olwine, 22 Pa. 441; Kittera's Est. 17 id. 416; Miller's App., 35 id. 481; Jervis v. Smith, 7 Abb. Pr. (N. S.) 217; Graeff's App., 79 Pa. 146; Patten's App., 45 Pa. 152, 84 Am. Dec. 479; Hess Est., 69 Pa. 272; Brough's Est., 71 Pa. 460.

In Patten's App., *supra*, it was held that the detention by vendors of goods sold, on the insolvency and assignment for the benefit of creditors by the vendees, does not rescind the contract of sale; and the vendors are entitled to a *pro rata* distribution out of the assigned estate; and that where a part of the goods had been delivered and the balance which had been detained was

sold by the vendors, who applied the proceeds to the payment of the notes given upon the sale, leaving a balance still due, they were entitled to a dividend upon the whole amount of their claim at the date of the assignment. See Midgeley v. Slocomb, 2 Abb. Pr. (N. S.) 275.

In Bridendecker v. Lowell, 32 Barb. 9, it was held that where an arrangement was made between debtor and creditor, by which the former gives a new security upon property exceeding in value the amount of the debt, and receives back the evidence of his indebtedness, there being at the time a general fund or security by mortgage upon real estate embracing all the debts of the debtor, but insufficient

§ 197. **Principles on which priority determined.** The principle is believed to be universal that a prior lien gives a prior claim which is entitled to prior satisfaction out of the subject which it binds unless the lien be intrinsically defective or be displaced by some act of the party holding it which should postpone him in a court of law or equity to a subsequent claimant.⁷¹ Where surplus moneys arose upon the foreclosure of several mortgages and were thus claimed: by judgment creditors having the first lien upon two such funds; by a mortgage creditor having a later lien on only one such fund, and by other judgment creditors having still later liens upon all, the prior judgment was ordered paid out of the fund not subject to the mortgage, but if it were not sufficient, any deficiency was to be paid prior to the mortgage out of the fund on which the mortgage was a lien; then the mortgage was to be paid out of the surplus on which it was a lien, and the subsequent creditors

to pay the whole, the effect of such an arrangement was to make the specified security the primary fund for the payment of the debt specifically secured by it, and to postpone the right of that creditor to participate in the general fund until the specific fund had been exhausted.

⁷¹ *Kansas City v. North American T. Co.*, 110 Mo. App. 647; *Rankin v. Scott*, 12 Wheat. 177, 6 L. ed. 592; *Broom's Max.* 236; 9 Paige, 61, note; *Weaver v. Toogood*, 1 Barb. 238; *Embree v. Hanna*, 5 Johns. 101, 9 Am. Dec. 274; *Muir v. Schenck*, 3 Hill, 228, 38 Am. Dec. 633; *Watson v. Le Row*, 6 Barb. 481; *Lynch v. Utica Ins. Co.*, 18 Wend. 236; *Poillon v. Martin*, 1 Sandf. Ch. 569; *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. 603.

It is held in *Gilliam v. McCormack*, 85 Tenn. 597, that marshaling is a pure equity and does not rest at all upon contract. The equity to marshal assets is not one which fastens itself upon the situ-

ation at the time the successive securities are taken, but is to be determined at the time the marshaling is invoked. The equity does not become a fixed right until the proper steps are taken to have it enforced; until then it is subject to displacement and defeat by subsequently acquired liens upon the funds. The facts were that the owner of three lots gave six mortgages thereon to different persons at various dates; the first mortgage covered the entire property, and the subsequent ones parcels thereof less than the whole. All the lots were sold, and their proceeds were insufficient to pay all the mortgage debts. A controversy arose among the junior mortgagees as to the application of the proceeds of the sale after the senior mortgages were discharged. It was held that the several mortgages should be paid *pro rata* in the order of their priority out of the amount realized from the parcel or parcels covered by each.

were entitled to payment only after satisfaction in this manner of the prior judgment and mortgage creditors.⁷²

SECTION 6.

SET-OFF OF JUDGMENTS.

§ 198. **Power to direct set-off inherent.** Courts of law or equity have power to order mutual judgments to be set off against each other on motion made for that purpose. Such power is not derived from or exercised in pursuance of the statutes which allow parties to set off mutual debts. It follows the general jurisdiction of a court over its suitors: it is an equitable part of such jurisdiction and has been frequently exercised.⁷³ Courts proceed upon the equity of the statute of set-offs; but as their power consists in the authority they have over their suitors, rather than any express or delegated authority, their action in such cases has been termed the exertion of the law of the court. Suitors may ask their interference in effecting such set-off, not *ex debito justitiæ*, but only *ex gratia curiæ*.⁷⁴

§ 199. **When it will or will not be granted.** One judgment will not be ordered to be set off against another, on motion, unless it is a judgment which is conclusive on the party against whom it is rendered, and which the party recovering and claiming the right to offset has a clear right to enforce; it must have

⁷² New York L. Ins. & F. Co. v. Vanderbilt, 12 Abb. Pr. 458.

⁷³ Rich v. Hayes, 101 Me. 324, 115 Am. St. 321; Chase v. Woodward, 61 N. H. 79; Hovey v. Morrill, id. 9, 60 Am. Rep. 315; Brown v. Hendrickson, 39 N. J. L. 239; Matson v. Oberne, 25 Ill. App. 213; Alexander v. Durkee, 112 N. Y. 655; Mitchell v. Oldfield, 4 T. R. 123; Williams v. Evans, 2 McCord 203; Tolbert v. Harrison, 1 Bailey 599; Herriek v. Bean, 20 Me. 51; Temple v. Scott, 3 Minn. 419; Makepeace v. Coates, 8 Mass. 451; Greene v. Hatch, 12 id. 195; Ames v. Bates, 119

id. 397; Mason v. Knowlson, 1 Hill, 218; Harris v. Palmer, 5 Barb. 105; Noble v. Howard, 2 Hayw. 14; Holmes v. Robinson, 4 Ohio, 90; Meadow v. Rhyne, 11 Rich. 631; Benjamin v. Benjamin, 17 Conn. 110; Cooper v. Bigalow, 1 Cow. 296. See Zogbaum v. Parker, 55 N. Y. 120.

⁷⁴ De Camp v. Thomson, 159 N. Y. 444, 70 Am. St. 570; Brown v. Hendrickson, 39 N. J. L. 239; Davidson v. Geoghagan, 3 Bibb, 233; Makepeace v. Coates, 8 Mass. 451; Simson v. Hart, 14 Johns. 63, 757.

been rendered by a court which had jurisdiction⁷⁵ and must be final; this right cannot be asserted pending an appeal from the judgment.⁷⁶ An appeal, however, only suspends the right to set-off, and the court may stay proceedings on the other judgment for the protection of that right until the appeal is determined.⁷⁷ In the exercise of this jurisdiction courts will act upon the equitable as well as legal interests and relations of the parties. Applications for such set-off, not being founded on any statute or governed by any fixed or arbitrary rule, are addressed to the discretion of the court, and its discretion will be so exercised as to do equity and not to sanction fraud⁷⁸ or oppression.⁷⁹ The fact that a plaintiff against whom a judgment

⁷⁵ Harris v. Palmer, 5 Barb. 105.

⁷⁶ Pierce v. Tuttle, 51 How. Pr. 193; Hardt v. Schulting, 24 Hun, 345; De Figanieri v. Young, 2 Robt. 670; Zerbe v. Missouri, etc. R. Co., 80 Mo. App. 414; Spencer v. Johnston, 58 Neb. 44; De Camp v. Thomson, 159 N. Y. 444, 70 Am. St. 570.

If a writ of error does not operate as a *supersedeas* an intention to obtain the review of a judgment will not interfere with the allowance of a set-off. Sowles v. Witters, 40 Fed. 413. See Haskins v. Jordan, 123 Cal. 157.

⁷⁷ Pierce v. Tuttle, *supra*; Terry v. Roberts, 15 How. Pr. 65.

In Irvine v. Myers, 6 Minn. 562, it was held that where the right of set-off was suspended by appeal after a motion made, it might remain undecided until the final determination of the appeal.

In Blackburn v. Reilly, 48 N. J. L. 82, it is held that after the affirmation of a judgment and the return of the record to the trial court, the latter may stay the execution of such judgment for the purpose of setting it off against a counter judgment.

⁷⁸ Tolbert v. Harrison, 1 Bailey,

599; Meador v. Rhyne, 11 Rich. 631.

⁷⁹ Williams v. Evans, 2 McCord, 203. W. had obtained judgment against E. for \$188; subsequently E. obtained a judgment in trover against W. for \$240. W., instead of moving to have his judgment set off against the larger one which had been recovered against him, issued a *ca. sa.* against E. and then assigned his judgment to a third person for value. E. was imprisoned on the *ca. sa.*, and so remained until he died. At the next term, W., who seems to have repossessed himself of the judgment recovered by him, moved to have it set off against that obtained by E. On a motion to rescind an order allowing such set-off, Nott, J., said: "There is no doubt but that the court has the power to order mutual judgments to be set off against each other. This is a common law power, and is not derived from the act authorizing parties to set off mutual debts. . . . If it constitute a part of the equitable jurisdiction of the court, it ought to be so exercised as to do equity and not to sanction fraud; and a person who wishes to have the benefit of it

for costs has been rendered has begun another action against the defendant for a larger amount will not prevent said judgment being offset against a judgment in favor of the defendant, since the latter judgment would be a proper set-off or counter claim against such demand as the plaintiff holds against the defendant.⁸⁰ The discretion of a court in acting upon a motion to set off judgments will not be reviewed if the motion is denied.⁸¹ In exercising their power, courts will consider the rights of

ought to avail himself of the earliest opportunity to make his application, and not to delay until the interests of third persons have become involved. If the party in this case had made his application at the court when his judgment was obtained, it ought to have been granted. He had three methods of proceeding: one, that which he is now endeavoring to pursue; another by *fi. fa.* against the goods of the defendants; and the third by taking his body in execution. He chose the latter, and after having made his election (and particularly under the circumstances of this case), he ought to be bound by it; at least he can have no high claim to the assistance of the court to relieve him from the difficulty of his own voluntary creation. It is true a judgment is not a negotiable instrument; nevertheless, an assignment conveys an equitable interest to the assignee, such as a court of law will notice and respect in all cases of appeal to its discretion. *Newman v. Crocker*, 1 Bay, 246. A bond is not negotiable, and yet this court would so far respect the assignee of one as not to permit a judgment recovered upon it to be set off against one recovered by the obligee. The plaintiff, by taking the body of the defendant, had voluntarily relinquished every other claim upon him; and the claim which he now

has upon his property is revived only by the accidental circumstance of his death. Suppose the assignee of this judgment had enforced an execution against W. in the lifetime of E. and during the time he had his body in execution, could W. have required that money, while in the hands of the sheriff, to be paid over to him? Certainly not; because, having taken the body in execution, he must have been contented with it; he could not have double satisfaction. A release of E. from custody would have been a release of the debt. He had a mild and easy method of enforcing the payment of his debt, if he had chosen to make use of it. Instead of which he resorted to the most rigorous and unfeeling known to the law; like another Shylock, he would have nothing short of his flesh; and having no longer the means of gratifying his vengeance, he now comes and asks this court to take from a humane and merciful creditor a vested right, to satisfy a debt which he had it in his power to receive, and which he voluntarily relinquished to gratify a vindictive passion. The motion must be granted." See *Cooper v. Bigalow*, 1 Cow. 206.

⁸⁰ *Welsher v. Libby*, 107 Wis. 47.

⁸¹ *Chipman v. Fowle*, 130 Mass. 352.

persons who are not parties to the action.⁸² If a party who is entitled to a set-off has a special fund which is primarily applicable to the satisfaction of his judgment or decree he will not be permitted to avail himself of his right against the holder of an opposing judgment or decree until such fund is exhausted, and then only for any balance of his demand which is unsatisfied.⁸³ A set-off of judgments will not be allowed if it will result in depriving a debtor of property which is exempt from execution.⁸⁴ Were it otherwise A. might get judgment against B., seize and sell his exempt horse and obtain partial satisfaction of the judgment from the proceeds of such sale. If B. should then recover a judgment for damages against A. the latter might set-off the unsatisfied portion of his judgment against it. Thus B. would lose his horse, and A., by a violation of the law, would collect a portion of his judgment against an insolvent debtor. B.'s judgment ought to take the place of his horse. But this exemption from liability to set-off is not to be extended to judgments in favor of the owner of exempt property for damages for its wrongful taking in attachment proceedings, the property being in his possession.⁸⁵ A court of equity may set off judgments when courts of law cannot because they are not between the same parties. But this will not be done unless the moving party shows equitable ground for it; he must make it appear that his rights are superior to any equitable right in favor of the other party.⁸⁶

⁸² Meador v. Rhyne, 11 Rich. 631; Simmons v. Reid, 31 S. C. 389, 17 Am. St. 36.

The lien of a third party on one of the judgments, arising subsequent to both of them, does not bar their set-off. Park v. Hutchinson, 80 Ark. 183.

⁸³ Nuzum v. Morris, 25 W. Va. 559. See Payne v. Webb, 29 id. 627.

⁸⁴ Putner v. Bowser, 104 Ind. 255; Pnett v. Beard, 86 Ind. 172, 44 Am. Rep. 280; Junker v. Hustes, 113 Ind. 524; Beekman v. Manlove, 18 Cal. 388; Duff v. Wells, 7 Heisk. 17; Collett v. Jones, 7 B. Mon. 586;

Johnson v. Hall, 84 Mo. 210. *Contra*, Temple v. Scott, 3 Minn. 419, ruled by a divided court, and on the theory that exemption statutes are to be strictly construed; a rule opposed to the great weight of authority. Sutherland's Stat. Const., §§ 420-422. See Mallory v. Morton, 21 Barb. 424; Caldwell v. Ryan, 210 Mo. 17, 16 L.R.A.(N.S.) 494.

⁸⁵ Johnson v. Hall, 84 Mo. 210.

⁸⁶ Howe Mach. Co. v. Hickox, 106 Ill. 461.

The Rhode Island statute governing the right to set off judgments and executions applies only to cases

§ 200. **Interest of the real parties considered.** The parties beneficially interested may assert their right, and a set-off between the nominal parties will be refused where it would be prejudicial to those having equitable interests.⁸⁷ Thus, a court will not order a judgment against an executor in his own right to be set off against a judgment in his favor on a promissory note taken from goods of his testator, sold by him, if it appear that the creditors or legatees of the testator will be thereby prejudiced.⁸⁸ A judgment debtor to the estate of a decedent may

in which the parties are reversed and sue and are sued in the same right; the suits must also be pending at the same time. *Hopkins v. Drowne*, 21 R. I. 80.

⁸⁷ *Daniel v. Bush*, 80 Ga. 218.

⁸⁸ *Tolbert v. Harrison*, 1 Bailey, 599. In this case the court say: "The note given to the executor for a contract made with him must be treated and considered as his own. In a legal point of view it was the note of Sterling Harrison to Jos. S. Tolbert. It is, however, unquestionable that in fact it was a part of the assets of the estate of his testator; and the executor might and ought to have treated it as such. He, on the present occasion, claims that it should be considered as the assets of the estate. This is the equity of the case; and the court of equity, in the exercise of the jurisdiction which legitimately belongs to it over trustees, will follow a note of hand as the property of an estate if really taken for assets of the estate sold by the administrator, though the note be taken in the private name of the administrator. *Glass v. Baxter*, 4 Desaus. 153. The question is whether this court is bound by legal rules to set off judgments in all cases where they are in the same right. It is clear that it is not."

In *Ames v. Bates*, 119 Mass. 397,

W. purchased of A. a claim against B. pending an action by A. upon the claim. B. had previously purchased a claim against A. and had given notice thereof to A. Suit was brought thereon by B. in which W. appeared as adverse claimant of funds in the hands of B. summoned as trustee. At the time of his purchase of the first claim W. had no knowledge of the claim against A. Held, that judgment for the plaintiff in the second action could not be set off against judgment for the plaintiff in the first action. The court say: "While there is no express statute authority for setting off judgments where the creditor in one action is the debtor in another, except in a limited number of cases (*Gen. Stats.*, ch. 126, §§ 2, 3, 5), yet this power has been frequently exercised by courts of law, and rests upon their jurisdiction over suitors in them and their general superintendence of proceedings before them. *Makepeace v. Coates*, 8 Mass. 451; *Greene v. Hatch*, 12 Mass. 195. Such a power is only to be exercised upon careful consideration of all the circumstances of the transactions out of which the judgments arise, and in order to protect the just rights of parties. In the present case the nominal parties to the judgments are not the same, nor is the equitable owner of

set off against such judgment claims proved against the estate and which existed in the debtor's favor prior to the death of the decedent, but not claims assigned to him after his death. As to these last it was said the rights of the administrators and the creditors had become fixed by the decedent's death; the claim against the assignee had become assets of the estate in which its creditors and the administrators had an interest.⁸⁹ A judgment against a decedent may not be set off against one with which he was not connected and which was bought by the administrator with the funds of the estate.⁹⁰ Set-off will not be allowed in favor of the nominal judgment creditor where it appears that before the judgment was obtained the cause of action had been assigned to a third person.⁹¹ But if the right exists at the time

the judgment recovered in the name of Ames the defendant in the suit of which Bates is the equitable owner. But even if Ames had continued to be the owner of the judgment recovered in his name, it might well be questioned whether Bates should be permitted to set off against it the judgment recovered by him in the name of Freeman and another, when he could not have set off the claim upon which the judgment was founded. The reason why a party is not permitted by the statute to set off such claims may fairly be presumed to be, that it is not just that one should be encouraged, instead of paying his own debt, to seek out claims against his creditor in order thus to change the position of parties *pendente lite*; and this reason is equally applicable to judgments which may afterwards be obtained upon such claims. However this might be as to Ames himself, it is clear that as to the assignee of Ames, Bates should not be allowed to effect this change. When the equitable rights of third parties would be affected by an offset of this character it is not to be

made to the injury of intervening rights honestly acquired. *Greene v. Hatch*, *ubi supra*; *Zogbaum v. Parker*, 55 N. Y. 120; *Gay v. Gay*, 10 Paige, 369; *Ramsey's App.*, 2 Watts, 228."

In *Carter v. Compton*, 79 Ind. 37, T. obtained judgments against the estate of S. on a note. The executors of S. held a note of a later date against T., which was executed to them in their representative capacity. Judgment upon it was set off against the first mentioned judgment.

⁸⁹ *Wikel v. Garrison*, 82 Iowa, 453. See *Martin County Nat. Bank v. Bird*, 92 Minn. 110.

⁹⁰ *Rich v. Hayes*, 101 Me. 324, 115 Am. St. 321.

⁹¹ *Swift v. Prouty*, 64 N. Y. 545; *Perry v. Chester*, 53 N. Y. 240; *Mackey v. Mackey*, 43 Barb. 58; *Turner v. Satterlee*, 7 Cow. 480; *Nash v. Hamilton*, 3 Abb. Pr. 35.

It is held in *Williams v. Taylor*, 69 Ind. 48, that if at the time a judgment is pleaded in set-off the equitable title to it is in one person and the legal title in another, the latter will prevail.

of the assignment of a judgment, the assignee will stand only in the shoes of the assignor.⁹² The assignee of a judgment is not affected by equities which arose between the parties to it subsequent to the assignment.⁹³ Nor is the assignee of all rights and demands under a contract charged with notice of such of its stipulations as are wholly distinct from that portion of it which he is concerned with; as where an instrument provides for closing up an existing, and also for carrying on a new, business. The subject-matters are so disassociated that they are several contracts. Hence the assignee of rights under the clause relating to prosecuting a new business is not charged with knowledge of the existence of a judgment against his assignor on account of a breach of the other provision, and such judgment cannot be set off against one subsequently rendered in his favor.⁹⁴ As between two persons who hold judgments by assignments, the one prior in time has the right to be paid first by the judgment he holds, and such judgment is not subject to set-off

⁹² *Skinker v. Smith*, 48 Mo. App. 91; *Irvine v. Myers*, 6 Minn. 502; *Jaeger v. Koenig*, 32 N. Y. Misc. 244; *Lammers v. Goodeman*, 69 Ind. 76; *McBride v. Fallon*, 65 Cal. 301; *Peirce v. Bent*, 69 Me. 381; *Wells v. Clarkson*, 5 Mont. 336; *Brown v. Hendrickson*, 39 N. J. L. 239; *Chamberlin v. Day*, 3 Cow. 353; *Ferguson v. Bassett*, 4 How. Pr. 168; *Noxon v. Gregory*, 5 id. 339; *Cooper v. Bigalow*, 1 Cow. 56, 206; *Turner v. Crawford*, 14 Kan. 499. See *Duncan v. Bloomstock*, 2 McCord, 318; *Ramsey's Appeal*, 2 Watts, 228.

"Cases often occur in which the set-off of one judgment against another is allowed regardless of a prior assignment of one to a third person. Such cases are, where the assignee has taken the judgment charged with notice of the right of set-off as an existing defense (*Rowe v. Langley*, 49 N. H. 395); where, through insolvency of the assignor

at the time of the assignment, the party claiming the right of set-off had no other means of collecting his debt (*Gay v. Gay*, 10 Paige, 369, 375); and where, in anticipation of an application to make the set-off, the assignment was made for the purpose of defeating the right. *Duncan v. Bloomstock*, 2 McCord, 318. In all cases where the assignment is without consideration, not in good faith, or fraudulently made to defeat the application, the court will direct the set-off to be made. *Cross v. Brown*, 51 N. H. 486; *Hurst v. Sheets*, 14 Iowa, 322; *Russell v. Conway*, 11 Cal. 93; *Morris v. Hollis*, 2 Harr. 4; *Duncan v. Bloomstock*, *supra*." *Hovey v. Morrill*, 61 N. H. 9, 60 Am. Rep. 315.

⁹³ *Wyvell v. Barwise*, 43 Minn. 171.

⁹⁴ *Howe Mach. Co. v. Hickox*, 106 Ill. 461.

by the assignor of it who subsequently purchased an assignment of a judgment against the holder.⁹⁵ The assignee of a judgment which was bought without notice of any offsets thereto cannot be denied the right to enforce it by injunction proceedings because the defendant seeks to offset against it a judgment recently rendered against the plaintiff upon demands bought by him before the transfer of the judgment for the purpose of being used in offset, notwithstanding the plaintiff is insolvent.⁹⁶ The valid assignment of a judgment does not affect the judgment debtor's right to thereafter have a judgment in his favor against the assignor rendered in another action, before the assignment was made, set off against the judgment assigned.⁹⁷

§ 201. **Set-off not granted before judgment.** The right does not attach on the recovery of a verdict merely, and if that be assigned before judgment thereon is rendered it is not subject to a set-off of a judgment against the assignor.⁹⁸ But this rule is not to be applied with technical strictness. In a late case it was said: The defendant in this action has recovered a verdict against this plaintiff in a suit growing out of the same transaction. The case came to the law court upon a motion for a new trial, which has been overruled, and judgment will be ordered upon the verdict—the announcement of the decision being made simultaneously with this. The counsel for the plaintiff in these cases has moved that the judgments, when recovered, both amounting to a less sum than the judgment that will be recovered by this defendant, be set off against the judgment in favor of this defendant, *pro tanto*. This should be done, but not so as to affect the attorney's lien upon the taxable costs in each case.⁹⁹

⁹⁵ *McAdams v. Randolph*, 42 N. J. L. 332; *Gauche v. Milbrath*, 105 Wis. 355; *Wright v. Wright*, 70 N. Y. 96; *Terney v. Wilson*, 45 N. J. L. 282.

⁹⁶ *Dutton v. Mason*, 21 Tex. Civ. App. 339. See 2 *Freeman on Judgments*, § 427; *Lundgreen v. Stratton*, 79 Wis. 227.

⁹⁷ *Benson v. Haywood*, 86 Iowa, 107, 23 L.R.A. 335.

⁹⁸ *Graves v. Woodbury*, 4 Hill, 559, 40 Am. Dec. 296; *Bagg v. Jefferson C. P.*, 10 Wend. 615; *People v. Judges, etc.*, 6 Cow. 598; *Garrick v. Jones*, 2 Dowl. P. C. 157; *Wood v. Merritt*, 45 How. Pr. 471; *Spencer v. Johnston*, 58 Neb. 44. See *McAdams v. Randolph*, 42 N. J. L. 332; *Patterson v. Ward*, 8 N. D. 87.

⁹⁹ *Howe v. Klein*, 89 Me. 376.

§ 202. Assignee must make an absolute purchase. The assignee of a judgment, to be entitled to assert this right of set-off, must acquire the judgment absolutely.¹ If the purchase is made on condition that the motion for set-off is successful, and otherwise to be void, the ownership is not acquired with sufficient absoluteness to enable the assignee to use it as a set-off.² An assignment upon condition of a rescission of the transfer in case the assignee cannot avoid a set-off is not sufficiently absolute.³ Nor will an assignment of a judgment to be collected for the assignor, less compensation for collecting, confer the requisite ownership.⁴ A party seeking to set off a judgment in his favor against one recovered against him should be the owner of the judgment in his own right.⁵ The mutual judgments should be in the same right.⁶ It is immaterial in whose names they were respectively recovered; the right of set-off exists between the several beneficial owners and is confined to them. It is no objection that the mutual judgments are not nominally due to and from the same number of persons;⁷ if the equitable

¹ Jones v. Chalfant, 55 Cal. 505.

² Butler v. Niles, 26 How. Pr. 61, 35 id. 329.

³ Gilman v. Van Slyke, 7 Cow. 469.

⁴ Porter v. Davis, 2 How. Pr. 30. It was held in Butler v. Niles, 26 How. Pr. 61, 35 Id. 329, that even if a plaintiff, in an action to procure a set-off of a judgment, be entitled to set off the judgment assigned to him against one recovered against himself, he cannot make use of such assigned judgment to defeat the incident claims for costs growing out of proceedings instituted before the assignment, if properly commenced. Such proceedings may have been legitimate and necessary consequences of the judgment when taken; and he has no right to take away the foundation of such proceeding, if still pending, by satisfying the judgment with those held by him. It

is not equivalent to payment and acceptance in satisfaction *pendente lite*.

⁵ Mason v. Knowlson, 1 Hill, 218.

⁶ Holmes v. Robinson, 4 Ohio, 90.

Although where one of the parties in two cross-actions has assigned his interest to a third party there may be no right to set off the judgments, yet, where the assignee, being the real plaintiff in one action, is also the real defendant in the other, there is such right. Standeven v. Murgatroyd, 27 L. J. (Ex.) 425.

⁷ Id.; Simson v. Hart, 14 Johns. 63, 75; Pierce v. Bent, 69 Me. 381, holding that a judgment in favor of a principal alone may be applied in satisfaction of one against him and his sureties.

In Brown v. Hendrickson, 39 N. J. L. 239, it is said that in testing the right to a set-off it is not necessary that the judgments should be

claims of many become vested in one, they may be set off against separate demands, and *vice versa*.⁸

§ 203. **Nature of action immaterial; foreign judgments.** Nor is it material what was the original cause of action, whether in tort or contract; when a final judgment is obtained the original cause is merged, the judgment becomes technically a contract of record, and on motion it may be made to mutually compensate and satisfy another.⁹ Nor is it necessary that both judgments should be recovered in the same court.¹⁰ The motion should be made in the court where the judgment against the moving party was obtained.¹¹ And the moving papers should be entitled in all the causes, whether in the same court or not.¹² In some states

in the same right; it is enough if the judgment prayed to be set off may be enforced at law against the party recovering the judgment to be satisfied by the set-off, provided it is not in a representative capacity. To the same effect, *Skinker v. Smith*, 48 Mo. App. 91.

Under the Missouri statute a judgment in favor of the attachment plaintiff on the cause of action counted on in the attachment suit may be set off against the damages recovered by the attachment defendant for the improper attachment, although such judgment is against the relator and another who was not a party in the attachment proceeding, since the judgment plaintiff has a right to receive satisfaction of his judgment from one of his two judgment debtors. *State v. Hudson*, 86 Mo. App. 501.

⁸ *Id.*; *Buller's Nisi Prius*, 336.

⁹ *Louisville & N. R. Co. v. Perkins*, 1 Ala. App. 376; *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Langston v. Roby*, 68 Ga. 406; *Sowles v. Witters*, 40 Fed. 413, holding that a decree in equity may be set off against a judgment at law; *Howell v. Shands*, 35 Ga. 66; *King v. Hoare*, 13 M. & W. 494, 504.

¹⁰ *How v. Klein*, 89 Me. 376; *Skinker v. Smith*, 48 Mo. App. 91; *Aldrich v. Blatchford*, 175 Mass. 396, 78 Am. St. 503; *Robinson v. Kunkleman*, 117 Mich. 193; *Taylor v. Williams*, 14 Wis. 155; *Kimball v. Munger*, 2 Hill, 364; *Barker v. Braham*, 2 W. Black. 869; *Hall v. Ody*, 2 B. & P. 29; *Bridges v. Smyth*, 8 Bing. 29; *Bristowe v. Needham*, 7 M. & G. 648; *Coxe v. State Bank*, 8 N. J. L. 472; *Noble v. Howard*, 2 Hayw. 14; *Ewen v. Terry*, 8 Cow. 126; *Ross v. Hicks*, 11 Barb. 481; *Irvine v. Myers*, 6 Minn. 562. *Contra*, *Tenant v. Mar-maduke*, 5 B. Mon. 76.

In *Schantz v. Kearney*, 47 N. J. L. 56, a decree in admiralty rendered by a federal court was set off against a judgment recovered in a state court.

¹¹ *Brookfield v. Hughson*, 44 N. J. L. 285; *Taylor v. Williams*, 14 Wis. 155; *Dunkin v. Vandenbergh*, 1 Paige, 622; *Cooke v. Smith*, 7 Hill, 186; *Ross v. Hicks*, 11 Barb. 481; *Russell v. Conway*, 11 Cal. 93.

¹² *Alcott v. Davison*, 2 How. Pr. 44. In North Carolina the practice has been to set off judgment by *scire facias*. *Noble v. Howard*, 2 Hayw. 14.

the motion may be made in the court in which one or both of the actions are pending.¹³ If the judgments are in different courts all difficulty in accomplishing the practical result is obviated, if the party desiring the set-off makes his application in the court where the judgment exists against him, for the court can then make its action in satisfying, either in whole or in part, its own judgment conditioned upon such applicant making reciprocal satisfaction of the judgment in his favor standing in another court.¹⁴

Equity will afford relief to a party against whom it is sought to enforce a foreign judgment in favor of a nonresident upon whom process cannot be served in an independent action in the jurisdiction in which the dependent action on the judgment is pending by allowing the debtor to set off claims for unliquidated damages arising out of dealings between the parties.¹⁵ Under some statutes a demand upon a simple contract may be set off against a foreign or domestic judgment; the statute of the forum governing as to the character of the set-off.¹⁶

§ 204. **Liens of attorneys.** In England for a long time there were two conflicting rules as to the right of a judgment debtor to set off a judgment in disregard of the lien of his attorney. Such right was denied by the court of king's bench if the exercise of it affected the attorney's lien for costs.¹⁷ The common pleas courts held that the equitable rights of the parties were superior to the attorney's lien.¹⁸ In 1853 the rules adopted made the practice in the king's bench applicable to all the courts, while the judicature act of 1873 adopted the other rule. The rule of the common pleas has been adopted in many jurisdictions in this country,¹⁹ while others follow that of the king's

¹³ *Peirce v. Bent*, 69 Me. 381.

¹⁴ *Welsher v. Libby*, 107 Wis. 47.

¹⁵ *Plattner I. Co. v. Bradley*, 40 Colo. 95, and cases cited; *Hubley Mfg. & S. Co. v. Ives*, 81 Conn. 244, 129 Am. St. 209.

¹⁶ *Leathe v. Thomas*, 288 Ill. 246.

¹⁷ *Mitchell v. Oldfield*, 4 T. R. 123.

¹⁸ *Schoole v. Noble*, 1 H. Black. 23.

¹⁹ *Benjamin v. Benjamin*, 17

Conn. 110; *Turner v. Crawford*, 14 Kan. 499; *Sanders v. Gillett*, 8 Daly, 183; *Nicoll v. Nicoll*, 16 Wend. 446; *Roberts v. Carter*, 24 How. Pr. 44; *Brooks v. Hanford*, 15 Abb. Pr. 342; *Hayden v. McDermott*, 9 id. 14; *People v. New York C. P. C.*, 13 Wend. 649; *Hovey v. Rubber T. P. Co.*, 14 Abb. Pr. (N. S.) 66; *Watson v. Smith*, 63 Iowa, 228; *Mosely v. Norman*, 74 Ala.

bench.²⁰ But where the equitable power of a court is invoked by motion the statute of set-off is not the obligatory guide, and the court, proceeding upon its own discretion, will sustain the attorney's lien and give it preference.²¹ An attorney has a lien for his costs upon money recovered by his client or awarded him in a cause in which the attorney was employed, in case the money has come into his hands, or he may stop it *in transitu* by giving notice to the opposite party not to pay it until his claim for costs is satisfied, and then moving the court to have the amount thereof paid to him in the first instance. And, if notwithstanding such notice, the other party pay the money to the client, he is still liable to the attorney for the amount of his lien; and the latter in such case will not be prejudiced by any collusive release given by his client. But unless such notice is given the client may compromise with the opposite party, and give him a release without the intervention of his attorney; and he in that event can afterwards look to his client only for payment.²²

422; Wright v. Treadwell, 43 Md. 212; Fairbanks v. Devereux, 58 Vt. 359, 3 Atl. Rep. 500; Bosworth v. Tallman, 66 Wis. 533.

In New York, since the enactment of 1879, no set-off is allowed as against the lien of an attorney. Ennis v. Curry, 22 Hun, 584; Naylor v. Lane, 66 How. Pr. 400, 18 J. & S. 97.

²⁰ Howe v. Klein, 89 Me. 376; Currier v. Boston & M. R. Co., 37 N. H. 223; Stratton v. Hussey, 62 Me. 286; Puett v. Beard, 86 Ind. 172, 44 Am. Rep. 280; Dunklee v. Locke, 13 Mass. 525; Boyer v. Clark, 3 Neb. 161; Robertson v. Slutt, 9 Bush, 659; Carter v. Davis, 8 Fla. 183; Caudle v. Rice, 78 Ga. 81. See Langston v. Roby, 68 id. 406.

²¹ Simmons v. Reid, 31 S. C. 389, 17 Am. St. 36; Diehl v. Friester, 37 Ohio St. 473; Ward v. Wordsworth, 1 E. D. Smith, 598; Haight v. Holcomb, 16 How. Pr. 163; Peckham v.

Barcalow, Lalor's Supp. 112; Smith v. Lowden, 1 Sandf. 696; Gihon v. Fryatt, 2 id. 638; Sweet v. Bartlett, 4 id. 661; Roberts v. Carter, 17 How. Pr. 341, 24 id. 44; Martin v. Kanouse, 17 id. 146; De Figanieri v. Young, 2 Robert. 670; Hovey v. Rubber T. P. Co. 14 Abb. Pr. (N. S.) 66; Bishop v. Garcia, id. 69.

²² Graham Pr. 61; Ex parte Kyle, 1 Cal. 332; Mansfield v. Dorland, 2 Cal. 507; Russell v. Conway, 11 Cal. 93; Wilkins v. Batterman, 4 Barb. 47; Ten Broeck v. De Witt, 10 Wend. 617; Bradt v. Koon, 4 Cow. 416; Martin v. Hawks, 15 Johns. 405; Chapman v. Haw, 1 Taunt. 341; Omerod v. Tate, 1 East, 464; Turwin v. Gibson, 3 Atk. 720; Read v. Dupper, 6 T. R. 361; Wilkins v. Carmichael, 1 Doug. 101; Schoole v. Noble, 1 H. Black. 23; Ackerman v. Ackerman, 14 Abb. Pr. 229; Bishop v. Garcia, 14 Abb. Pr. (N. S.) 69.

This lien has sometimes been supposed to be confined to some fixed and certain amount allowed to an attorney by statute, and that it does not extend to a *quantum meruit* claim for his services.²³ A distinction has been made as to the right of set-off when the judgments are in the same action, or in actions growing out of the same subject-matter, and where the judgments are in actions having no connection with each other. In the former class of cases the right is generally deemed superior to the claim of the attorney in either action for his services and disbursements;²⁴ in the latter the equitable right of the attorney who has rendered services and incurred expenses in obtaining one of such judgments, to be paid out of it, is deemed superior to the right of the judgment debtor to have that judgment paid by applying upon it the judgment owned by him against his judgment creditor, the assignment being made *bona fide* before the right of set-off attaches.²⁵

²³ *Ex parte Kyle*, 1 Cal. 332; *Davenport v. Ludlow*, 4 How. Pr. 337; *Benedict v. Harlow*, 5 id. 347. But a more reasonable view, in the writer's judgment, is to be found in the able opinion of Daly, J., in *Ward v. Wordsworth*, 1 E. D. Smith, 598, where it is held that the abolition by the code of all statutes regulating the fees of attorneys, and of all rules or provisions of law preventing an attorney from agreeing with his client for his com-

pensation, and leaving the measure thereof to the contract of the parties, has not affected the right of the attorney to his lien.

²⁴ *Yorton v. Milwaukee, etc. R. Co.*, 62 Wis. 367.

²⁵ *Gauche v. Milbrath*, 105 Wis. 355; *Benjamin v. Benjamin*, 17 Conn. 110; *Diehl v. Friester*, 37 Ohio St. 473; *Wells v. Elsam*, 40 Mich. 218; *Kinney v. Robison*, 52 Mich. 389.

CHAPTER VI.

PECUNIARY REPRESENTATIVE OF VALUE.

SECTION 1.

MONEY.

§ 205. Characteristics of money.

206. Payment to be made in money of country of performance.

207. Payment in currency.

208. Effect of changes in the value of money.

209. Value of money at time of contracting.

210. The legal tender act.

211. Effect of fluctuations in currency.

SECTION 2.

PAR AND RATE OF EXCHANGE.

212. Par of exchange.

213. Rate of exchange.

SECTION 1.

MONEY.

§ 205. **Characteristics of money.** All civilized nations have some method or system of pecuniary remuneration, based upon an arbitrary unit of value sanctioned by law. By it accounts are kept, the amounts of debts and judgments expressed, and wealth computed. They have, also, gold and silver coins, either representing that unit or some multiple of it, or other value estimated with reference to it. These are of intrinsic value, and being made and issued by the sovereign power are acceptable to everybody and therefore have universal currency as a convenient and necessary medium of exchange and payment. They are money in the strict sense. All pecuniary obligations are measured by and expressed in the value they represent, and are solvable by them. Nor can such obligations be otherwise liquidated or paid, except by agreement, unless the state which has the power to coin money prescribes some other form of legal money. The precious metals, being valued according

to a uniform and fixed standard, are the only proper measure of value. Their value is determined by weight and purity, and the impress on the coins is a certificate so generally relied upon that the pieces readily pass for their nominal value by count.

Money is cosmopolitan. A contract which is a money contract where it is entered into and to be performed is a money contract everywhere. To this extent the money of one nation is treated as money by another, as distinguished from a mere chattel or a commodity. Thus, money lent in India in *pagodas*, and sued for in England as money lent, was held recoverable in that form. It was contended that the averment that the defendant was indebted for "lawful money of Great Britain" was not supported; but Gibbs, J., said "the doctrine contended for has been exploded these thirty years."¹ The real meaning of such a count was afterwards explained to be that the defendant is indebted for money of such a value or amount in English money.² So a contract made and to be performed in the same country, for the payment of what is money at the time of contracting, will be held a money contract after that currency has been abolished and another entirely different has been substituted.

§ 206. **Payment to be made in money of country of performance.** Contracts for the payment of money are deemed payable in the legal money of the country where payment is to be made, unless a contrary intention appears; that is, a contract for the payment within the United States of dollars is presumptively payable in dollars of our decimal currency. If a contract be made here, and even not within the law merchant, and between citizens of the United States, and to be performed here, for the payment of a sum stated in the denominations of a foreign currency it is undoubtedly to be treated as a money contract, the same as if made and to be performed in the country where such currency is the legal money.³ Debts have no *situs*; they are payable everywhere; and in every country where pay-

¹ *Harrington v. Macmorris*, 5 Taunt. 228.

Colglazure, Sneed, 2; *Sheehan v. Dalrymple*, 19 Mich. 239.

² *Ehrensperger v. Anderson*, 3 Ex. 148. But see *McLachlan v. Evans*, 1 Y. & J. 380; *Pollock v.*

³ See *Milligan v. Marshall*, 38 Pa. Super. 60; *Mervine v. Sailor*, 52 Pa. 18; *Christ Church Hospital*

ment may be either tendered or demanded, they are strictly payable in the legal currency or money of that country, and in no other currency unless strictly at maturity. A sterling debt contracted or incurred in England, a debt payable in francs incurred in France, or a contract payable in pistoles entered into in Spain, when sought to be enforced or paid in the United States, is a contract for an equivalent amount payable only in the lawful money of the United States. The very currency in which the contract by its terms was payable, if tendered in this country after maturity, would be no legal offer of payment; it would not be a tender which would stop interest. Contracts made abroad, or payable in foreign currency, are treated as money contracts; but the money specified therein, if not tendered when due, is no longer the money in which the damages due would be computed, except within the jurisdiction where such money is the lawful currency.

§ 207. **Payment in currency.** Bank bills and other paper currency circulate as money. It is not strictly such, for no debtor has a legal right to discharge a money obligation with such currency unless it is made legal tender by law; the creditor may refuse to receive it; but when it is paid and received, it is paid and received as money. The receipt of bank bills, dollar for dollar, upon a debt, is not conditional payment, depending on diligence of the payee in presenting the bills to the bank and obtaining legal-tender funds, nor is it accord and satisfaction.⁴

v. Fnechsel, 54 id. 71; Mather v. Kinike, 51 id. 425; Sears v. Dewing, 14 Allen, 413.

⁴ Solomon v. Bank, 13 East, 135; Pickard v. Bankes, id. 20; Corbit v. Bank, 2 Harr. 235, 30 Am. Dec. 635; Ware v. Street, 2 Head, 609; Magee v. Carmack, 13 Ill. 289; Lightbody v. Ontario Bank, 11 Wend. 1; Ontario Bank v. Lightbody, 13 id. 101; Wainwright v. Webster, 11 Vt. 576, 34 Am. Dec. 707; Fogg v. Sawyer, 9 N. H. 365; Frontier Bank v. Morse, 22 Me. 88, 38 Am. Dec. 284; Westfall v. Braley, 10 Ohio St. 188, 75 Am. Dec. 509;

Harley v. Thornton, 2 Hill (S. C.), 509n. See Keating v. People, 160 Ill. 480, 486.

In Maynard v. Newman, 1 Nev. 271, Beatty, J., said: "Money means anything which passes current as the common medium of exchange and measure of value for other articles, whether it be the bills of private or incorporated banks, government bills of credit, treasury notes or pieces of coined metal. Money is anything which by law, usage or common consent becomes a general medium by which the value of other commodities is meas-

A contract payable in currency or in funds, qualified by any term which imports money, is a money contract. A check for "current funds" calls for current money—par funds, money circulating without discount.⁵ This term, as well as "currency,"

ured and denominated. Paper money is distinguishable from other negotiable paper, such as notes, bills of exchange, etc., because it is always, after once put in circulation, payable to bearer, not to order; because it is made to represent convenient amounts for the ordinary transaction of business, is printed and written on paper not easily worn out, and therefore capable of being passed from hand to hand for a long time without destruction. By general consent it is used and treated as money and not as negotiable paper. If one indorses his name on such a note he does not thereby become responsible for the insolvency of the bank, but merely guarantees that the note is not a counterfeit. Neither the courts of law, nor the community, treat such paper as negotiable securities, but as *money*, something which is used as a general representative and measure of values." *Woodruff v. Mississippi*, 66 Miss. 298.

A genuine silver coin worn smooth by use, not appreciably diminished in weight and identifiable, is a legal tender. *Jersey City & B. R. Co. v. Morgan*, 52 N. J. L. 60, 8 Am. Neg. Cas. 510. See *United States v. Lissner*, 12 Fed. 840.

A genuine silver coin of the United States, distinguishable as such, though somewhat rare and differing in appearance from other coins of that government of like denomination and of later dates, is a legal tender. *Atlanta Con. St. R. Co. v. Keeny*, 99 Ga. 266, 8 Am. Neg. Cas. 148, 33 L.R.A. 824.

A statute requiring an officer to pay out the same moneys received and held by him by virtue of his office does not include only coin and currency in circulation as money. Money, it was said, is a generic term, and may mean not only legal tender coin and currency, but also any other circulating medium or any instrument or token in general use in the commercial world as the representatives of value. It includes whatever is lawfully and actually current in commercial transactions as the equivalent of legal tender coin and currency. Certificates of deposit or other vouchers for money deposited in solvent banks payable on demand are a most convenient medium of exchange and are extensively used in commercial and financial transactions to represent the money thus deposited. *State v. McFetridge*, 84 Wis. 473, 20 L.R.A. 223; *State v. Hill*, 47 Neb. 456, 537.

⁵ *Klanber v. Biggerstaff*, 47 Wis. 551, 32 Am. Rep. 773; *Mare v. Kupfer*, 34 Ill. 286. *Contra*, *Huse v. Hamblin*, 29 Iowa, 501, 4 Am. Rep. Am. Rep. 244.

That term was held to have a specific, legal and well known meaning which cannot be contradicted or explained by parol. See *Moore v. Morris*, 20 Ill. 255.

In *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756, it was held that a note payable in "current funds," in the absence of all evidence showing that anything else is current at the place of payment, must be regarded as payable only

excludes depreciated paper money.⁶ A note, payable in "current Florida money" is payable in good funds.⁷ "Canada currency" is equivalent to lawful money of Canada.⁸

§ 208. **Effect of changes in the value of money.** The amount due by contract is sometimes subject to question by reason of fluctuations in the value of the money in which the contract was made payable. These fluctuations may be caused by the state debasing the coins which represented that money, or by arbitrary changes in the value of existing denominations of the legal currency; and so the value of paper money will rise and fall with the fluctuations in the credit of its maker. Suppose a contract for the payment of \$100 made while the present decimal system is in force; and while that contract is pending congress revises that system and retains a dollar as a unit of value representing only fifty cents. Uninfluenced by any provision that the new dollar shall be a legal tender for all debts at their nominal value, would a hundred of these dollars discharge the principal of the debt under the supposed contract? The injustice of holding the affirmative is apparent. The new dollars would not be those of the contract; by paying a hundred of them the promisor does not pay the value which he undertook to pay, and which was expressed by the contract. He, of course, would be entitled to pay in the money which was lawful and current when the contract required payment to be made; but as the word "dollar" is but a representative of value, that value should be ascertained by the legal sense of the term when the contract was made. Though the parties contracted with a knowledge of the power of congress to make the subsequent changes, it does

in such funds as are current by law.

"Current money" means "currency of the country," whatever is intended to and does actually circulate as money; every species of coin or currency; the specification of dollars in connection with those words serves only to measure the quantity of the notes or currency, not their value, which may be ascertained by proof. There is no dis-

inction between a note for so many dollars in currency and one for so many dollars "payable in currency." *Miller v. McKinney*, 5 Lea, 93; *Commissioners v. McCormick*, 4 Mont. 115, 133.

⁶ *Springfield M. & F. Ins. Co. v. Tincher*, 30 Ill. 399; *Webster v. Pierce*, 35 Ill. 158.

⁷ *Williams v. Moseley*, 2 Fla. 304.

⁸ *Black v. Ward*, 27 Mich. 191.

not follow that they impliedly agreed that the value stipulated to be paid, as fitly expressed in the contract, should be modified by an arbitrary change in the meaning of the terms which had been employed to express their intention. This view is so obviously just that it is a matter of surprise it should ever have been questioned.⁹

⁹See 2 Daniel on Neg. Inst., § 1214; Story's Confl. Laws, §§ 313, 313*a*.

The case of Mixed Moneys, Davis, 28, rests on a contrary view. A bond was given for "£100 sterling current and lawful money of England," to be paid in Dublin, Ireland. Between the time of making the bond and its becoming due, Queen Elizabeth recalled the existing currency in Ireland and issued a new debased coinage called mixed money, declaring it to be lawful currency in Ireland. Of this debased coin a tender was made in Dublin, and it was held good. In a note to § 313*a* of Story's Confl. Laws, it is said: "The court do not seem to have considered that the true value of the English current money might, if that was required by the bond, have been paid in Irish currency, though debased, by adding so much more as would bring it to the par. And it is extremely difficult to conceive how a payment of current lawful money of England could be interpreted to mean current or lawful money of Ireland, when the currency of each kingdom was different, and the royal proclamation made a distinction between them, the mixed money being declared the lawful currency of Ireland only. Perhaps the desire to yield to the royal prerogative of the queen a submissive obedience as to all payments in Ireland may account for a decision so little consonant with the principles of law in

modern times. Sir William Grant, quoting Vinnius, in *Pilkington v. Commissioner for Claims*, 2 Knapp, 18 to 21, affirms the better doctrine. 'He (Vinnius) takes the distinction, that if, between the time of contracting the debt and the time of its payment, the currency of the country is depreciated by the state, that is to say, lowered in its intrinsic goodness, as if there were a greater proportion of alloy put into a guinea or a shilling, the debtor should not liberate himself by paying the nominal amount of his debt in the debased money; that is, he may pay in the debased money, being the current coin, but he must pay so much more as will make it equal to the sum he borrowed.' But he says (and this seems contradictory of the foregoing), if the nominal value of the currency, leaving it unadulterated, were to be increased, as if they were to make the guinea pass for 30*s.*, the debtor may liberate himself from a debt of £1 10*s.* by paying a guinea, although he borrowed the guinea when it was but 21*s.*" And the case of *Reynolds v. Lyne's Ex'r*, 3 Bibb, 340, is in accord with that principle. A contract was made when a dollar was 5*s.* 9*d.* for the payment of a sum at a future day on the performance of a concurrent act of the payee. Before the money became payable, the state where the contract was made enhanced the value of the dollar to 6*s.* Subsequently payments were made and a dispute arose

§ 209. **Value of money at time of contracting.** When a bill is drawn in one country payable in and in the coin of another, the value of which, intermediate the drawing and payment, is reduced by the government, it has been held that payment should be made according to the value of the money at the time the bill was drawn.¹⁰ The common law cannot be deemed settled on this point; nor are the writers on the civil law in accord upon it. The opposite view is apparently based on the assumption that in money we do not regard the coins which constitute it, but only the value which the sovereignty has been pleased that they shall signify.¹¹ But coins have, in the world's exchanges, an intrinsic value which no sovereignty can affect by arbitrary regulation. And if by a regulation concurrently adopted by all nations the coins of each were uniformly

whether the money paid should be estimated at the rate of currency when the money was paid, or when the contract was made. Finally, the obligation in question was given for a balance of the original debt remaining by estimating the payment according to the value of a dollar at the date of the contract, viz, 5s. 9d., for which judgment at law had been rendered. The question arose on a bill in equity for relief on the ground of mistake against that obligation and the judgment founded upon it. Judge Owsley said: "When the original obligation . . . was made the legislature of Virginia had the power to regulate the currency of their coin within the limits of that state; and as the contract . . . was made within the limits of that state, the promise . . . to pay in current money of Virginia must have been agreed on with a knowledge of the state sovereignty, and subject to its control in regulating the currency. We are of the opinion, therefore, that the original obligation . . . might have been

satisfied by payment in current money at its value when Lyne became entitled to demand payment;" and that relief was granted against the judgment.

¹⁰ *Du Costa v. Cole*, Skin. 272; *Chitty on Bills*, *399. See *Anonymous*, 1 Hayw. (by Batt.) 354.

A will speaks from the time of the testator's death, and a legacy of a certain number of dollars is payable in such dollars as were then standard. *Graveley v. Graveley*, 25 S. C. 1, 60 Am. Rep. 478.

If at the time a contract which provides for its discharge in lawful silver money is made silver coins of all denominations are legal tender, the fact that subsequently such coins are a legal tender for only a small proportion of the amount due does not prevent the payment of the obligation in the manner stipulated. *Parish v. Kohler*, 11 Phila. 346.

Damages are assessable in the same kind of money as the contract calls for. *Martin v. Evans*, 14 Phila. 122.

¹¹ See *Story Confl. Laws*, § 313*b*.

either debased or enhanced in value without a corresponding change of their intrinsic value, the change would be immediately followed by an equal advance or decline in the price of property. If the change were made in the value of the coins of one country only it would be at once succeeded by a fluctuation in prices of property measured by it, showing that their purchasing power had undergone no essential modification; and the same conclusion would result from a comparison of the value of such coins with the coined money of other nations. When a contract is made for the payment at a future day of a given amount of money in specified legal denominations, having at the date of the contract a fixed legal value, are not the intention and legal obligation of the parties to be ascertained by the import at that time of the terms used? Undoubtedly a debt created by contract which can be paid with money can be satisfied by whatever medium of payment is legal tender at the time it is due and payable,¹² if paid then; and it may be added, that at all times afterwards it will be solvable in any money which for the time being is legal tender at the place where payment may be demanded or tendered, whether it be the place of contract or elsewhere.¹³

The legal currency which may be applicable at the place of contract when the debt becomes due and is actually demanded, or sought by tender to be paid, may be as unlike that mentioned in the contract as though the demand of payment or tender were made in another country. Upon general principles and legal analogies the value should be ascertained by the legal reading of the contract at the time it was made, and this is payable in any currency which is legal tender when payment is actually made.¹⁴ If when and where payment is made the currency consists of coins of the same or a different name, and represent

¹² *Higgins v. Bear River & A. W. & M. Co.*, 27 Cal. 153; *Wilson v. Morgan*, 4 Robert. 58.

"The general rule, under both the common and the civil law, is that in the absence of a stipulation to the contrary the character of money which is current at the time fixed for performance of a contract is

the medium in which payments may be made." *San Juan v. St. John's G. Co.*, 195 U. S. 510, 49 L. ed. 299, 25 Sup. Ct. 108.

¹³ *Downman v. Downman*, 1 Wash. (Va.) 26.

¹⁴ *Bronson v. Rodes*, 7 Wall. 229, 19 L. ed. 141.

different values from those named in the contract, or the same values, but have been either debased or the contrary, the par should be ascertained of the money of the contract, and that par should be the measure of the amount due. This question may be precluded by the new currency, or that which is offered in payment being made a lawful tender for the particular debt at the nominal value of such currency. Under such legislation, these general views have but a subordinate influence; the practical question then being what is the effect of the statute.

§ 210. **The legal tender act.** Under the legal tender law of 1862 the value of the dollar was not changed, but a new legal representative of it was introduced as a medium of payment. Paper money in the form of the government's promise to pay was issued and declared to be legal tender for all debts, public and private, with certain exceptions of the former. The coinage, which had previously been the exclusive legal tender, was, however, still retained as money. During the first years after the issue of this paper currency, owing to the situation of the country, and doubtless to the circumstance that no time was fixed for its redemption in specie, it became depreciated; that is, gold and silver money was largely at a premium. As greenbacks were a legal tender for all debts payable in money generally they became, of course, the ordinary currency, and were thereby made the legal, as they were the nominal, equivalent, dollar for dollar, for the payment not only of all subsequent but also all antecedent debts.¹⁵ The difference in market value could not be recognized when the paper dollar was offered in payment of any debts to which it was applicable by law. The court said: "A court cannot say judicially that one kind of money made a legal tender is of greater or less value than another; nor can evidence be received to prove a difference."¹⁶

¹⁵ Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; Dooley v. Smith, 13 Wall. 604, 20 L. ed. 547; Bigler v. Waller, 14 Wall. 297, 20 L. ed. 891; Bowen v. Clark, 46 Ind. 405; Reynolds v. Bank, etc., 18 id. 467; Thayer v. Hedges, 23 id. 141; Brown v. Welch, 26 id. 116; Bank v. Bur-

ton, 27 id. 426; McInhill v. Odell, 62 Ill. 169; Black v. Lusk, 69 id. 70; Morrow v. Rainey, 58 id. 357; Chamblin v. Blair, id. 385; Longworth v. Mitchell, 26 Ohio St. 334; Belloc v. Davis, 38 Cal. 243.

¹⁶ Carpentier v. Atherton, 25 Cal. 564; Reese v. Stearns, 29 id. 273;

The legal equivalence in value of coined money and greenbacks is more absolutely asserted by the early than by the later decisions.¹⁷ In an action for specific performance the plaintiff had a verdict; and in September 1860, deposited the purchase-money in court, in gold to be taken out by the defendant on filing his deed. The prothonotary deposited the money with reliable bankers to his own credit. They employed the money as they did other deposits, without profit as coin; it was always subject to the prothonotary's draft. The defendant filed his deed after the passage of the legal-tender law, and the prothonotary offered

Spencer v. Prindle, 28 id. 276; Poett v. Stearnes, 31 id. 78.

¹⁷ In *Buegger v. Shultz*, 13 Mich. 420 (1865), it was held that the act of congress making treasury notes a legal tender in payment of private debts was not designed to confer a personal privilege upon debtors, but was based upon principles of state policy; and an agreement between parties waiving its provisions, and requiring a debt to be paid in gold, is illegal, and cannot be sustained. See *Linn v. Minor*, 4 Nev. 462 (1868).

In *Kimpton v. Bronson*, 45 Barb. 618, Daniels, J., said: "The law has impressed them (treasury notes) with a legal value precisely equal to that of gold and silver of the same denominations for the purpose of paying individual debts with them, and it cannot permit a discrimination against them in favor of gold and silver, without allowing its authority to be substantially annulled. However the fact may be as to their value as a mere commodity, for the purpose of paying individual debts a treasury note is as completely a legal dollar as a piece of metal of a certain weight and quality, impressed as the law directs, is a legal dollar. The one is no more so than the other for

those purposes that the laws have declared them to be of equal value. Where these laws are supreme, that value must be observed and secured by courts of justice. If the obligation in this case had been such as required the delivery of one thousand and eight hundred gold dollars, and not as it was, one thousand eight hundred dollars in gold or silver coin, its construction must have been different. Further, it would have been in no sense a debt within the contemplation of these statutes, and could not be affected by their provisions declaring treasury notes a lawful tender for the payment of debts." Such was the general current of decisions; namely, that all debts, whether payable in terms in gold and silver as money, or in dollars generally, were solvable in greenbacks. *Shollenberger v. Brinton*, 52 Pa. 1; *Appel v. Woltmann*, 38 Mo. 194; *Riddlesbarger v. McDaniel*, id. 138; *Wilson v. Morgan*, 4 Robert. 58, 1 Abb. Pr. (N. S.) 174, 30 How. Pr. 386; *Murray v. Gale*, 5 Abb. Pr. (N. S.) 236, 52 Barb. 427; *Whetstone v. Colley*, 36 Ill. 328; *Humphrey v. Clement*, 44 Ill. 299; *Galliano v. Pierre*, 18 La. Ann. 10, 89 Am. Dec. 643; *Munter v. Rogers*, 50 Ala. 283.

to pay him the money in court in legal tender, which he refused and brought trover for the gold; held, that he could not recover.¹⁸

The earlier cases proceeded on the construction that "*all debts*" in the legal tender law of 1862 included all pecuniary liabilities, whether originating in contracts expressly to pay in gold and silver, or in "dollars" generally. But the subject received a different treatment when it came to be considered in the national supreme court. That court said congress must have had in contemplation debts originating in contract, or demands carried into judgment, and only debts of this character. And the term did not include taxes levied under state laws;¹⁹ nor obligations payable expressly in coined money. Referring to a tender of United States notes in 1865 on a debt contracted in 1851, payable by the language of the contract in gold and silver coin, Chase, C. J., said there were two descriptions of money in use at the time the tender was made, both authorized by law, and both made legal tender in payments. The statute denomination of both descriptions was dollars; but they were essentially unlike in nature. The coined dollar was a piece of gold or silver of a prescribed degree of purity, weighing a prescribed number of grains. The note dollar was a promise to pay a coined dollar; but it was not a promise to pay on demand, nor at any fixed time, nor was it in fact convertible into a coined dollar. It was impossible, in the nature of things, that these two dollars should be actual equivalents of each other, nor was there anything in the currency acts purporting to make them such.²⁰ Except for the payment of debts, in the sense of the

¹⁸ Aurentz v. Porter, 56 Pa. 115.

¹⁹ Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101.

²⁰ Bronson v. Rodes, 7 Wall. 229, 19 L. ed. 141; Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287.

In The Vaughan and Telegraph, 14 Wall. 258, 20 L. ed. 807, which was a collision case, there was a right to recover for the loss of property according to its value at the time and place of shipment. The

place of shipment being in Canada, the value in dollars was stated in the currency of Canada, which was equivalent to the gold currency of the United States, but being stated in dollars, the district court refused to recognize any difference between the value of a dollar of that currency and the dollar of the currency in which the judgment of the court would be payable; in other words, would allow nothing to be added to

legal tender law, there was no conclusive presumption that the two currencies were of equal value. Parties may by their con-

the amount stated in the dollars of Canada currency, to give the equivalent when paid in legal tender notes—holding that the loss in this way was an incident of the suit in the forum where it was brought, and was unavoidable. In the circuit court the same rule of damages was applied, but the decree gave the value of the Canada currency in legal tender notes. "These notes," said Swayne, J., "have since largely appreciated, so that while the libelants would, under the decree of the district court, if it had been paid when rendered, have received much less than the estimated value of the barley, they will now, if the circuit court be affirmed, receive much more. . . . Upon the rule of damages applied by both courts as respects the kind of currency in which the value of the barley was estimated, the libelants were entitled, on the plainest principles of justice, to be paid in specie or its equivalent. The hardship arising from the decree before us is due entirely to the delay in its payment which has since occurred, and the change which time and circumstances have wrought in the value of the legal tender currency. The decree was right when rendered, and being so, cannot now be disturbed." A minority of the court dissented, on the ground that the original decree should have been rendered for the Canada value in gold to avoid the loss incident to the fluctuations in the value of greenbacks. See *Edmondson v. Hyde*, 2 Sawyer, 205; *Kellogg v. Sweeney*, 46 N. Y. 291, 7 Am. Rep. 333.

In *Simpkins v. Low*, 54 N. Y. 179, it was held that the legal tender

acts of congress relate to the effect of the notes issued thereunder as a tender in the payment of debts arising on contract; they do not forbid the recognition in other relations of the difference between coin and currency. The action was brought for the conversion of certain bonds issued by a California company, and though not in terms payable in gold, still as they were by the custom of business treated as such, recovery was permitted on a gold basis.

In *Luling v. Atlantic Mut. Ins. Co.*, 30 How. Pr. 69, it was held that where there is a specific agreement made between any *policy-holders* of a mutual insurance company and the *company* that the premiums of the former shall be paid in *gold* and the losses shall be paid by the latter in *gold*, the company on declaring its *dividends* are bound to allow such *policy-holders* a certificate of their share of the profits in accordance with a *gold standard* as compared with currency. A *notice* issued by the company to the effect that the dealers making insurances payable in gold were to participate with others in the earnings, and that these would be computed and made payable *in currency*, and the delivery by the company and acceptance of the certificates of such earnings by such *policy-holders* under said notice does not affect the legal bearing of the contract, nor make the certificates a bar to an action by the *policy-holders* against the company to correct the account upon which these were based and for a proper readjustment. The certificates were good to the extent which they provided for only. *Baltimore & O. R.*

tracts recognize not only the actual, but any estimated, differ-

Co. v. State, 36 Md. 519; *Bank of Prince Edward Island v. Turnbull*, 35 How. Pr. 8; *Lane v. Gluckauf*, 28 Cal. 288; *Vilhac v. Biven*, id. 410; *Rankin v. Demott*, 61 Pa. 263.

A debt payable "in gold or its equivalent in lawful money of the U. S." requires payment to be made at the commercial value of gold when due. *Baker's App.* 59 Pa. 313. The defendants in 1866 bought goods from plaintiffs, "Liverpool tests, monthly shipments from Liverpool to Philadelphia, . . . at three and one-fourth cents per pound, cash, gold coin, on vessel at Philadelphia:" held to be payable in gold or its equivalent. Parties could take themselves out of the operation of the legal tender law after its passage by contracting for payment in coin alone. *Frank v. Colhoun*, 59 Pa. 381. See *Governor, Opinion in Response to*, 49 Mo. 216; *The Emily B. Souder*, 8 Blatchf. 337.

In *Glass v. Abbott*, 6 Bush, 622, it was held that the difference in value between gold and greenbacks is sufficient to make usury, where there would be none if no such difference existed. But see *Reinback v. Crabtree*, 77 Ill. 182.

Money had and received maintainable for proceeds of a gold bond sold, and recovery may be had of such proceeds at its value in paper money. *Hancock v. Franklin Ins. Co.*, 114 Mass. 155.

In *Carpenter v. Atherton*, 28 How. Pr. 303, a California contract payable in gold was in question; being such as under the statutes of that state, called the specific contract act, would be there enforced by requiring payment in gold, it was held proper to decree in New

York that it be specifically performed, and a tender of greenbacks was held no defense. This remedy was afforded while the courts of the latter state held that legal tender notes were applicable to debts payable expressly in coined money. But in Massachusetts the courts held that the benefits of the California specific contract act could not be allowed. *Tufts v. Plymouth C. M. Co.*, 14 Allen, 407.

In *Cooke v. Davis*, 53 N. Y. 318, it was held that a contract to deliver or receive either of the two recognized kinds of currency at a price expressed in dollars and fractions of a dollar, or at a specified percentage, is to be construed as meaning that the price is payable in the other currency. The defendant contracted to deliver to the plaintiff's assignor "\$10,000 current funds of the United States" at fifteen cents on the dollar ten months after date. It was held that the contract was to deliver \$10,000 legal tender notes for \$1,500 in coin; that it was valid, and for a breach thereof the defendant was liable. The contract was so construed, because otherwise it would be meaningless. The court below construed the promise of fifteen per cent. as payable also in legal tender, and nonsuited the plaintiff on the ground that the contract was void for want of consideration. See *Smith v. McKenney*, 22 Ohio St. 200; also *Caldwell v. Craig*, 22 Gratt. 340; *Turpin v. Sled's Ex'r*, 23 id. 238.

The subject of the comparative value of treasury notes and coin is discussed in a practical way by *Beatty, C. J.*, in *State v. Knittschnecht*, 4 Nev. 178 (1868). See

ence, incur obligations on the basis of it as a consideration;²¹ obtain damages for torts in respect to it, or recover for the loss of it as an element of damage;²² and by that standard where there have been dealings on a gold basis resulting in an indebtedness,²³ or an indebtedness payable in a foreign coin currency.²⁴ And to insure the full benefit of the gold value of the debt or liability, judgment in coined money is authorized and required to be rendered.²⁵

§ 211. **Effect of fluctuations in currency.** Where there are fluctuations in the value of the money of account, or of the currency in which the commercial business of a country is transacted, allowances have sometimes been made. These fluctuations have been very great, and are always liable to occur when the currency is paper. A promisor has a right to pay in the currency of the contract at par, although depreciated, if he pays when it is due; but if he does not, and that currency is money, is the subsequent depreciation an item of legal damages to the creditor; or if it subsequently appreciates, is the increase of value an item for which allowance can be made

Fabbri v. Kalbfleisch, 52 N. Y. 28; *Kupfer v. Bank*, 34 Ill. 328, 85 Am. Dec. 309; *Trebilcock v. Wilson*, 12 Wall. 687, 20 L. ed. 460; *People v. Cook*, 44 Cal. 638.

²¹ *Cooke v. Davis*, 53 N. Y. 318; *Smith v. McKinney*, 22 Ohio St. 200; *Luling v. Atlantic Mut. Ins. Co.*, 30 How. Pr. 69.

²² *Simpkins v. Low*, 54 N. Y. 179; *Kellogg v. Sweeney*, 46 id. 291, 7 Am. Rep. 333; *The Vaughan and Telegraph*, 14 Wall. 258, 20 L. ed. 807; *Fabbri v. Kalbfleisch*, 52 N. Y. 28.

²³ *Hancock v. Franklin Ins. Co.*, 114 Mass. 155. But see *Wright v. Jacobs*, 61 Mo. 19.

²⁴ *Christ Church Hospital v. Fuechsel*, 54 Pa. 71; *Mather v. Kinike*, 51 id. 425; *The Emily B. Souder*, 8 Blatchf. 337, 17 Wall. 666, 21 L. ed. 683; *Sheehan v.*

Dalrymple, 19 Mich. 239; *Colton v. Dunham*, 2 Paige, 267; *Black v. Ward*, 27 Mich. 191; *Oliver v. Shoemaker*, 35 Mich. 464.

²⁵ *Bronson v. Rodes*, 7 Wall. 229, 19 L. ed. 141; *The Emily B. Souder*, 17 Wall. 666, 21 L. ed. 683; *Trebilcock v. Wilson*, 12 Wall. 687, 20 L. ed. 460; *Dewing v. Sears*, 11 Wall. 379, 20 L. ed. 189; *Quinn v. Lloyd*, 1 Sweeney 253; *Currier v. Davis*, 111 Mass. 480; *Independent Ins. Co. v. Thomas*, 104 id. 192; *Chilholm v. Arrington*, 43 Ala. 610; *Kellogg v. Sweeney*, *supra*; *Phillips v. Dugan*, 21 Ohio St. 466, 8 Am. Rep. 66; *Chesapeake Bank v. Swain*, 29 Md. 483; *Atkinson v. Clark*, 69 Ga. 460. See *Gist v. Alexander*, 15 Rich. 50; *Townsend v. Jennison*, 44 Vt. 315; *Grund v. Pendergast*, 58 Barb. 216.

against him? In an early case in North Carolina the court say: "Where the currency in which the judgment is to be given is equal, sum for sum to the money mentioned in the bond, the jury assess damages usually for the detention to the amount of the interest accrued, but they are not obliged to assess damages to that amount only. If upon inquiry, for instance, they find that one pound of the present currency of this country is not equal to one pound of the money payable by the obligation, whether this inequality be occasioned by depreciation or any other cause, and though the money mentioned in the obligation be not foreign money, they may, in the assessment of damages, increase them beyond the amount of the interest so as to make the damages and principal equal in value to the principal and interest mentioned in the bond."²⁶ But whatever may be the rule in respect to a mere conventional money, a debt or liability payable in a legal tender currency may always be discharged in that currency at par, and no allowance is made for fluctuations in its value.²⁷

More than once in the history of this country there has been a conventional and fluctuating paper currency in general use as a substitute for and purporting to represent the denominations of an otherwise ideal legal money. During the prevalence of such currency values have been estimated and dealt with as though this depreciated money were their legal standard and measure. Questions of amount have arisen out of such transactions after this vicious currency had passed away, and sums agreed to be paid while it was the general medium of exchange,

²⁶ Anonymous, 1 Hayw. (by Batt.) 354. In a note to this case it is stated that there were at the same term several cases of assumption for currency more depreciated at the time of the contract than it is now, and according to the direction of the court the plaintiff recovered only the real value in the present currency, the sum demanded being reduced one-sixth,—twelve shillings having been equal to one dollar when the contract was made,

and one dollar now being equal to ten shillings. See *Taliaferro v. Minor*, 1 Call, 456; *Massachusetts Hospital v. Provincial Ins. Co.*, 25 Up. Can. Q. B. 613.

²⁷ See *Faw v. Marsteller*, 2 Cranch, 10, 29, 2 L. ed. 191, 197; *Downman v. Downman*, 1 Wash. (Va.) 26; *Higgins v. Bear River & A. W. & M. Co.*, 27 Cal. 153; *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400.

and magnified in consequence of its depreciation, have been demanded when payment could be exacted in the pure, legal currency. Sealing laws have then been enacted as the only relief against the injustice and inequality of interpreting the inflated language of value which a depreciated currency had popularized by the actual legal standard subsequently brought into practical use. This mode of relief was resorted to in the late insurgent states after the rebellion where the notes of the confederacy had necessarily been the only circulating medium; and until the subject was considered in the supreme court of the United States sealing acts were, by the decisions of several of the state courts, regarded as essential to protect debtors from the enforcement of contracts made with reference to the depreciated currency from liability to pay an equal sum in the lawful currency of the United States.²⁸

²⁸ In *Omohundro v. Crump*, 18 Gratt. 703, Jaynes, J., said, in respect to notes made in Virginia in November, 1861, payable in one, two and three years: "The act of March 3, 1866, provides that in any action founded on any contract, express or implied, made and entered into between the 1st day of January, 1862, and the 10th day of April, 1865, it shall be lawful for either party to show by parol or other relevant evidence what was the true understanding and agreement of the parties, either expressed or to be implied, as to the kind of currency in which it was to be fulfilled or performed, or in reference to which as a standard of value it was made and entered into. This case does not come within the provisions of that act, because the note was made before the 1st day of January, 1862. It is doubtful, to say the least, whether parol evidence of the actual understanding and agreement of the parties as to the kind of currency in which a contract is to be fulfilled, which is ex-

pressed to be payable in 'dollars' generally, would be admissible, independently of the provisions of that act. The word 'dollars' has a definite signification fixed by law, and it is laid down that 'when the words have a known legal meaning, such for example as measures of quantity fixed by statute, parol evidence that the parties intended to use them in a sense different from their meaning, though it was still the customary and popular meaning, is not admissible.' 1 Greenleaf Ev., § 280. See also *Smith v. Walker*, 1 Call, 24; *Commonwealth v. Beaumarchais*, 3 Call, 107. We need not decide whether such evidence could have been received in this case, because it is expressly stated in the facts agreed that there was no actual agreement.

"It is contended, however, that the law will imply an agreement under the circumstances of this case to accept confederate money in payment of the note on which the action is founded. The argument is that the note, having been, made

In 1868 a case from Alabama brought this subject before the federal court of last resort. The question was, "Whether evidence can be received to prove that a promise, made in one of the insurgent states, and expressed to be for the payment of dollars, without qualifying words, was in fact made for the payment of any other than lawful dollars of the United States?" "It is quite clear," said Chase, C. J., delivering the opinion of the court, "that a contract to pay dollars, made between citizens of any state of the Union, while maintaining its constitutional relations with the national government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence. But it is equally clear, if in any other country, coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that, in a suit upon a contract to pay dollars, made in that country, evidence would be admitted to prove what kind of dollars were intended; and, if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States. Such evidence

after the establishment of the confederate states, must be considered as made with reference to the actual currency of those states; and that as confederate notes were the actual currency in those states at the time the note became payable it was payable in that currency. It must be remembered, however, that confederate notes were never made a legal tender. They were never the lawful money of the country, but only a substitute for money like bank notes. Gold and silver were the lawful money of the confederate states at the time this note was made, and also at the time it became payable according to the provisions of the act of congress of the United States, expressly adopted by the congress of the confederate states. The principle of public law relied on by the counsel for the appellant, and quoted from Story, *Suth. Dam. Vol. I.*—39.

Confl., § 242, presumes, in the absence of evidence to the contrary, that every contract is made with reference to the lawful currency of the country in which it is entered into. It does not presume it to be made with reference to any substitute for any currency which may happen to circulate. A contract made in Richmond before the war for the payment of so many dollars would not have been deemed payable in bank notes, though bank notes were then the common and practically the exclusive currency. And so in this case, if we apply to the confederate states the principle relied on, the note must be deemed payable in specie, which was the lawful money of the confederate states at the time it became payable." *Boulware v. Newton*, 18 Gratt. 708; *Hansbrough v. Utz*, 75 Va. 959.

does not alter or modify the contract. It simply explains an ambiguity, which, under the general rules of evidence, may be removed by parol evidence. We have already seen that the people in the insurgent states, under the confederate government, were, in legal contemplation, substantially in the same condition as inhabitants of districts of a country occupied and controlled by an invading belligerent. The rules which would apply in the former case would apply in the latter; and as, in the former case, the people would be regarded as subjects of a foreign power, and contracts among them be interpreted and enforced with reference to the conditions imposed by the conqueror, so in the latter case, the inhabitants must be regarded as under the authority of the insurgent belligerent power actually established as the government of the country, and contracts made with them must be interpreted and enforced with reference to the condition of things created by the acts of the governing power. It is said, indeed, that under the insurgent government the word 'dollar' had the same meaning as under the government of the United States; that the confederate notes were never made a legal tender; and, therefore, that no evidence can be received to show any other meaning of the word when used in a contract. But, it must be remembered that the whole condition of things in the insurgent states was matter of fact rather than matter of law, and as matter of fact, these notes, payable at a future and contingent day, which has not arrived and can never arrive, were forced into circulation as dollars, if not directly by the legislation, yet indirectly and quite as effectually by the acts of the insurgent government. Considered in themselves, and in the light of subsequent events, these notes had no real value, but they were made current as dollars by irresistible force. They were the only measure of value which the people had, and their use was a matter of almost absolute necessity. And this gave them a sort of value, insignificant and precarious enough, it is true, but always having a sufficiently definite relation to gold and silver, the universal measures of value, so that it was always easy to ascertain how much gold and silver was the real equivalent of a sum expressed in this currency. In the light of these facts, it seems hardly less than absurd to say that

these dollars must be regarded as identical in kind and value with the dollars which constitute the money of the United States. We cannot shut our eyes to the fact that they were essentially different in both respects; and it seems to us that no rule of evidence properly understood requires us to refuse, under the circumstances, to admit proof of the sense in which the word 'dollar' is used in the contract before us."²⁹

The presumption from the promise to pay dollars was that dollars of lawful money were meant.³⁰ But this presumption was reversed by the provisions of the seceding laws enacted in some states. Payments actually received by the creditor in confederate notes were held valid.³¹ But it was held in some of the southern states that payments received by an agent or trustee in such currency would not have effect as such.³² In Tennessee, North Carolina and Georgia, however, it was held that a sheriff might receive, in the absence of instructions to the contrary, whatever kind of money is passing currently in the payment of debts of the same character as that which he has

²⁹ *Thorington v. Smith*, 8 Wall. 1, 19 L. ed. 361. See *Hanauer v. Woodruff*, 15 Wall. 448, 21 L. ed. 227; *Confederate Note Case*, 19 Wall. 548, 22 L. ed. 196; *Gavinzel v. Crump*, 22 Wall. 308, 22 L. ed. 783; *Effinger v. Kenney*, 115 U. S. 566, 29 L. ed. 495, 9 Sup. Ct. 179, and cases cited; *Bailey v. Stroud*, 26 W. Va. 614; *Chalmers v. Jones*, 23 S. C. 463.

If payment is made in a depreciated currency which is not legal tender a promise to make good the depreciation is founded on a valuable consideration; but it is otherwise where payment is made in what the law designates as money. *McElderry v. Jones*, 67 Ala. 203.

³⁰ *Id.*; *Wilcox v. Reynolds*, 46 Ala. 529; *Taunton v. McInnish*, *id.* 619; *Neeley v. McFadden*, 2 S. C. 169; *Williamson v. Smith*, 1 Cold. 1, 78 Am. Dec. 478.

³¹ *Ponder v. Scott*, 44 Ala. 241.

³² *Scruggs v. Luster*, 1 Heisk. 150; *Whitley v. Moseley*, 46 Ala. 480. See *Williams v. Campbell*, 46 Miss. 57; *Powell v. Knighton*, 43 Ala. 626; *Fretz v. Stover*, 22 Wall. 198, 22 L. ed. 769; also *Robinson v. International L. Assur. Soc.*, etc. 42 N. Y. 54, 1 Am. Rep. 490; *Bank v. McVeigh*, 20 Gratt. 457; *Alley v. Rogers*, 19 *id.* 366.

Executors or administrators and other trustees who were clothed with the legal title to claims due the estates they represented discharged debtors thereto by receiving payment in confederate currency in the absence of fraud or collusion. *Trustees of Howard College v. Turner*, 71 Ala. 429, and cases cited; *Hyatt v. McBurney*, 18 S. C. 199. But it was not so in the case of one whose authority was special, as an agent or attorney. *Ferguson v. Morris*, 67 Ala. 389. See next note.

to collect, subject to the limitation that he would not be warranted in receiving any currency so depreciated as to amount to notice that the creditor would not accept it.³³

SECTION 2.

PAR AND RATE OF EXCHANGE.

§ 212. **Par of exchange.** There is no common or international unit of value; hence the business and commerce of the

³³ *Atkin v. Mooney*, Phil. (N. C. L.) 32; *Emerson v. Mallett*, Phil. Eq. 236; *Turner v. Collier*, 4 Heisk. 89; *Boyd v. Sales*, 39 Ga. 74; *King v. King*, 37 id. 205; *Campbell v. Miller*, 38 id. 304, 95 Am. Dec. 389; *Hutchins v. Hullman*, 34 Ga. 346; *Neely v. Woodward*, 7 Heisk. 495. See *Van Vacter v. Brewster*, 1 Sm. & M. 490.

"No court since the war has held, so far as we know, that confederate treasury notes were issued by lawful authority; but money has been recognized generally by the courts as a generic term, covering anything that by common consent is made to represent property and pass as such in current business transactions, and that when a judgment or debt has been paid in confederate money and accepted, the transaction cannot be opened. Several decisions go to the extent that if at the time and place of payment confederate money was generally received in business transactions and was in fact the current money of the country, the agent's authority to receive such money, in the absence of directions to the contrary, may be presumed. This rule has been applied not only when the creditor and debtor were within the same state, but when the creditor resided in a state not a member of the confederacy, and the debtor was within

the confederate lines. *King v. King*, 37 Ga. 205; *Westbrook v. Davis*, 48 Ga. 471; *Rodgers v. Bass*, 46 Tex. 505; *Burford v. Memphis B. Co.*, 9 Heisk. 691; *Pidgeon v. Williams*, 21 Gratt. 251; *Hale v. Wall*, 22 Gratt. 224; *Robinson v. International L. Assur. Soc.*, 42 N. Y. 54, 1 Am. Rep. 490; *Glasgow v. Lipse*, 117 U. S. 327, 29 L. ed. 901, 6 Sup. Ct. 757; *Martin v. United States*, 2 T. B. Mon. 89, 15 Am. Dec. 129. Other decisions hold that the rule should not be applied where the creditor was within the federal lines, with communication between him and his agent in the confederacy destroyed. In such a case no implied authority to receive confederate money existed, and payment to the agent or attorney did not discharge the debt. *Harper v. Harvey*, 4 W. Va. 539; *Alley v. Rogers*, 19 Gratt. 366; *Waterhouse v. Citizens' Bank*, 25 La. Ann. 77; *Fretz v. Stover*, 22 Wall. 198, 22 L. ed. 769." *Hendry v. Benlisa*, 37 Fla. 609, 34 L.R.A. 283. The last case holds that if at the time and place of payment in confederate money it was generally received in business transactions, and was the current money of the country, an agent's authority to receive it, in the absence of directions to the contrary from a resident principal, will be presumed.

world are conducted in many kinds of money. It often becomes necessary, therefore, to enforce the collection of debts incurred or contracted in one currency by resort to courts whose judgments are rendered in another; and the gold and silver coins of one country often circulate as money in other countries and are current at their value, which is capable of equivalent expression in the local currency. Whatever the coinage, a like amount of these precious metals will, in all forms of coined money, be of like intrinsic value, depending for its equality on weight and fineness. An amount stated in one currency which is an equivalent for the same value expressed in another is the par of exchange; it is a literal translation of the language of value in one country or currency into that of equal value in another. The true par of exchange between two countries is the equivalent of a certain amount of the currency of one in the currency of the other, supposing the currency of both to be at the precise weight and purity fixed by their respective mints;³⁴ or in other words, it is the amount which the standard coin of either country would produce when coined at the mint of the other.³⁵

³⁴ McCulloch's Com. Dic., tit. Par of Exchange.

³⁵ Commonwealth v. Haupt, 10 Allen, 38. In Daniel on Neg. Inst. the par of exchange is thus explained, vol. 2, §§ 1442, 1443; "By the par of exchange is meant the precise equality of any given sum of money in the coin or currency of one country and the like sum in the coin or currency of another country into which it is to be exchanged, regard being had to the fineness and weight of the coins as fixed by the mint standard of the respective countries. Cunningham on Bills, 417: Story on Bills, § 30. Marius says: '*Pair*,' as the French call it, 'is to equalize, match or make even the money of exchange from one place with that of another place; when I take up so much money for exchange in one place to pay the just value thereof in another kind

of money in another place, without having respect to the current of exchange for the same, but only to what the moneys are worth.' Marius on Bills, 4. It is necessary to this purpose to ascertain the intrinsic values of the different coins; and then it is a matter of arithmetical computation to arrive at the amount of one which will be the exact equivalent of a certain amount of the other, into which it is to be exchanged. When this has been accomplished, and the exact equivalent of a certain amount in one currency has been ascertained in an other, should it be desired to transmit such amount from one country to another, the rate of exchange between the countries will be added to or subtracted from such amount, accordingly as the course of exchange is in favor of the one country or the other. So the par

The par of exchange is the measure of damages only when the sum for which it is substituted as an equivalent would be such if judgment could be taken in the same currency as that in which the debt exists. It is the measure where there is no question of the rate of exchange, and the only inquiry is what is the equivalent amount in our currency to that found due in a foreign currency.

The nominal par based on the equality in value of gold or silver, whether in foreign or domestic coins, by the universal standard, may not be the real par if the money of the former be not gold and silver of the standard value, or if it be some depreciated substitute. Then it may be a question whether

of exchange is the equivalency of amounts in different currencies, while the rate of exchange is the difference between the amounts at different places. Gilbert remarks on this subject, in his *Treatise on Banking*: 'The real par of exchange between two countries is that by which an ounce of gold in one country can be replaced by an ounce of gold of equal fineness in the other country. In England gold is the legal tender, and its price is fixed at £3 17s. 10½*d.* per ounce. In France, silver is the currency, and gold, like other commodities, fluctuates in price according to supply and demand. Usually it bears a premium or *agio*.' In the above quotation the premium is stated to be 7 per *mille*; that is, it would require 1,007 francs in silver to purchase, 1,000 francs in gold. At this price the natural exchange, or that at which an ounce of gold in England would purchase an ounce of gold in France, is 25.31½. But the commercial exchange—that is, the price at which bills on London would sell on the Paris exchange—is 25 francs, 25 cents, showing that gold is 0.30 per cent. dearer in Paris than in London. Tables have been

constructed to show the results of each fluctuation in the premium of gold in Paris and Amsterdam (Gilbert on Banking, 424). And in *Cunningham on Bills* it is said: By the par of exchange is meant the precise equality between any sum or quantity of English money, and the money of a foreign country into which it is to be exchanged, regard being had to the fineness as well as to the weight of each. When Sir Isaac Newton had the inspection of the English mint he made, by order of council, assays of a great number of foreign coins to know their intrinsic values and to calculate thereby the par of exchange between England and other countries, of which a table is given by Dr. Arbuthnot. And he says you may thereby judge the balance of trade, as well as the distemper of a patient by the pulse. And this, it seems, induced Mons. Dutot, in a late book, entitled, *Reflexions Politique sur les Finances*, to follow the same path in calculating the par of exchange, and to say that the balance of trade may be thereby as well judged of as the weather by a barometer." Gilbert on Banking, 417.

the creditor is entitled to judgment for an equivalent according to the real par, or whether he must accept as an equivalent the nominal par. Judge Story says, "if a note were made in England for £100 sterling, payable in Boston, if a suit were brought in Massachusetts, the party would be entitled to recover . . . the established par of exchange by our laws. But if our currency had become depreciated by a debasement of our coinage, then the depreciation ought to be allowed for, so as to bring the sum to the real par, instead of the nominal par."³⁶ And for the same reason, if the money in which the debt was incurred were depreciated, an allowance by way of deduction should be made in ascertaining the equivalent in a currency of gold and silver of standard value. There being no statute fixing for general purposes a legal par of exchange, the rule which is established by the best authorities is that in rendering judgment in a different currency it should be given for such sum as approximates most nearly to the value of the amount contracted for.³⁷

§ 213. Rate of exchange. Where the debt is not only payable in the currency of a foreign country, but is expressly or by implication also payable there, and not having been paid is sued in this country, the creditor is entitled to the money of the forum to a sum equal to the value of the debt at the place where it should have been paid. Where the creditor sues the law ought to give him just as much as he would have had if the contract had been performed, just what he must pay to remit the amount of the debt to the country where it was payable. Hence he is entitled to recover according to the rate of exchange between the two countries at the time of the trial.³⁸

³⁶ Story's Conf. Laws, § 310.

³⁷ *Benmers v. Clemens*, 58 Pa. 24; *Robinson v. Hall*, 28 How. Pr. 342; *Pollock v. Colglazure*, Sneed, 2; *Comstock v. Smith*, 20 Mich. 338; *Reiser v. Parker*, 1 Lowell, 262; *Hawes v. Woolcock*, 26 Wis. 629; *Jelison v. Lee*, 3 Woodb. & M. 368; *Cary v. Courtenay*, 103 Mass. 316, 4 Am. Rep. 559; *Swanson v. Cooke*, 30 How. Pr. 385, 45 Barb. 574; *The*

Vaughan and Telegraph, 14 Wall. 258, 20 L. ed. 807; *Story's Conf. Laws*, §§ 310, 311; *Scott v. Bevan*, 2 B. & Ad. 78.

³⁸ *Marburg v. Marburg*, 26 Md. 8, 90 Am. Dec. 84; *Watson v. Brewster*, 1 Pa. 381; *Hawes v. Woolcock*, 26 Wis. 629; *Allshouse v. Ramsey*, 6 Whart. 331, 37 Am. Dec. 417; *Jelison v. Lee*, 3 Woodb. & M. 368; *Nickerson v. Soesman*, 98 Mass.

364; Capron v. Adams, 28 Md. 529; Cushing v. Wells, 98 Mass. 550; Smith v. Shaw, 2 Wash. C. C. 167; Stringer v. Coombs, 62 Me. 160, 16 Am. Rep. 414; Grant v. Healey, 3 Sumn. 523; Benners v. Clemens, 58 Pa. 24; Woodhull v. Wagner, 1 Bald. 296; Wood v. Watson, 53 Me. 300; Delegal v. Naylor, 7 Bing. 460; Cash v. Kennion, 11 Ves. 314; Lee v. Wilcocks, 5 S. & R. 48; Scott v. Bevan, 2 B. & Ad. 78, and note; Ekins v. East India Co., 1 P. Wms. 395; Lanusse v. Barker, 3 Wheat. 101, 4 L. ed. 343.

The opinion in *Grant v. Healey*, *supra*, places the law on this subject in a clear light, and answers with great force the contrary decisions in Massachusetts and New York which are cited in the discussion. "I take the general doctrine to be clear," said the learned judge, "that whenever a debt is made payable in one country, and is afterwards sued for in another country, the creditor is entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, with interest for the delay; for then and then only is he fully indemnified for the violation of the contract. In every such case the plaintiff is therefore entitled to have the debt due to him first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between these countries added to or subtracted from the amount, as the case may require, in order to replace the money in the country where it ought to be paid. It seems to me that this doctrine is founded on the true principles of reciprocal justice. The question, therefore, in all cases of this sort, where there is not a known and settled commercial usage to govern them, seems to me to be

rather a question of fact than of law. In cases of accounts and of advances, the object is to ascertain where, according to the intention of the parties, the balance is to be repaid—in the country of the creditor or of the debtor. In *Lanusse v. Baker*, 3 Wheat. 101, 147, 4 L. ed. 343, 356, the supreme court of the United States seem to have thought that where money is advanced for a person in another state, the implied undertaking is to replace it in the country where it is advanced, unless that conclusion is repelled by the agreement of the parties or by other controlling circumstances. . . . In relation to mere balances of account between a foreign factor and a home merchant, there may be more difficulty in ascertaining where the balance is reimbursable, whether where the creditor resides or where the debtor resides. Perhaps it will be found, in the absence of all controlling circumstances, the truest rule and the easiest in its application is that advances ought to be deemed reimbursable at the place where they are made, and sales of goods accounted for at the place where they are made or authorized to be made. . . . (*Consequa v. Fanning*, 3 Johns. Ch. 587, 610, 17 Johns. 511, 8 Am. Dec. 442.) . . . I am aware that a different rule, in respect to balances of account and debts due and payable in a foreign country, was laid down in *Martin v. Franklin*, 4 Johns. 125, and *Seo-field v. Day*, 20 Johns. 102, and that it has been followed by the supreme court of Massachusetts in *Adams v. Cordis*, 8 Pick. 260. It is with unaffected diffidence that I venture to express a doubt as to the correctness of the decisions of these learned courts upon this point. It appears to me that the reasoning

in the 4 Johns. 125, which constitutes the basis of the other decisions, is far from being satisfactory. It states very properly that the court have nothing to do with inquiries into the disposition which the creditor may make of his debt after the money has reached his hands; and the court are not to award damages upon such uncertain calculations as to the future disposition of it. But that is not, it is respectfully submitted, the point in controversy. The question is whether, if a man has undertaken to pay a debt in one country, and the creditor is compelled to sue him for it in another country, where the money is of less value, the loss is to be borne by the creditor, who is in no fault, or by the debtor, who by the breach of his contract has occasioned the loss. The loss of which we here speak is not a future contingent loss. It is positive, direct, immediate. The very rate of exchange shows that the very sum of money paid in one country is not an indemnity or equivalent for it when paid in another country, to which by the default of the debtor the creditor is bound to resort. Suppose a man undertakes to pay another \$10,000 in China and violates his contract, and then he is sued therefor in Boston, when the money if duly paid in China would be worth at the very moment twenty per cent. more than it is in Boston; what compensation is it to the creditor to pay him the \$10,000 at par in Boston? Indeed I do not perceive any just foundation for the rule that interest is payable according to the law of the place where the contract is to be performed, except it be the very same on which

a like claim may be made as to the principal, viz., that the debtor undertakes to pay there, and therefore is bound to put the creditor in the same situation as if he had punctually complied with his contract there. It is suggested that the case of bills of exchange stands upon a distinct ground, that of usage, and is an exception from the general doctrine. I think otherwise. The usage has done nothing more than ascertain what should be the rate of damages for a violation of the contract generally, a matter of convenience and daily occurrence in business, rather than to have a fluctuating standard dependent upon the daily rates of exchange; exactly for the same reason that the rule of deducting one-third new for old is applied to cases of repairs of ships, and the deduction of one-third from the gross freight is applied in cases of general average. It cuts off all minute calculations and inquiries into evidence. But in cases of bills of exchange drawn between countries where no such fixed rate of damages exists, the doctrine of damages applied to the contract is precisely that which is sought to be applied to the case of a common debt due and payable in another country; that is to say, to pay the creditor the exact sum which he ought to have received in that country. That is sufficiently clear from the case of *Mellish v. Simeon*, 2 H. Black. 378, and the whole theory of re-exchange." See *Lodge v. Spooner*, 8 Gray, 166; *Hussey v. Farlow*, 9 Allen, 263; *Bush v. Baldrey*, 11 id. 367; *Weed v. Miller*, 1 McLean, 423; *Gruetcup v. Woulhouse*, 2 id. 581.

CHAPTER VII.

CONVENTIONAL LIQUIDATIONS AND DISCHARGES.

SECTION 1.

PAYMENT.

- § 214-216. What is; modes of making.
217. What is not payment.
218. Effect of payment.
219. Payment before debt due.
220. Payment by devise or legacy.
221. Payment by gift *inter vivos*.
222. Retaining money by executor, etc.
223, 224. Payment in counterfeit money, bills of broken banks or forged notes and checks.
225-227. Payment by note, bill or check.
228, 229. Collaterals collected or lost by negligence of creditor are payments.
230. Who may make payments.
231. To whom payment may be made.
232. Pleading payment.
233. Evidence of payment.

SECTION 2.

APPLICATION OF PAYMENTS.

234. General rule.
235, 236. By debtor.
237. Same subject; evidence.
238-240. By creditor.
241. Appropriation by the court.
242. When payments applied *pro rata*.
243. General payment applied to oldest debt.
244. General payment applied to a debt bearing interest, and first to interest.
245. General payments applied to the debt least secured; comments on conflicting views of the general subject.

SECTION 3.

ACCORD AND SATISFACTION.

246. Definition.
247. Consideration.

- 248. Payment of part of a debt will not support agreement to discharge the whole.
- 248*a*. Same subject.
- 249. Any other act or promise which is a new consideration will suffice.
- 250. Composition with creditors.
- 251. Compromise of disputed claim.
- 252. Agreement must be executed.
- 252*a*. Rescission or exoneration before breach.

SECTION 4.

RELEASE.

- 253. Definition.
- 254. Differs from accord and satisfaction.
- 255. Extrinsic evidence and construction.
- 256. Who may execute.
- 257. Effect when executed by or to one of several claiming or liable.
- 258. What will operate as a release.
- 259. Covenant not to sue.

SECTION 5.

TENDER.

- 260. Right to make.
- 261. On what demands it may be made.
- 262. When it may be made.
- 263. In what money.
- 264. By whom.
- 265. To whom.
- 266, 267. It must be sufficient in amount.
- 268. How made.
- 269. Where to be made.
- 270. Must be unconditional.
- 271. Effect of accepting.
- 272. Must be kept good.
- 273. Waiver and omission of tender on sufficient excuse.
- 274. Tender must be pleaded and money paid into court.
- 275. Effect of plea of tender.
- 276. Effect of tender when money paid into court.
- 277. Effect of tender on collateral securities.
- 278. Paying money into court.

SECTION 6.

STIPULATED DAMAGES.

- 279. Contracts to liquidate damages valid.
- 280. Damages can be liquidated only by a valid contract.
- 281. Modes of liquidating damages; computation of time.

- 282. Alternative contracts.
- 283. Liquidated damages contradistinguished from penalty.
- 284. The evidence and effect of intention to liquidate.
- 285. Stipulated sum where damages otherwise certain or uncertain.
- 286, 287. Contracts for the payment of money.
- 288. Large sum to secure payment of a smaller.
- 289. Stipulation where damages certain and easily proved.
- 290-292. Stipulations when damages uncertain.
- 293. Same subject; illustrations.
- 294, 295. Stipulation for payment of a fixed sum for partial or total breach.
- 296. Effect of part performance accepted where damages liquidated.
- 297. Liquidated damages are in lien of performance.
- 298. Effect of stipulation upon right of action.
- 299. Waiver of right to stipulated damages.

SECTION 1.

PAYMENT.

§ 214. **What is; modes of making.** Payment is the actual performance of an agreement or duty to pay money.¹ It is distinguishable from accord and satisfaction, and from release; it is strict performance in respect to a debt, according to the literal and substantial import of the contract by virtue of which it was incurred; accord and satisfaction is the adoption, by mutual consent and the doing, of some other act as a substitute;

¹ *City Sav. Bank v. Stevens*, 59 N. Y. Super. Ct. 549.

"Payment is the discharge in money or its equivalent of an obligation or debt owing by one person to another." *Morris v. Reyman*, 55 Ind. App. 112.

Payment on Sunday discharges the debt. *Jameson v. Carpenter*, 68 N. H. 62.

Under an agreement to pay bills daily for goods delivered the purchaser has the whole of the day in which bills are presented to pay them. *Anglo-Am. P. Co. v. Prentiss*, 157 Ill. 506.

Punctual payment means payment on the day fixed; nine days

thereafter is too late. *Leeds & H. Theater v. Broadbent*, [1898] 1 Ch. 343.

"Originally payment was the performance of a promise to pay money at the time and in the manner required by the terms of the contract; but it has been extended to include the delivery of money in satisfaction of a debt after a default has been made in payment according to the terms of the contract." *Ulsch v. Muller*, 143 Mass. 379.

A cross-demand is not payment and cannot be treated as such unless by agreement of the parties. *McCurdy v. Middleton*, 82 Ala. 131; *Wharton v. King*, 69 Ala. 365.

release is a renunciation of the contract or liability, whereby performance is waived. But accord and satisfaction is a payment *sub modo*; and a release, as it must be founded on an actual consideration, shown or implied, is to the extent of such consideration a payment or satisfaction.²

Payment includes the transfer by the debtor to the creditor and the receipt by the latter of money or something else of value accepted by him as representing money.³ Ordinarily the debtor must seek the creditor to pay him.⁴ But if a lease is silent as to the place where rent is to be paid the landlord must make a demand of payment on the land before he can declare a forfeiture, notwithstanding the tenant has theretofore sought him for the purpose of making payment.⁵ If there is no agreement on the subject payment must be made where the creditor resides, or may be found, or to his agent.⁶ But if the place of payment is designated and the presence of the payee is necessary, he must attend; and if either of two places is agreed upon he must select, and there is no default until he has done so.⁷ If the creditor refuses to receive payment at the place appointed by him and does not inform his debtor of a purpose to require it to be made elsewhere, he waives the right to payment at another than the designated place and cannot reap any benefit from his act.⁸ The duty of the debtor to seek his creditor does not require that he should do so beyond the limits of the state or country in which the debt was contracted, and by implication or express agreement was

² See *Bottomley v. Nuttall*, 5 C. B. (N. S.) 122, 134, 135.

³ *Fremont County v. Fremont Co. Bank*, 145 Iowa, 8.

⁴ *Magruder v. Cumberland Tel. & T. Co.*, 92 Miss. 716, 16 L.R.A. (N.S.) 560; *Weyand v. Randall*, 131 App. Div. (N. Y.) 167; *Scott v. Grant*, 37 Tex. Civ. App. 169; *Berley v. Columbia, etc. R. Co.*, 82 S. C. 232; *Cranley v. Hillary*, 2 M. & S. 120; *Soward v. Palmer*, 2 Moore, 276; *Galloway v. Standard F. Ins. Co.*, 45 W. Va. 237.

⁵ *Rea v. Eagle T. Co.*, 201 Pa. 273.

⁶ *State v. District Court*, 41 Mont. 84; *Bardsley v. Washington M. Co.*, 54 Wash. 553, 132 Am. St. 1133; *Greenawalt v. Este*, 40 Kan. 418; *Baker v. Holt*, 56 Wis. 100; *Northwestern I. Co. v. Meade*, 21 Wis. 480.

⁷ *Thorn v. City Rice Mills*, 40 Ch. Div. 357. See *Rutherford v. Prudential Ins. Co.*, 34 Ind. App. 531.

⁸ *Union Mut. L. Ins. Co. v. Union Mills P. Co.*, 37 Fed. 286, 3 L.R.A. 90.

to be paid.⁹ But as nothing but actual payment will discharge the debt, this duty of seeking the creditor will more properly be considered in connection with the subject of tender.¹⁰ It may, however, be added here that if the debtor is a municipality, county, state or government the obligation is not dischargeable at any other place than its treasury¹¹ unless some other place be designated. A county which issued bonds containing a reservation of the right to pay them after a certain date, prior to their maturity, was not bound to seek the holders of them and give notice of its election to pay them after a date duly fixed by the authorities. Its duty was discharged by giving ample notice through newspapers of the exercise of its option that the bonds would be paid at the place named therein. By placing the funds there the debtor discharged its duty to the bondholders and was not liable to them for interest thereafter.¹²

If a debtor is directed by his creditor to remit money by mail, or if that be the usual mode of remitting it, and the remittance be lost, the creditor must sustain the loss.¹³ In such

⁹ *Weyand v. Park Terrace Co.*, 202 N. Y. 231, 36 L.R.A.(N.S.) 308; *King v. Finch*, 60 Ind. 423; *Littell v. Nicholas*, Hardin 66; *Galloway v. Standard F. Ins. Co.*, 45 W. Va. 237.

¹⁰ §§ 260-270.

¹¹ *Pekin v. Reynolds*, 31 Ill. 529, 83 Am. Dec. 244; *Boyle's Lunacy*, 20 Pa. Super. Ct. 1; *People v. Tazewell County*, 22 Ill. 147; *Johnson v. Stark County*, 24 id. 75; *South Park Com'rs v. Dunlevy*, 91 id. 49; *Friend v. Pittsburgh*, 131 Pa. 305, 6 L.R.A. 636, 17 Am. St. 811; *Sibley v. Pine County*, 31 Minn. 201; *Monteith v. Parker*, 36 Ore. 170; *Williamson County v. Farson*, 101 Ill. App. 328, aff'd 199 Ill. 71.

¹² *Stewart v. Henry County*, 66 Fed. 127; *Ward v. Smith*, 7 Wall. 450, 19 L. ed. 209. See *Williamson County v. Farson*, *supra*.

¹³ *Colvin v. United States Mut. Accident Ass'n*, 66 Hun 543;

Primeau v. National L. Ass'n, 77 Hun 418; *McCluskey v. Same*, 77 Hun 566, affirmed without opinion 149 N. Y. 616; *Guilfoyle v. National L. Ass'n*, 36 App. Div. (N. Y.) 343; *Jung v. Second Ward Sav. Bank*, 55 Wis. 364, 42 Am. Rep. 719; *Warwieke v. Noakes, Peake*, 67. See *Parker v. Gordon*, 7 East 385. Compare *State v. Insurance Co.*, 106 Tenn. 282.

If no mode of remitting is indicated by the creditor a remittance made in the way a prudent man would do if he was paying his own debt relieves an agent from responsibility. *Underwriters' W. Co. v. Board of Underwriters*, 35 La. Ann. 803.

In the absence of an express direction to remit by mail or a usage or course of dealing from which authority to so remit may be inferred, a remittance of money so made is at the risk of the party

case compliance with the direction in respect to the mode of remittance fulfills all the requisites of payment—tender and acceptance,—both of which are essential. To constitute a payment, money or some other valuable thing must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for that purpose,¹⁴ and if a remittance is made by post it must reach the creditor on or before the time it was due.¹⁵ It is, however, competent for parties to agree that payments shall be made in something else of value than money.¹⁶ If an employer and employee stipulate that advances made to the latter should be repaid by services, the former is bound to accept payment in that mode, and if

mailing it. *Burr v. Sickles*, 17 Ark. 428, 65 Am. Dec. 437.

There is no evidence of payment when the instrument remitted describes the payee by a wrong Christian name, though he keeps it and might have obtained the money by signing it in the name used. *Gordon v. Strange*, 1 Ex. 477.

¹⁴ *Gaar v. Taylor*, 128 Iowa, 636; *Slaughter v. Slaughter*, 7 Houst. 482; *Lofland v. McDaniel*, 1 Penne. 416; *Holdsworth v. DeBelaunzaran*, 106 N. Y. 119; *Robinson v. Robinson*, 20 S. C. 567; *Steiner v. Erie Dime S. & L. Co.*, 98 Pa. 591; *Ryan v. O'Neil*, 49 Mich. 281; *Kingston Bank v. Gay*, 19 Barb. 459. See *Collins v. Adams*, 53 Vt. 433.

A promise by a creditor to cover a check signed by a third person in favor of the debtor does not prevent the check, on its transfer to the creditor and appropriation by him, from operating as payment. *Tiddy v. Harris*, 101 N. C. 589.

Payment implies a voluntary act of the debtor looking to the satisfaction, in whole or in part, of the demand against him. A creditor cannot lawfully pay himself with the debtor's money without the latter's consent, express or implied;

and when the debtor delivers him money for a purpose which negatives the idea of payment the creditor's control of it is limited to the purpose declared. *Detroit, etc. R. Co. v. Smith*, 50 Mich. 112.

Monthly payments made on a mortgage in consideration, as stated in receipts therefor, of the extension of the time for payment of the mortgage debt from month to month will be applied in extinguishment of such debt. *Bateman v. Blake*, 81 Mich. 227.

If money paid unconditionally is retained its acceptance cannot be made conditional unless notice to that effect is in fact given the payor. *Shea v. Massachusetts Ben. Ass'n*, 160 Mass. 289, 39 Am. St. 475.

¹⁵ *Illinois L. Ins. Co. v. McKay*, 6 Ga. App. 285.

¹⁶ *Burlee D. D. Co. v. Besse*, 130 Fed. 444, 64 C. C. A. 646; *Mail & T. Pub. Co. v. Marks*, 125 Iowa, 622; *Mahnken v. Pelletreau*, 93 App. Div. (N. Y.) 420; *United W. W. Co. v. Farmers' L. & T. Co.*, 11 Colo. App. 225, 240; *Webb v. Vermillion*, 13 Ky. L. Rep. 367 (Ky. Super. Ct.); *Rider v. Culp*, 68 Mo. App. 527; *Pinson v. Puckett*, 35 S. C. 178;

he permits the employee to be involuntarily driven from the service by a co-employee the debt is extinguished.¹⁷ A note payable in property may be satisfied by the payment of money;¹⁸ by failing to pay in property as agreed the debtor forfeits his election to pay either in that mode or in money, and the creditor may demand money.¹⁹ If a contract may be satisfied by delivery of a commodity as ordered by the payee the failure to fill an order renders the balance due payable in money, and the acceptance of another order in the course of business does not re-instate the clause of the contract as to the mode of payment.²⁰ For the failure to pay a given sum in currency or in coin, it being provided that less of the latter than of the former shall extinguish the debt, the measure of damages is the lesser sum

Van Werden v. Equitable L. Assur. Soc., 99 Iowa 621; *Bixby v. Grand Lodge A. O. U. W.*, 105 Iowa, 505; *Stirna v. Beebe*, 11 App. Div. (N. Y.) 206; *Weir v. Hudnut*, 115 Ind. 525; *Sharp v. Carroll*, 66 Wis. 62; *Phillips v. Ocmulgee Mills*, 55 Ga. 633. See § 215.

Payment is made "at the time," within the meaning of the statute of frauds, where the vendor accepts as payment a check which is then good and which is subsequently paid, though the time of payment is not shown. *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Ellwell v. Jackson*, 1 Cab. & Ellis, 362.

The "good will" of a business has a market value so that it may be accepted in payment. *Beebe v. Hatfield*, 67 Mo. App. 609.

A creditor receiving a commodity as part payment of an indebtedness should sell it in accordance with the debtor's directions and credit him with proceeds. *Williamson v. Roberts*, 70 Ore. 126.

¹⁷ *Hanlin v. Walters*, 3 Colo. App. 513.

¹⁸ *Leapald v. McCartney*, 14 Colo. App. 442, citing *Pinney v. Gleason*,

5 Wend. 394, 21 Am. Dec. 223; *Brooks v. Hubbard*, 3 Conn. 58, 8 Am. Dec. 154; *Hise v. Foster*, 17 Iowa, 23; *Ferguson v. Hogan*, 25 Minn. 135; *Heywood v. Heywood*, 42 Me. 229, 66 Am. Dec. 277; *White v. Tompkins*, 52 Pa. 363; *Towbridge v. Holcomb*, 4 Ohio St. 38.

¹⁹ *Sugar Beets P. Co. v. Lyons B. S. R. Co.*, 161 Fed. 215; *Porter v. Brown*, 11 Ariz. 153; *Jonesboro, etc. R. Co. v. Watts*, 80 Ark. 543; *McKinnie v. Lane*, 230 Ill. 544, 120 Am. St. 338; *Wroughten v. Waffle*, 122 Iowa, 486; *Irving v. Bond*, 76 Neb. 293; *Walker v. Venters*, 148 N. C. 388; *Crowl v. Goodenberger*, 112 Mich. 683; *Wyman v. Winslow*, 11 Me. 398, 26 Am. Dec. 542; *Robbins v. Luce*, 4 Mass. 474; *Caldwell v. Dutton*, 20 Tex. Civ. App. 369; *Brashear v. Davidson*, 31 Tex. 191; *Haskins v. Dern*, 19 Utah, 89; *Texas & P. R. Co. v. Marlbor*, 123 U. S. 687, 31 L. ed. 303; *Pearson v. Williams*, 24 Wend. 244; *Roberts v. Beatty*, 2 P. & W. 63, 21 Am. Dec. 410; *Renwick v. Goldstone*, 48 Cal. 554; *Smith v. Coolidge*, 68 Vt. 516, 54 Am. St. 902.

²⁰ *Smith v. Coolidge*, *supra*.

and interest thereon.²¹ And if payment may be made in either of several kinds of specified notes the covenantor may elect those in which payment shall be made; on default his liability will be measured by the specie value of such as would have been most to his interest to have paid.²² These cases proceed on the principle that where a contract gives an alternative and the party who has it violates it the damages are measurable by it if it will be least burdensome for him.²³

The defendants forwarded to the plaintiffs sufficient funds to pay a note held by the latter against the former, but they refused to receive it, and informed the defendants that the money was subject to their order. There was no payment; if the defendants would protect themselves against costs they should have withdrawn the deposit and made a tender.²⁴ The weight of authority is, as will be seen in the section on accord and satisfaction, that the payment of a less sum than is due does not discharge a liquidated demand unless a sealed acquittal is given as evidence of the fact.²⁵ But this principle does not apply if something else of value than money is received, though the security accepted is of inferior rank to that which it is received in lieu of,²⁶ or is less in amount,²⁷ if the parties agree that it shall be payment. There are well considered cases by courts of good standing to the effect that "if one owing a sum of

²¹ *White v. Green*, 3 T. B. Mon. 155.

²² *Hixon v. Hixon*, 7 Humph. 33.

²³ *Holliday v. Highland l. & S. Co.*, 43 Ind. App. 342.

²⁴ *Kingston Bank v. Gay*, 19 Barb. 459; *Greenough v. Walker*, 5 Mass. 214; *Clark v. Wells*, 5 Gray, 69.

After the commencement of an action upon a note by the indorsee against the maker its payment by the payee and indorser does not constitute a defense so as to affect the costs. *Concord G. Co. v. French*, 12 Daly, 228.

An answer by a surety alleged that the plaintiff had been fully
Suth. Dam. Vol. 1.—40.

paid by money received from the principal debtor's estate and with the administrator's consent; held to show that the latter agreed that the money so received should be payment. *Johnson v. Breedlove*, 104 Ind. 521.

²⁵ *Grinnell v. Spink*, 128 Mass. 25; *Tuttle v. Tuttle*, 12 Mete. (Mass.) 551, 46 Am. Dec. 701; *Harriman v. Harriman*, 12 Gray, 341; *Baldwin v. United States*, 15 Ct. of Cls. 297; *Bostwick v. Same*, 94 U. S. 53.

²⁶ *Peters v. Barnhill*, 1 Hill (S. C.), 237; *Dogan v. Ashbey*, 1 Rich. 36.

²⁷ *Fensler v. Prather*, 43 Ind.

money, the amount of which is not ascertained and fixed, offers his creditor a certain sum, declaring that it is in full for all that is owing him, which sum is accepted by the creditor, such acceptance is in full discharge of the demand.”²⁸ A judgment against an insolvent may be satisfied with less than the amount due if the creditor so agrees.²⁹ If a debtor mails to his creditor a statement of the account between them and sends the balance which he admits to be due, requesting a receipt in full, the claim will be satisfied if the creditor retains the money.³⁰ “When one gets his due ignorantly, if he is not hurt by his ignorance, it is the same as if he acted with knowledge. Thus, where a negotiable note was transferred before maturity as collateral, and was afterwards paid off in property, not to the holder but to the payee, who collected without authority, and who, after converting the property into money, transmitted the proceeds to the holder as his own money, and the holder applied the same to the secured debt only, not applying it also to the collateral, and not knowing that he was dealing with a fund derived from the collateral, this was a discharge of the collateral debt, notwithstanding such ignorance on the part of the holder.”³¹ Crediting an agent with the amount due his principal is payment if the agent pays it to the principal.³²

§ 215. **Same subject.** The creditor may assent in advance to a mode of payment which reserves no subsequent election by excluding any concurrent act on his part in accomplishing it, or by making any such act obligatory. Thus, an award made against a party in pursuance of a submission in which

119; *Wells v. Morrison*, 91 *id.* 51; *Sibree v. Tripp*, 14 *M. & W.* 23; *Thomas v. Heathorn*, 2 *B. & C.* 477; *Bush v. Abraham*, 25 *Ore.* 336; *Bolt v. Dawkins*, 16 *S. C.* 198, 214.

²⁸ *American M. Co. v. Virginia M. Co.*, 91 *Va.* 272, 284, citing *Donohue v. Woodbury*, 6 *Cush.* 148; *McDaniels v. Lapham*, 21 *Vt.* 222; *McDaniels v. Bank*, 29 *Vt.* 230, 70 *Am. Dec.* 406.

²⁹ *Engbretson v. Seiberling*, 122

Iowa, 522, 101 *Am. St.* 279, 64 *L.R.A.* 75. *Pearson v. Thomason*, 15 *Ala.* 700, 50 *Am. Dec.* 159, is to the contrary.

³⁰ *Rumsey v. Barber*, 78 *Ill. App.* 88, citing *Ostrander v. Scott*, 161 *Ill.* 339.

³¹ *Coleman v. Jenkins*, 78 *Ga.* 607; *Butts v. Whitney*, 96 *Ga.* 445.

³² *Herring v. American Ins. Co.*, 123 *Iowa*, 533.

he agreed to indorse it on a note is a payment *pro tanto*.³³ So money paid by a debtor to a third person on the prior request of the creditor is a payment,³⁴ and so is the transfer of a credit if all the parties are agreed.³⁵ The acceptance by a debtor of a written order of his creditor to pay money to a third person entitles the former to a credit to the extent of the sum called for by the order, although payment was not then made, if the debtor was solvent and his liability fixed,³⁶ and it is immaterial that the debtor thought he had not accepted the order and paid it only after judgment was rendered against him.³⁷ The tender of bonds, etc., of a banking association to them in payment of a debt, in pursuance of their agreement to receive them in payment,³⁸ or work done for the payee of a note by the maker under an agreement that the proceeds are to be applied to discharge the note, is a payment.³⁹ Where it is agreed between debtor and creditor that the former shall do some collateral act for a stipulated price or a price which may be made certain, and that such act shall be deemed a payment or part payment of the debt, the amount so stipulated becomes at once a payment when the act has been performed.

In case of mutual connected debts it is not necessary that the formality should be gone through of each party handing the

³³ Flint v. Clark, 12 Johns, 374.

³⁴ Brady v. Durbrow, 2 E. D. Smith, 78; Storey v. Menzies, 3 Pin. 329.

³⁵ Brockman v. Ostdiek, 79 Neb. 843; Patterson v. First Nat. Bank, 73 Neb. 384; Eyles v. Ellis, 4 Bing. 112; Shryer v. Morgan, 77 Ind. 479; Beach v. Wakefield, 107 Iowa, 567; Daniel v. St. Louis Nat. Bank, 67 Ark. 223.

If an insurance agent gives credit for the premium due on a policy and insurer charges him with the amount, the transaction is equivalent to payment. Wytheville Ins. & B. Co. v. Teiger, 90 Va. 277; Miller v. Life Ins. Co., 12 Wall. 285, 20 L. ed. 398; White v. Connecti-

cut Ins. Co., 120 Mass. 330; Train v. Holland P. Ins. Co., 62 N. Y. 598; Bang v. Farmville Ins. Co., 1 Hughes, 290; Griffith v. New York L. Ins. Co., 101 Cal. 627, 40 Am. St. 96.

³⁶ Merwin v. Austin, 58 Conn. 22, 7 L.R.A. 84.

³⁷ Carroll v. Weaver, 65 Conn. 76.

³⁸ Leavitt v. Beers, Hill & Denio, 221. See Northampton Bank v. Balliet, 8 W. & S. 311, 42 Am. Dec. 297; Woodruff v. Trapnall, 12 Ark. 811, 10 How. 190; Exchange Bank v. Knox, 19 Gratt. 739; Mann v. Curtis, 6 Robert. 128.

³⁹ Moore v. Stadden, Wright, 88; Hall v. Holmes, 4 Pa. 251.

amount he owes over to the other, whether the sums they are mutually entitled to be equal or not. If they are equal they wholly cancel each other; if not equal the lesser is to be deducted from the greater. These compensations, when they fairly and properly occur, are reciprocal payments.⁴⁰ An agreement between parties having mutual demands to set off one against the other would seem on principle and the weight of authority to take effect also as reciprocal payments, and the same result follows in all cases of connected accounts.⁴¹ Thus,

⁴⁰ *Rutherford v. Schattman*, 119 N. Y. 604; *Iron Cliffs Co. v. Gingrass*, 42 Mich. 30; *Roberts v. Wilkinson*, 34 Mich. 129; *Connecticut Mut. Ins. Co. v. State Treasurer*, 31 Mich. 6; *Phoenix Ins. Co. v. Meier*, 28 Neb. 124; *McKeon v. Byington*, 70 Conn. 429. See *Sword v. Keith*, 31 Mich. 247; *Jewett v. Winship*, 42 Vt. 205; *Slasson v. Davis*, 1 Aik. 73; *Strong v. McConnell*, 10 Vt. 231; *Chellis v. Woods*, 11 Vt. 466; *Robinson v. Hurlburt*, 34 Vt. 115; *Bronson v. Rugg*, 39 Vt. 241; *Downer v. Sinclair*, 15 Vt. 495; *Huffmans v. Walker*, 26 Gratt. 314; *Eaves v. Henderson*, 17 Wend. 190; *National C. R. Co. v. Bonneville*, 119 Wis. 222.

⁴¹ *Breck v. Barney*, 183 Mass. 133. It was said that it has been the law of England for thirty years that a set-off of a debt absolutely due from a joint stock company to a subscriber to its shares against the sum due from him to the company on his subscription is a payment in cash for the shares. *Spago's Case*, L. R. 8 Ch. 407; *Kent's Case*, 39 Ch. Div. 259, and intermediate cases are cited.

In *Davis v. Spenceer*, 24 N. Y. 386, it was held that an agreement between the payee of a note and the maker, made with the assent of the latter's partner, to apply the indebtedness of the payee to such

maker and his partner in payment of the note, operates *in presenti* as a satisfaction of the note *pro tanto*. *Allen, J.*, said: "Formerly there appears to have been a doubt whether an agreement to set off precedent debts operated as payment, satisfaction or extinguishment. An accord that each of the parties should be quit of actions against the other was said not to be good because it was not any satisfaction. *Bac. Abr.*, Accord, A. But there is no difference in principle between an agreement concerning debts, one of which is to be contracted in the future, as in *Eaves v. Henderson*, 17 Wend. 190, and an agreement concerning debts already existing; and it has been decided that an agreement to discontinue and a discontinuance of cross-actions for false imprisonment constitute an accord and satisfaction, and bar another action by either. *Foster v. Trull*, 12 Johns. 456. Whenever a valid new contract is substituted in the place of the old, . . . an action will not lie on the old contract, but the remedy of the parties is on the new or substituted agreement although the transaction may not amount to a technical accord and satisfaction. *Good v. Cheesman*, 2 B. & Ad. 328. Where two brothers, A. and B., principal and surety in an annuity, had, in an agreement between them and

if A. has a valid and subsisting demand against B. for goods, services or cash, constituting proper items of an account upon

a third brother for the settlement of their affairs, declared that the bond was the debt of B., the surety, it was held that this agreement, whether subsequently acted upon or not, was a binding accord between A. and B. *Cartwright v. Cooke*, 3 B. & Ad. 701. *Hills v. Mesnard*, 10 Q. B. 266, is in principle not unlike *Eaves v. Henderson*, *supra*. The action was by payees against acceptors of a bill. The defendants became acceptors for the accommodation of one Hundle, and the plaintiffs, the payees, agreed to appropriate certain moneys which they expected to receive in discharge of the bill. They subsequently received the money, and the court held it a payment of the bill *pro tanto*. Lord Denman, C. J., says: It was competent for the parties to agree beforehand that the money should be specifically applied to the discharge of the liability on the bill *pro tanto*. 'And it seems to be the good sense of the transaction to treat it as so much money paid to the plaintiffs by Hundle on their account and as their agent.' *Gardiner v. Callender*, 12 Pick. 374, is in point, and decides that when E. H. R., one of the executors of A. S., gave to the executors of W. P. a memorandum as follows: 'It is agreed that the sum of \$3,235, due from E. H. R. to the estate of W. P., shall be applied on a certain note of \$6,000 now held by the representatives of A. S.,' the memorandum amounted to a payment on the note and was not merely an executor's agreement. The fact that a memorandum in writing was made of the agreement does not vary its legal effect. It was not required by law to be in

writing. The court, as in *Hills v. Mesnard*, sought the good sense of the transaction, and to give effect to the sensible arrangement of the parties, holding that it could not be necessary, in order to connect the one debt with the other by an agreement *in præsenti*, that there should be the vain formality of passing the money from one party to the other and returning it again to the party from whom it just came, or that a formal release or receipt should be executed. This case is not cited by counsel or alluded to by the court in the subsequent case of *Cary v. Baneroft*, 14 Pick. 315, but the latter was decided upon a ground which distinguished it from the former case; the court holding that in the case last cited the agreement was executory and not executed, requiring some further act to be done before the one note would operate as payment or extinguishment *pro tanto* of the other. *Dehon v. Stetson*, 9 Mete. (Mass.) 341, followed *Cary v. Baneroft*, and was decided upon the same ground. Another point was in the case, to wit: that one of the parties interested in the debt which it was sought to supply in payment as the individual debt of one of his partners had not been consulted, and had no knowledge of the contemplated arrangement." See *Peabody v. Peters*, 5 Pick. 1; *Dudley v. Stiles*, 32 Wis. 371; *Ely v. McNight*, 30 How. Pr. 97; *Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 183; *Shinkle v. First Nat. Bank*, 22 Ohio St. 516; *Heaton v. Angier*, 7 N. H. 397, 28 Am. Dec. 353; *Fatlock v. Harris*, 4 D. & E. 180; *Wilson v. Coupland*, 5 B. &

which he has a present right of action, and before commencing suit thereon credits on such account a demand B. has against him for services at their fair and full value, such credit by A. so far operates as payment that B. cannot maintain an action for his demand brought while such other suit is pending.⁴² But where A. owes B. by promissory note payable in instalments, and at the same time holds a note against B. for a larger amount, on which he indorses as part payment the amount of the instalments of his own note as they fall due, but without B.'s consent, this is not a payment of the instalments.⁴³ A payment by credit occurs where a bank receives a check drawn on itself and credits the holder the amount,⁴⁴ or where the bank is the creditor and receives the debtor's check drawn on itself.⁴⁵ There is a distinction between the acceptance by a creditor from his debtor of a new security for an old debt, and the acceptance by a bank of a check drawn upon itself in payment of a note. The former is a mere substitution of one executory agreement to pay for another, or a commutation of securities; there is no extinguishment of the precedent debt unless there is an agreement to accept the new obligation or security as a satisfaction of the old. But when a bank receives upon a debt a check drawn

Ald. 228; *Wharton v. Walker*, 4 B. & C. 163; *Cuxon v. Chadley*, 3 B. & C. 591.

Evidence of payment by set-off is not admissible under a plea of payment. *Williams v. Uzzell*, 108 Ark. 241.

⁴² *Briggs v. Richmond*, 10 Pick. 391, 20 Am. Dec. 526; *Allen v. Carman*, 1 E. D. Smith, 692; *Means v. Smith*, Tappan, 60.

⁴³ *Greenough v. Walker*, 5 Mass. 214. See *Clark v. Wells*, 5 Gray, 69.

A payment to a vendor on his own obligations is a payment in cash. *Hand v. Gas E. & P. Co.*, 167 N. Y. 142; *Foley v. Mason*, 6 Md. 37.

⁴⁴ *Addie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160; *Bank*

v. Burkhardt, 100 U. S. 688, 25 L. ed. 767; *American Exch. Nat. Bank v. Gregg*, 138 Ill. 596, 32 Am. St. 171 (although the bank may fail to charge the drawer with the amount); *Watkins v. Parsons*, 13 Kan. 426; *Weedsport Bank v. Park Bank*, 2 Keyes, 561.

⁴⁵ *Pratt v. Foote*, 9 N. Y. 463; *Rozet v. McClellan*, 48 Ill. 345, 95 Am. Dec. 551.

If the guarantor of a note owned and held by a bank has on deposit in it a sum nearly equal to the amount called for by the note, a tender of his check for such sum and the necessary amount of cash to the assignee of the bank satisfies the note. *Lionberger v. Kinealy*, 13 Mo. App. 41. See *Shipp v. Staeker*, 8 Mo. 145.

upon itself by one of its customers and charges it in account, it thereby admits that it has funds of the drawer sufficient to meet the check, and the acceptance is *per se* an appropriation of the funds to pay it. The transaction operates directly as a payment of the debt.⁴⁶ If the dividends on a policy of life insurance equal the premiums and have, in the immediately preceding years, at the request of the insured or his beneficiary, been applied to the payment of the premiums as they became due, the latter are paid as fast as they become due so long as the conditions stated exist.⁴⁷ So long as money illegally exacted from a member of a benefit society remains in its treasury and is sufficient to meet assessments made upon him he is not in default.⁴⁸

By a valid new agreement the debtor may obtain the right to pay otherwise than in money; and the acceptance by the creditor of any chose in action or property will operate as payment.⁴⁹ The receipt by the creditor of bank bills or treasury notes in payment of a gold debt, although under protest and with an express reservation of a claim for the difference, will be payment dollar for dollar.⁵⁰ So gold dollars, if applied towards the payment of a debt without any special contract as to the value at which they are to be taken, cannot be treated as having any greater value than any other currency which is a legal tender for the payment of debts.⁵¹ The common-law rule

⁴⁶ *Id.*; *Commercial Bank v. Union Bank*, 11 N. Y. 203.

If a sight draft is indorsed for collection to the debtor's bankers and by his direction the amount it calls for is charged against him, the banker drawing his check for the amount to the order of the creditor and transmitting it to him, the debt is paid, although the bank which so draws fails and its check is made valueless. *Welge v. Batty*, 11 Ill. App. 461.

⁴⁷ *Matlock v. Mutual L. Ins. Co.*, 180 Pa. 360.

⁴⁸ *Knight v. Supreme Court of Chosen Friends*, 2 Silvernail, 453.

⁴⁹ *Inman v. Griswold*, 1 Cow. 199; *Sword v. Keith*, 31 Mich. 247; *Block v. Dorman*, 51 Mo. 31; *Casey v. Harris*, 2 Litt. 172; *Allegheny R. Co. v. Casey*, 79 Pa. 84; *Eaves v. Henderson*, 17 Wend. 190; *Perkins v. Cady*, 111 Mass. 318; *Locke v. Andres*, 7 Ired. 159; *Perit v. Pittfield*, 5 Rawle, 166; *Cramer v. Willetts*, 61 Ill. 481; *Brown v. Feeter*, 7 Wend. 301; *Burchard v. Frazer*, 23 Mich. 224.

⁵⁰ *Gilman v. Douglas County*, 6 Nev. 27, 3 Am. Rep. 237.

⁵¹ *Bush v. Baldrey*, 11 Allen, 367.

that marriage has the legal effect of paying or extinguishing a debt the husband might owe the wife, or the wife the husband at the time of marriage, is in force in Kentucky.⁵²

§ 216. **Same subject.** On the foreclosure of a mortgage on real estate by entry the land inures as payment to the extent of its value.⁵³ So taking possession of chattels mortgaged or forfeited is also payment to the amount of their value;⁵⁴ and the proceeds of sale realized by foreclosure are *pro tanto* payment.⁵⁵ Taking the debtor's body is a satisfaction unless he escape.⁵⁶ It has this effect though the creditor consented to his being set at liberty under an agreement which the debtor has failed to perform;⁵⁷ or on his giving a warrant of attorney which turned out to be void for informality.⁵⁸ It is not, however, an absolute satisfaction like payment, for it will not discharge a guarantor,⁵⁹ nor prevent the creditor from pursuing his remedy against other parties.⁶⁰ The assignment of a mortgage on land, assumed by the purchaser of the land, to persons named by him, who paid nothing for it and never had possession of it, and which he caused to be recorded, evidences its payment and the note secured by it.⁶¹ The assignment of a claim by a creditor to his debtor is a payment of it.⁶²

A levy on sufficient personal property by execution is presumably a satisfaction of the debt; it is a means of payment, and requires only the performance of a ministerial duty by an officer to accomplish it. The levy is not of itself satisfaction, and anything which subsequently, without the fault of the officer or creditor, prevents actual satisfaction, as if the debtor

⁵² Farley v. Farley, 91 Ky. 497.

⁵³ Hedge v. Holmes, 10 Pick. 381; Briggs v. Richmond, id. 391, 20 Am. Dec. 526.

⁵⁴ Case v. Boughton, 11 Wend. 106; Charter v. Stevens, 3 Denio, 33.

⁵⁵ Lansing v. Goelet, 9 Cow. 346; Globe Ins. Co. v. Lansing, 5 id. 380, 15 Am. Dec. 474.

⁵⁶ Jaques v. Withy, 1 T. R. 557; Williams v. Evans, 2 McCord, 203.

⁵⁷ Vigers v. Aldrich, 4 Burr. 2482;

Blackburn v. Stupart, 2 East, 243; Tanner v. Hague, 7 T. R. 420.

⁵⁸ Jaques v. Withy, *supra*; Loomis v. Storrs, 4 Conn. 440. See Sheldon v. Kibbe, 3 Conn. 214, 8 Am. Dec. 176.

⁵⁹ Terrell v. Smith, 8 Conn. 426.

⁶⁰ Porter v. Ingraham, 10 Mass. 88.

⁶¹ Lydon v. Campbell, 204 Mass. 580, 134 Am. St. 702.

⁶² Dial v. Inland L. Co., 52 Wash. 81.

has not been deprived of property levied upon, will destroy its effect as evidence of that result.⁶³ So long as the property remains in legal custody the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain an action on the judgment, nor use it for the purpose of becoming a redeeming creditor.⁶⁴ The levy does not divest title; it only creates a lien. It often happens that the levy is overreached by some other lien, is abandoned for the benefit of the debtor or defeated by his misconduct. In such cases there is no color for saying that the judgment is gone. The judgment is satisfied when the execution has been so used as to change the title or in some other way to deprive the debtor of his property. This includes the case of a levy and sale, and also of a loss or destruction of the goods after they have been taken out of the debtor's possession by virtue of the process.⁶⁵ In admiralty, where a *res* is seized by a judicial process for a debt which carries with it a *jus in re*, as between debtor and creditor, the maxim *domino perit res* means that the destruction of the seized property, without fault of the debtor, works a payment of the debt to the extent of its value. Where third parties voluntarily join the seizing creditor in his proceeding and unite, so to speak, in the seizure, also asserting claims which carry with them liens, the destruction of the property, without fault of the debtor, works a payment of their respective claims, to the extent of the value of the property destroyed, in the order of the

⁶³ *Starr v. Moore*, 3 McLean, 354; *Clerk v. Withers*, 2 Ld. Raym. 1072, 1 Salk. 323, 6 Mod. 290; *Mountney v. Andrews*, Cro. Eliz. 237; *Atkinson v. Atkinson*, id. 391; *Ladd v. Blunt*, 4 East, 402; *Bayley v. French*, 2 Pick. 590; *Denton v. Livingston*, 9 Johns. 98; *Hoyt v. Hudson*, 12 id. 207; *Troup v. Wood*, 4 Johns. Ch. 228; *Ex parte Lawrence*, 4 Cow. 417, 15 Am. Dec. 386; *Jackson v. Bowen*, 7 Cow. 13, 21; *Cornell v. Cook*, id. 312; *Wood v. Torrey*, 6 Wend. 562; *Cass v. Adams*, 3

Ohio, 223; *Webb v. Bumpass*, 9 Port. 201, 23 Am. Dec. 310; *Green v. Burke*, 23 Wend. 490; *Browning v. Hanford*, 5 Hill, 588; *Duncan v. Harris*, 17 S. & R. 436; *Farmers' & M. Bank v. Kingley*, 2 Doug. (Mich.) 379; *Churchill v. Warren*, 2 N. H. 298; *Ordinary v. Spann*, 1 Rich. 429; *Porter v. Boone*, 1 W. & S. 252; *Ex parte King*, 2 Dev. 341, 21 Am. Dec. 335; *Binford v. Alston*, 4 Dev. 354.

⁶⁴ *People v. Hopson*, 1 Denio, 577.

⁶⁵ *People v. Hopson*, 1 Denio, 577.

priority of their claims, and operates as a payment up to its value precisely as would its sale and the application of its proceeds.⁶⁶

A sufficient tender, made and kept good by bringing the money into court, is equivalent to a payment, and is such of the date of the tender to prevent costs and interest. The debtor pleading it cannot withdraw the money whatever may be the verdict; it must be paid to the plaintiff.⁶⁷

§ 217. What is not payment. The deposit of money in a bank where a note is payable is not of itself a payment, but simply a tender,⁶⁸ unless in some way appropriated to the note;⁶⁹ nor is the surrender of a check at the clearing-house.⁷⁰ A note held by an administrator and payable to him is not paid because he charges himself with the amount it represents in settling his accounts with the estate.⁷¹ So charging a note supposing the maker had funds in bank, when in fact he had not, the charge being canceled the next day on discovery of the mistake, will not amount to payment.⁷² And where the president of a bank, having his notes lying therein under protest, indorsed for his accommodation, procured the cashier to make a new note, which the president indorsed and exchanged for those protested, delivering the latter to the cashier for his security, the original notes were not thereby paid, although the president entered them as paid and all new notes as discounted.⁷³ A clerk of a bank stole from the drawer of another clerk bills belonging to the bank, which he delivered to the cashier, and which the latter, not knowing them to have been thus

⁶⁶ Per Billings, D. J., in *Gill v. Packard*, 4 Woods, 270.

⁶⁷ *Reed v. Armstrong*, 18 Wend. 446; *Taylor v. Brooklyn E. R. Co.*, 119 N. Y. 561; § 275.

⁶⁸ *Capital Nat. Bank v. Robinson*, 41 Wash. 454; *Hill v. Place*, 36 How. Pr. 26.

⁶⁹ See *Johnston v. Green*, 102 Va. 373; *Sutherland v. First Nat. Bank*, 31 Mich. 230.

Payment to a bank, in which the creditor has an account, with direc-

tions to place the sum to the latter's credit and notify him thereof is payment when such directions have been carried out. *Beranek v. Beranek*, 95 Neb. 311.

⁷⁰ *Merchants' Nat. Bank v. Procter*, 1 Cin. Super. Ct. 1.

⁷¹ *Robinson v. Robinson*, 20 S. C. 567.

⁷² *Troy City Bank v. Grant*, Hill & Denio, 119.

⁷³ *Highland Bank v. Dubois*, 5 Denio, 558.

stolen, accepted in discharge of the balance due from such clerk to the bank; the transaction did not work a payment.⁷⁴ The mutilation of a note by a stranger to it, with intent to cancel and extinguish it, raises no presumption of its payment.⁷⁵ The receipt of part of the amount due is not a waiver of the right to recover the balance, nor does it work an estoppel.⁷⁶ A note is not paid because its maker placed in the hands of the payee's attorney, who had the note for collection, notes and accounts to be collected, on which certain sums were paid the attorney, but not credited or applied on such note, the payee of which had not concurred in such arrangement. The attorney was agent for the debtor in making collections, and money paid him was the property of the latter. Until applied or appropriated it could not become a payment on the note.⁷⁷ Surrendering a city warrant calling for the payment of a large sum for others amounting in all to the same sum, these being dated and indorsed as was the original, is a mere exchange.⁷⁸ An insurance assessment is not paid by depositing the necessary sum in the mail in the absence of anything in the dealings between the parties giving such deposit that effect.⁷⁹ If money which reaches insurer after it is due is tendered insured within a reasonable time it is not payment.⁸⁰ An insurer owing an insured employee money is not bound to apply any part of its indebtedness on the payment of an assessment due from him.⁸¹ An insurance premium is not paid by a confession of judgment for the amount of premium notes held by insurer.⁸² Thus it ap-

⁷⁴ *State Bank v. Wells*, 3 Pick. 394.

⁷⁵ *Whitlock v. Manciet*, 10 Ore. 166.

The destruction of a note held by a wife against her husband, under the influence of feelings caused by his cruel treatment of her, is not payment. *Schlemmer v. Schendorf*, 20 Ind. App. 447.

⁷⁶ *Hodges v. Tennessee I. Co.*, 123 Ala. 572; *Greer v. Laws*, 56 Ark. 37; *Clark v. Equitable L. Assur. Soc.*, 76 Miss. 22; *Whiting v. Plumas County*, 64 Cal. 65.

⁷⁷ *Hatch v. Hutchinson*, 64 Ark. 119; *Moore v. Norman*, 52 Minn. 83, 18 L.R.A. 359, 38 Am. St. 526.

⁷⁸ *Montieth v. Parker*, 36 Ore. 170.

⁷⁹ *Rice v. Grand Lodge, A. O. U. W.*, 103 Iowa, 643; *Continental Ins. Co. v. Hargrove*, 131 Ky. 837.

⁸⁰ *Rice v. Lodge, etc.*, 92 Iowa, 417.

⁸¹ *Pister v. Keystone Mut. Ben. Ass'n*, 3 Pa. Super. Ct. 50.

⁸² *Proebstel v. State Ins. Co.*, 14 Wash. 669.

pears that unless there is an actual payment and receipt of money, or something else accepted in its place as payment, a debt is not satisfied; any ceremony by which payment is nominally made or acknowledged may be avoided for mistake or fraud, and so where the actual or authorized assent of the creditor is wanting.⁸³ A selling agent may not accept goods or services in payment of his principal's demand; but if the debtor believes the agent to be the principal and the latter accepts the contract payment so made it is binding.⁸⁴

§ 218. **Effect of payment.** Whether a payment made by a guarantor or surety or a volunteer will operate as a purchase or as an extinguishment depends on the intention with which it is made.⁸⁵ But a debtor cannot himself become the owner,⁸⁶ nor pay his debt without discharging it, though he may wish

⁸³ *Hayden v. Lauffenburger*, 157 Mo. 88.

Where a creditor having received checks in excess of the amount of an indebtedness inadvertently failed to retain a sufficient amount to satisfy such indebtedness and returned an excessive balance, only a partial payment was effected. *Morris v. Reyman*, 55 Ind. App. 112.

A payment by a bankrupt of a joint note of himself and another subsequently set aside as a preference will not discharge the indebtedness as to the bankrupt or debtor even though the note was marked paid and returned to the bankrupt. *Commercial Bank of Boonville v. Varnum*, 176 Mo. App. 78.

⁸⁴ *Hook v. Crowe*, 100 Me. 399.

⁸⁵ *Fogarty v. Wilson*, 30 Minn. 289; *Swope v. Leffingwell*, 72 Mo. 348; *Lucas v. Wilkinson*, 1 Hurl. & N. 423; *Morris v. Oakford*, 9 Pa. 498; *Kinley v. Hill*, 4 W. & S. 426; *Elkinton v. Newman*, 20 Pa. 281; *Carter v. Jones*, 5 Ired. Eq. 196, 49 Am. Dec. 425; *Mathews v. Aiken*, 1 N. Y. 595; 1 Lead. Cas. in Eq. 88; id. pt. 1, 167 (2d Am. ed.); *Low v.*

Blodgett, 21 N. H. 121; *Ex parte Balch*, 2 Low. 440; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Mechanics' Bank v. Hazard*, 13 Johns. 353. See *Gillett v. Gillett*, 9 Wis. 194.

In Louisiana the payment of a note secured by a mortgage by one not bound for it, and who had no interest in discharging it, will not subrogate him to the rights of the party to whom he paid, but will extinguish the debt and the mortgage securing it, and the claim for reimbursement will constitute the party who paid an ordinary creditor of him for whose benefit the payment was made. *Nicholls v. Creditors*, 9 Rob. 476; *Weil v. Enterprise G. & Mfg. Co.*, 42 La. Ann. 492.

⁸⁶ *Kingsley v. Purdom*, 53 Kan. 56; *Gordon v. Wansey*, 21 Cal. 77.

But an officer of an insolvent corporation may in the absence of fraud, personally purchase at full value an outstanding obligation of the corporation without working a discharge of the obligation. *Martin v. Chambers*, 131 C. C. A. 181, 214 Fed. 769.

and intend to keep it on foot;⁸⁷ and any assignment to a third person with a view to keeping it alive will be void.⁸⁸ A payment actually made upon a debt, whether of the whole or a part, is a total or partial discharge, and cannot afterwards be changed except by mutual consent, and if other parties are interested, by their consent also.⁸⁹ Where marriage extinguishes a debt due from the wife to the husband it also discharges any lien by which the debt was secured, and the debt is not revived by a divorce.⁹⁰ As will more fully appear in another connection,⁹¹ the payment of a debt due after suit brought will prevent the recovery of interest as damages,⁹² though it would be otherwise if there had been a contract to pay interest.⁹³

After a judgment recovered upon a paid debt, or without deducting payments, the sum paid cannot be recovered; payment in a strict sense is a defense, and if not used as such is lost.⁹⁴ The payments must be strictly such or definitely ap-

⁸⁷ *Martin v. Chambers*, 131 C. C. A. 181, 214 Fed. 769; *Livermore v. Truesdell*, 9 Colo. App. 332; *Champney v. Coope*, 34 Barb. 539; *Collins v. Adams*, 53 Vt. 433; *Hammatt v. Wyman*, 9 Mass. 138; *Brackett v. Winslow*, 17 id. 153; *Adams v. Drake*, 11 Cush. 504; *Tuckerman v. Newhall*, 17 Mass. 581; *Chapman v. Collins*, 12 Cush. 163; *Pray v. Maine*, 7 id. 253; *Harbeck v. Vanderbilt*, 20 N. Y. 395, 398. See *Shaw v. Clark*, 6 Vt. 507, 27 Am. Dec. 578.

If payment is made at the request of the maker the obligation is extinguished and an indorsement of it subsequently made by the payee is ineffectual. *Moran v. Abbey*, 63 Cal. 56; *Pearce v. Bryant C. Co.*, 121 Ill. 590.

⁸⁸ *Id.*; *Moran v. Abbey*, 58 Cal. 167; *Gordon v. Wansey*, 21 id. 78; *Citizens' Bank v. Lay*, 80 Va. 436; *Rolf v. Wooster*, 58 N. H. 526.

It makes no difference that an at-

tempt to transfer was made at the time of payment, and as a part of that transaction. *Wright v. Mix*, 76 Cal. 465.

If a note is deposited in a bank for collection, a payment made by a guarantor, surety or the maker will discharge it. *Citizens' Bank v. Lay*, 80 Va. 436; *Lancey v. Clark*, 64 N. Y. 209, 21 Am. Rep. 604; *Eastman v. Palmer*, 32 N. Y. 238; *Dooley v. Virginia F. & M. Ins. Co.*, 3 Hughes, 221.

⁸⁹ *Mead v. York*, 6 N. Y. 449, 57 Am. Dec. 467; *Marvin v. Vedder*, 5 Cow. 671; *Hawkins v. Stark*, 19 Johns. 305; *Frost v. Martin*, 26 N. H. 422, 59 Am. Dec. 353; *Miller v. Montgomery*, 31 Ill. 350.

⁹⁰ *Farley v. Farley*, 91 Ky. 497.

⁹¹ Ch. 8.

⁹² *Davis v. Harrington*, 160 Mass. 278.

⁹³ *Andover Sav. Bank v. Adams*, 1 Allen, 28.

⁹⁴ *Loring v. Mansfield*, 17 Mass.

propriated to the debt to have that effect.⁹⁵ Where a sum of money was delivered by the obligor to the obligee to be credited by the latter upon the bond as part payment and the obligee neglected to indorse or apply it and obtained judgment for the whole amount of the bond, the obligor was allowed to recover the money paid.⁹⁶ There was a special trust reposed in the defendant to credit the money on the bond and he had violated it. Where, however, there is a direct payment on a debt which is not evidenced by writing of any kind; where no act beyond payment and receipt of it is necessary or contemplated to give effect to the payment, and the money is passed from the debtor to the creditor as payment at once, and not simply to become such on the doing of some act to evidence it, it is strict payment and cannot be recovered, though the debt is afterwards sued upon and judgment rendered for it without deducting the sum paid.⁹⁷ If payment has been made for a consideration which is subsequently withdrawn or withheld, the money may be recovered.⁹⁸

"It is undoubtedly the rule that one partner may not appropriate the property or money of the firm to the payment of his own debt without the consent of his copartners, and that if he does so the property misapplied may be followed and recovered until it reaches the hands of a *bona fide* purchaser for value. But I think it is equally well settled that the payment of money to a creditor, who receives it in discharge of an existing debt innocently and without knowledge or means of knowledge that the debtor paying had no rightful ownership of the fund, is good and effectual, and does not subject the recipient to a recovery by the true owner."⁹⁹

394; *Marriot v. Hampton*, 7 T. R. 269; *De Sylva v. Henry*, 3 Port. 132; *Eggleston v. Knickerbacker*, 6 Barb. 458; *Adams v. Barnes*, 17 Mass. 365; *Job v. Collier*, 11 Ohio, 422; *Seymour v. Lewis*, 19 Wend. 512.

⁹⁵ See *Hazen v. Reed*, 30 Mich. 331; *Judd v. Littlejohn*, 11 Wis. 176.

⁹⁶ *Woodward v. Hill*, 6 Wis. 147;

Fowler v. Shearer, 7 Mass. 14. See *Wheeler v. Harrison*, 28 Mich. 265.

⁹⁷ *Driscoll v. Damp*, 17 Wis. 419; *Bronson v. Rugg*, 39 Vt. 241.

⁹⁸ *Mechanics & T's Ins. Co. v. McLain*, 48 La. Ann. 1091.

⁹⁹ *Newhall v. Wyatt*, 139 N. Y. 452, 36 Am. St. 712; *Stephens v. Board of Education*, 79 N. Y. 187, 35 Am. Rep. 511.

§ 219. Payment before debt due. The creditor is not obliged to receive a part payment¹ but if he does it has the effect of partial satisfaction. Payment before the money is due is a payment at maturity.² If a creditor, however, receives money before it is due on a demand drawing interest, such payment, in the absence of an agreement to the contrary, should be applied to the extinguishment of the principal.³ And even when received upon the understanding that it was not to draw interest until the balance of the debt should be paid because the creditor used the money as his own it was held that it should be applied at the date of payment.⁴ The holder of a note entitled to grace cannot be compelled to accept payment until the last day, to which interest should be computed.⁵

§ 220. Payment by devise or legacy. A devise or legacy will operate as payment when it is intended by the testator and accepted by the creditor as such.⁶ A legacy to a creditor which is equal to or greater than his debt, and which is not contingent or uncertain, is presumed to be a satisfaction of the debt.⁷ Courts, however, have given effect to slight circumstances, appearing on the face of the will or otherwise, by way of repelling

¹ *Jennings v. Shriver*, 5 Blackf. 37.

² *Sykes v. Citizens' Nat. Bank*, 69 Kan. 134; *Patten v. Fullerton*, 27 Me. 58; *Holmes v. Broket*, Cro. Jac. 434. See *Roberts v. Wilkin-*
son, 34 Mich. 129.

³ *Starr v. Richmond*, 30 Ill. 276.

⁴ *Toll v. Hiller*, 11 Paige, 228.

⁵ *Kornegay v. Georgia State B. & L. Ass'n*, 91 Miss. 551; *Smith v. Merchants' & F's Bank*, 14 Ohio C. C. 199.

⁶ *Newcomb v. La Roe*, 162 App. Div. (N. Y.) 906; *Scheerer v. Scheerer*, 109 Ill. 11; *Rose v. Rose*, 7 Barb. 174; *Clarke v. Bogardus*, 13 Wend. 67; *Mulheran v. Gillespie*, id. 349; *Courtenay v. Williams*, 3 Hare, 539; *Voorhees v. Voorhees*, 18 N. J. Eq. 227; *Brokaw v. Hudson*, 27

id. 135; *Blair v. White*, 61 Vt. 110; *Brunn v. Schuett*, 59 Wis. 260.

Where it was agreed between the parties that the claimant was to be paid by a testamentary provision and the testator has made such provision, which has been accepted, the intention that it should have that effect may be deduced from the will and the surrounding circumstances. *Alderding v. Allison*, 31 Ind. App. 397.

⁷ *Chapin v. Leapley*, 35 Ind. App. 511; *Wescoe's App.*, 52 Pa. 195; *Eaton v. Benton*, 2 Hill, 576; *Cloud v. Clinkinbeard*, 8 B. Mon. 398, 48 Am. Dec. 397; *Strong v. Williams*, 12 Mass. 392, 7 Am. Dec. 81; *Williams v. Crary*, 5 Cow. 368; 2 *Story's Eq.*, § 1100; *Petrow v. Kranse*, 61 Ill. App. 238.

the presumption of satisfaction.⁸ And the rule is not allowed to prevail where the legacy is a less amount than the debt, even as a satisfaction *pro tanto* except where a conveyance is made for a nominal consideration to become operative at the death of the grantor in pursuance of contract,⁹ nor where there is a difference in the time of payment of the debt and the legacy; nor where they are of different natures as to subject-matter; nor where there is an express direction in the will for the payment of debts.¹⁰ When a legacy is made by a creditor to a debtor and the debt is less in amount than the legacy, the legatee is considered as having so much of the assets in his hands as the debt amounts to and consequently to be satisfied *pro tanto*; and when the debt exceeds the legacy, the executors of the testator are entitled to retain the legacy in part discharge of the debt.¹¹ There is no presumption that a legacy given a creditor is in satisfaction of the debt if the testator is a joint debtor, or if the legacy is contingent.¹² Though no general rule was laid down a legacy has been declared not to be a satisfaction of a debt incurred after the will was made.¹³ A bequest

⁸ Id. See Story's Eq., §§ 1100, 1101; Strong v. Williams, 12 Mass. 392; Willis v. Dun, Wright, 133; Byrne v. Byrne, 3 S. & R. 54," 8 Am. Dec. 641; 1 Pom. Eq., § 527.

"There is no doubt the rule still nominally exists; but the tendency of the more recent decisions is to consider the bequest a bounty and not the discharge of an obligation. And the courts now lay hold of any circumstances, however trifling, for the purpose of repelling the presumption that the legacy was intended as a satisfaction of the debt." Crouch v. Davis, 23 Gratt. 62, 93. In another case it was observed: Inasmuch as the presumption is arbitrary and often in conflict with the real motives and wishes of the testator, and seemingly harsh, courts have been prompt to seize upon every circumstance to

counteract and overcome it. *Gilliam v. Brown*, 43 Miss. 641. Both these cases are approved in *Patten v. Glover*, 1 D. C. App. Cas. 466, 480. See *Pitts v. Van Orden* (Tex. Civ. App.), 158 S. W. 1043.

⁹ In *re McNamara's Est.*, 148 Mich. 346.

¹⁰ *Fetrow v. Krause*, 61 Ill. App. 238; *Van Riper v. Van Riper*, 2 N. J. Eq. 1; *Lisle v. Tribble*, 92 Ky. 304; *Gibbons v. Woodward*, 3 Walker (Pa. Sup. Ct.), 303; *Cloud v. Clinkinbeard*, 8 B. Mon. 398, 48 Am. Dec. 397; *Fort v. Gooding*, 9 Barb. 371.

¹¹ *Tinkham v. Smith*, 56 Vt. 187; *Clarke v. Bogardus*, 12 Wend. 67. See *Close v. Van Husen*, 19 Barb. 505.

¹² *Gibbons v. Woodward*, *supra*.

¹³ *Sullivan v. Latimer*, 38 S. C. 158.

by a mother, indebted to her children as administratrix of the estate of their father and as their guardian, of a portion of her own estate, which is more than the amount of the indebtedness, is not to be regarded as a satisfaction of her indebtedness to them. But this rule does not apply to an advancement made by a father or other person *in loco parentis* to a child to whom he is indebted.¹⁴

§ 221. **Payment by gift inter vivos.** A creditor may extinguish a debt gratuitously by such acts as are equivalent to a gift consummated. Thus, indorsements made in consideration of kindness, by direction and in the presence of a mortgagee, of part payments upon a mortgage against his granddaughter and her husband, with whom he was living at the time, and which were to accord with his deliberate and expressed intention to make a gift or donation of his property to her, have been sustained as an extinguishment or forgiving of the mortgage debt to that extent. It was objected that, this being a gift *inter vivos*, delivery and acceptance were essential to its validity, and as there was no delivery it could not take effect. Christiancy, J., said: "Doubtless such is the rule where the gift consists of tangible personal property which admits of actual delivery; and the same rule would probably apply where the note or bond of a third person is the subject of the gift. Whether if the whole of the mortgage debt in the present case had been the subject, delivery of the note and mortgage, or one of them, would not have been essential we need not inquire. In the present case it was but a part of the sum secured by the note and mortgage; and the attempted donation was to the debtors themselves. And it is difficult to conceive how any delivery could have been made. But it is said that there must have been a delivery of the papers or of a release or receipt for the portion of the debt intended to be given; because without something of this kind it would have been in the power of the donor to retract, and this he might doubtless have done if this had been an executory agreement or undertaking to make this gift. But here the purpose and intention of making the gift was fully executed, and by one of the

¹⁴ Patten v. Glover, 1 D. C. App. Cas. 466; Phunkett v. Lewis, 3 Hare, 316; 1 Pom. Eq., § 540.

Suth. Dam. Vol. I.—41.

donees actually accepted at the time; and the acceptance by the other of the extinguishment of a part of the debt against himself may be very safely presumed. And if it remained in the power of the donor to retract, it would have been equally so, if purely a gift, had a receipt been given, and equally so, for aught we can discover, had a release been given, there being no consideration and under our statute¹⁵ which makes the seal no more than *prima facie* evidence of a consideration. The want of consideration could, therefore, in either case, have been shown. As the debt which was the subject of the gift, when considered with reference to the fact that the donee was the debtor, and that only part of the debt was attempted to be given, did not admit of actual delivery, and as all was done that could well be done under the circumstances to make the gift effectual, we do not think the act and intention of the donor should be defeated merely because the subject did not admit of an actual or technical delivery.”¹⁶

A delivery is so essential to the validity of a gift that its place cannot be supplied by a formal declaration of the donor's executory intention, although in writing.¹⁷ The intention to discharge by gift a debt in the form of a note, bond or the like should be executed by an actual surrender of the instrument or by a release delivered to the donee.¹⁸ The delivery of a note by the holder to the maker, with the intention of transferring the title thereto, is an extinguishment of the note and a discharge of the obligation to pay it.¹⁹

¹⁵ Comp. L. of Mich. 1871, § 5947.

¹⁶ Green v. Langdon, 28 Mich. 221.

¹⁷ Plumstead's App., 4 S. & R. 545; Wheatley v. Abbott, 32 Miss. 343; Hunter v. Hunter, 19 Barb. 631; Noble v. Smith, 2 Johns. 52, 3 Am. Dec. 399; Cook v. Husted, 12 Johns. 188; Davis v. Boyd, 6 Jones, 249; Brunn v. Schuett, 59 Wis. 260.

¹⁸ Trombly v. Klersy, 141 Mich. 73; Kidder v. Kidder, 33 Pa. 268; Campbell's Est., 7 id. 100, 47 Am. Dec. 503; Wentz v. Dehaven, 1 S. & R. 312; Whitehill v. Wilson, 3 P. & W. 405; Duffield v. Elwes, 1 Bligh

(N. S.), 497; Duffield v. Hicks, 1 Dow. & C. 11; Licey v. Licey, 7 Pa. 251, 47 Am. Dec. 513; 1 Smith's Lead. Cas. 1st pt. *469.

In Campbell's Est., *supra*, Gibson, C. J., said that “the gift of a bond, note or other chattel cannot be made by words *in futuro* or in words *in presenti*, unaccompanied by such delivery of the possession as makes the disposal of the thing irrevocable.” Brunn v. Schuett, *supra*.

¹⁹ Slade v. Mutrie, 156 Mass. 19, 11 L.R.A. 710n; Stewart v. Hidden,

§ 222. **Retaining money by executor, etc.** Payment or satisfaction of a debt may result as the legal effect of the debtor having conferred on him in some character the duty or right to receive payment. This conclusion rests upon the ground that when the same hand is to pay and receive the money that which the law requires to be done shall be deemed to be done; and, therefore, that such debt, when due from an administrator, for instance, shall be assets *de facto* to be accounted for in the probate account.²⁰ But the principle only applies where it is shown that the personal representative had sufficient personal assets for the payment of his debt which he could have applied for that purpose.²¹ When a testator makes his debtor executor it is a release at law, but the former may reserve the debt, and payment be enforced by the party to whom it is bequeathed under the fiction of a promise to him.²² Such appointment does not extinguish the debt, nor a mortgage security for it,²³ but it becomes assets in his hands,²⁴ especially if there is a deficiency to pay debts.²⁵ An executor or other trustee for the distribution of moneys to pay debts, legacies, etc., may retain for a debt owing him from the trust funds, and may also retain for the benefit of the trust any sum due from a beneficiary. A personal representative may retain for his debt by withholding within the period allowed by the statute of limitations a sufficient amount from the moneys coming to his hands, and is entitled to due credit therefor in the settlement of his accounts,²⁶ on such proof

13 Minn. 43; Ellsworth v. Fogg, 35 Vt. 355; Vanderbeck v. Vanderbeck, 30 N. J. Eq. 265; Jaffray v. Davis, 124 N. Y. 164, 170, 11 L.R.A. 710; Patten v. Glover, 1 D. C. App. Cas. 466, 481.

²⁰ Ipswich Mfg. Co. v. Story, 5 Mete. (Mass.) 310; Stevens v. Gaylord, 11 Mass. 255; Kinney v. Ensign, 18 Pick. 232; Winship v. Bass, 12 Mass. 199; Wankford v. Wankford, 1 Salk. 299; Cheetham v. Ward, 1 B. & P. 630; Freakley v. Fox, 9 B. & C. 130; Taylor v. Deblouis, 4 Mason, 131; Bryant v. Smith, 10 Cush. 169; Hunt v. Nevers, 15

Pick. 500, 26 Am. Dec. 616, 15 Pick. 54, 1 Allen, 153. See Hsley v. Jewett, 2 Mete. (Mass.) 168; Wilson v. Wilson, 17 Ohio St. 150, 91 Am. Dec. 125.

²¹ Jordan v. Hardie, 131 Ala. 72; Miller v. Irby, 63 Ala. 485.

²² Fishel v. Fishel, 7 Watts, 44.

²³ Bacon v. Fairman, 6 Conn. 121; Collard v. Donaldson, 17 Ohio, 264. See Pratt v. Northam, 5 Mason, 95; Miller v. Irby, 63 Ala. 477.

²⁴ Winship v. Bass, 12 Mass. 198.

²⁵ Marvin v. Stone, 2 Cow. 781.

²⁶ Batson v. Murrell, 10 Humph. 301, 51 Am. Dec. 707; Hamner v.

as would authorize a recovery upon it.²⁷ And such retainer will be presumed from sufficient assets coming into his hands which were susceptible of conversion into money.²⁸ His debt, however, will not be deemed extinguished by the receipt of assets sufficient to discharge it, but which he fails to reduce to money and turn over to his successor.²⁹ The right of retainer, and the legal incidents thereof, applies to debts due the personal representative as trustee, or as executor or administrator of another person.³⁰ An executor *de son tort* cannot retain for his own debt.³¹

Sureties in a bond who pay it after the death of the principal are entitled to rank as his specialty creditors and if they be administrators of his estate may retain whatever they pay on account of such suretyship out of assets that come to their hands as administrators against other specialty creditors.³² A retainer may either be pleaded or given in evidence under the plea of *plene administravit*.³³

§ 223. **Payment in counterfeit money, bills of broken banks, forged notes and checks.** It accords with principles governing in like cases, and certainly with the decided weight of authority, to hold that the party paying by legal implication warrants the genuineness of what he pays as money,³⁴ unless the character of the transaction or the accompanying circumstances show a different intention.³⁵ This rule is now recognized as an ex-

Hamner, 3 Head, 398; Harrison v. Henderson, 7 Heisk. 315.

²⁷ Kirksey v. Kirksey, 41 Ala. 626.

²⁸ Glenn v. Glenn, 41 Ala. 571.

²⁹ Harrison v. Henderson, 7 Heisk. 315; Ross v. Wharton, 10 Yerg. 190.

³⁰ Miller v. Irby, 63 Ala. 477; Thompson v. Cooper, 1 Call, 861, 1 Am. Dec. 509; Thomas v. Thompson, 2 Johns. 471; Hosack v. Rogers, 6 Paige, 415; Morrow v. Payton, 8 Leigh, 54.

³¹ Turner v. Child, 1 Dev. 331.

³² Powell v. White, 11 Leigh, 309. See Copis v. Middleton, 1 Turn. & Russ. 224; Jones v. Davids, 4 Russ. 277.

³³ Evans v. Norris, Hayw. (by Batt.) 473.

³⁴ Watson v. Cresap, 1 B. Mon. 195, 36 Am. Dec. 572; Edmunds v. Digges, 1 Gratt. 359, 42 Am. Dec. 561; Hargrave v. Dusenbury, 2 Hawks, 326; Fogg v. Sawyer, 9 N. H. 365; Buck v. Doyle, 4 Gill, 478, 45 Am. Dec. 176; Goodrich v. Tracy, 43 Vt. 314, 5 Am. Rep. 281.

³⁵ See Dakin v. Anderson, 18 Ind. 52.

In Orchard v. Hughes, 1 Wall. 73, it was held to be no defense to a suit for debt that the debt arose from the receipt of the bills of a bank chartered illegally, and for fraudulent purposes, and that the

ception to that of *caveat emptor*, but it is evident it was not always so.³⁶ This warranty of genuineness, however, is not absolute; but the general current of authority is that the payer warrants the quality to such an extent that he is bound to make it good, if found bad and return within a proper time.³⁷ It is a special warranty, requiring the return of the thing warranted and involving an obligation of the debtor to pay the amount again in good money but leaving the creditor, of course, the option, on returning the spurious money, to proceed on the *statu quo* as upon a rescission. The payment in either case, to the extent of the counterfeit money, is treated as a nullity when it has been restored.³⁸

bills were void in law, and finally proved worthless in fact; they themselves having been actually current at the time the defendant received them, and not having proved worthless in *his* hands, and he not being bound to take them back from the person to whom he paid them.

³⁶ In *Wade's Case*, 5 Coke, 114a, it was said: "It was adjudged between *Vare* and *Studley* that when the lessor demanded rent of the lessee, according to the condition of re-entry, and the lessee payeth the rent to his lessor, and he received it and put it in his purse, and afterwards in looking it over again at the same time he found amongst the money that he had received some counterfeit pieces and thereupon refused to carry away the money, but re-entered for the condition broken, it was adjudged the entry was not lawful; for when the lessor had accepted the money it was at his peril, and upon that allowance he shall not take exception to any part of it." And it is said in *Shepherd's Touchstone*, 140, in respect to mortgages: "If the payment be made, part of it with counterfeit coin, and the party accept and put it up, this is a good payment, and consequent-

ly a good performance of the condition."

³⁷ *Atwood v. Cornwall*, 28 Mich. 336, 15 Am. Rep. 219; *Wingate v. Neidlinger*, 50 Ind. 520; *Samuels v. King*, id. 527; *Stebbins v. Stebbins*, 51 Ind. 595. See *Alexander v. Byers*, 19 Ind. 301.

³⁸ *Id.*; *Markle v. Hatfield*, 2 Johns. 453; *Gilman v. Peck*, 14 Vt. 516; *Thomas v. Todd*, 6 Hill, 340; *Torrey v. Baxter*, 13 Vt. 452; *Pindall v. Northwestern Bank*, 7 Leigh, 617; *Raymond v. Baar*, 13 S. & R. 318, 15 Am. Dec. 603; *Bank v. Farmers' & M. Bank*, 10 Vt. 141, 33 Am. Dec. 188.

In *Watson v. Cresap*, 1 B. Mon. 195, 36 Am. Dec. 572, Judge Ewing said: "It must be presumed that he who passes a bill as money passes it as genuine, and the law implies an *assumpsit* or warranty that it is so (2 Johns. 458, 15 Johns. 241); and if the bill should be counterfeit and worthless, this implied promise is immediately, upon passing the bill, broken, and an action lies for its breach: nor does it matter whether he who passes it knows that it is counterfeit or not. 2 Johns., *supra*. The action is not an action for fraud, but for breach

The same principle applies to the notes or checks of individuals. If they are forged, in whole or in part, or are void because of the incapacity of their makers, the paper does not discharge the debt it was accepted in payment of.³⁹ A contract to receive payment in certificates of indebtedness issued by pub-

of promise implied by law. And to sustain this form of declaring it would certainly be unnecessary to prove that the note was tendered back, as it goes for breach of promise, and not for restitution of the consideration upon a disaffirmance of the contract of payment. As the first count in the case under consideration is a count on the implied promise, the proof justified the recovery without any evidence that the bill was tendered back to the defendants before suit brought. We are also satisfied that if money or other bills which pass and are received as money be the consideration given for a counterfeit bill, that it may be recovered back on an *indebitatus* count for so much money had and received. Payment for such a bill must be regarded as a payment by mistake for a thing of no value, but which was, at the time it was received, believed to be, and imported on its face to be, of intrinsic worth. 2 Johns. 458.

"But this form of declaring proceeds on the ground of a disaffirmance of the contract and a restitution of the thing given in exchange. It is an equitable remedy, and to entitle the plaintiff to recovery, if anything of value has been received, it must be shown that it was tendered back before the action was brought. A counterfeit bill is certainly of no intrinsic value; it would be as worthless in the hands of the defendants as that of the plaintiffs, and according to the rule laid down, it would seem unneces-

sary to show that it was tendered back, even in this form of declaring. But whether it was or not it is not now necessary to determine, as the recovery was proper on the first count."

This case, it is respectfully suggested, would not now be regarded as correctly decided, for it proceeds upon a ground fundamentally erroneous; namely, that a counterfeit bill "would be as worthless in the hands of the defendants as in that of the plaintiffs." An absolute warranty of genuineness is assumed doubtless on that theory. The consideration appears to have been overlooked that where a counterfeit bill has been innocently paid and received, the prompt return of it will enable the party who had paid it to restore it to the person from whom he received it, and thus obtain its nominal amount in good money. The implied warranty requires such restitution.

³⁹ *Simpson v. New Orleans*, 109 La. 897; *Bass v. Wellesley*, 192 Mass. 526; *Central Nat. Bank v. Copp*, 184 Mass. 328; *Godfrey v. Crisler*, 121 Ind. 203; *First Nat. Bank v. Buchanan*, 87 Tenn. 32, 1 L.R.A. 199, 10 Am. St. 617; *School Town v. Grant*, 104 Ind. 168; *Gerwig v. Sitterly*, 56 N. Y. 214; *Stratton v. McMakin*, 84 Ky. 641, 4 Am. St. 215; *Ritter v. Singmaster*, 73 Pa. 400; *Graham's Est.*, 14 Phila. 280; *Emerie v. O'Brien*, 36 Ohio St. 491; *Guichard v. Brande*, 57 Wis. 534; *Sandy River Nat. Bank v. Miller*, 82 Me. 137.

lie officers contemplates that the instruments shall be enforceable; that they shall rest upon antecedent proceedings which gave the officers jurisdiction to issue them.⁴⁰ The tendency of modern decisions is to require reasonable vigilance in the receipt and prompt diligence in the return of counterfeits, or in giving notice to the payer that he may protect himself against prior parties. What is diligence is determined with reference to the facts of each case, but upon analogies drawn from the law of commercial paper. A delay of months or even a few days may be fatal to the right of recourse to the payee.⁴¹ Any unnecessary delay beyond such reasonable time as would enable the taker to inform himself as to its genuineness operates as a fraud on the payer and prevents a recovery.⁴²

§ 224. **Same subject.** When payment is made in the bills of insolvent banks or in other depreciated conventional currency the question of who should bear the loss may arise under various circumstances. If both parties deal in the currency in question as uncurrent money it is like dealing in a commodity. And if a debtor pays as money bank notes, knowing the bank to be insolvent, and conceals it from the creditor or payee, it will be deemed a fraud.⁴³ But there are various aspects in which an innocent payment of depreciated or worthless currency may be viewed; that is, though both the payer and receiver take for

Payment by means of a stolen check bearing the forged indorsement of the payee will not discharge the indebtedness. *Main Street Bank v. Planters' Nat. Bank of Richmond*, 116 Va. 137.

⁴⁰ *Catlin v. Munn*, 37 Hun (N. Y.), 23.

⁴¹ *Raymond v. Baar*, 13 S. & R. 318; *Samuels v. King*, 50 Ind. 527; *Thomas v. Todd*, 6 Hill, 340; *Lawrenceburgh Nat. Bank v. Stevenson*, 51 Ind. 594; *Corn Exch. Nat. Bank v. National Bank*, 78 Pa. 233; *Kenny v. First Nat. Bank*, 50 Barb. 112; *Camidge v. Allenby*, 6 B. & C. 373; *Bank v. Farmers' & M. Bank*, 10 Vt. 141; *Pindall v. Northwestern*

Bank, 7 Leigh, 617; *Union Bank v. Baldenwick*, 45 Ill. 375; *Pumphrey v. Eyre*, Tappan, 283. See *Young v. Adams*, 6 Mass. 187; *Salem Bank v. Gloucester Bank*, 17 id. 1, 28, 9 Am. Dec. 111.

⁴² *Atwood v. Cornwall*, 28 Mich. 336, 15 Am. Rep. 219. This case is valuable because of the ability and learning with which Judge Campbell discusses the legal relations between the payer and receiver of counterfeit money. See *First Nat. Bank v. Ricker*, 71 Ill. 439, 22 Am. Rep. 104; *Simms v. Clark*, 11 Ill. 137; *United States Bank v. Bank*, 10 Wheat. 333, 6 L. ed. 334.

⁴³ *Story on Prom. Notes*, § 118.

granted it is good, and may be equally ignorant of any fact tending to lessen its value: first, the bank may be in fact insolvent, but had not stopped payment; second, it may have stopped payment, but a knowledge of it not have reached the neighborhood where the payment was made and the bills may have continued there actually current; third, the currency used may be wholly worthless or only depreciated. Mr. Chitty says: "It should seem that if in discounting a note or bill the promissory note of country bankers be delivered, after they have stopped payment, but unknown to the parties, the person taking, unless guilty of laches, might recover the amount of the discount because it must be implied that at the time of the transfer the notes were capable of being received if duly presented for payment."⁴⁴ And Mr. Story says of a payment in bills of an insolvent bank, where both parties are equally innocent, and alike ignorant that the bank had become insolvent, that the weight of reasoning and of authority seems to be in favor of the payer bearing the loss. The decisions in New York,⁴⁵ Wisconsin,⁴⁶ Vermont,⁴⁷ New Hampshire,⁴⁸ Illinois,⁴⁹ Maine,⁵⁰ South Carolina,⁵¹ and Ohio⁵² are in accord with that doctrine. But in Pennsylvania,⁵³ Tennessee,⁵⁴ and Alabama⁵⁵ such loss must be borne by the receiver.⁵⁶

⁴⁴ Chitty on Bills, 247.

⁴⁵ *Lightbody v. Ontario Bank*, 11 Wend. 9, aff'd 13 id. 101; *Houghton v. Adams*, 18 Barb. 545.

⁴⁶ *Townsend v. Bank*, 7 Wis. 185.

⁴⁷ *Gilman v. Peck*, 11 Vt. 516, 34 Am. Dec. 702; *Wainwright v. Webster*, 11 Vt. 576, 34 Am. Dec. 707.

⁴⁸ *Fogg v. Sawyer*, 9 N. H. 365, 25 Am. Dec. 462.

⁴⁹ *Magee v. Carmack*, 13 Ill. 289.

⁵⁰ *Frontier Bank v. Morse*, 22 Me. 88, 38 Am. Dec. 284.

⁵¹ *Harley v. Thornton*, 2 Hill 509.

⁵² *Westfall v. Braley*, 10 Ohio St. 188, 75 Am. Dec. 509. But see *Imbush v. Mechanics' Bank*, 1 West. L. J. 49.

⁵³ *Bayard v. Shunk*, 1 W. & S. 94, 37 Am. Dec. 441.

⁵⁴ *Seruggs v. Gass*, 8 Yerg. 175, 29 Am. Dec. 114. But see *Ware v. Street*, 2 Head, 609, 75 Am. Dec. 755.

⁵⁵ *Lowrey v. Murrell*, 2 Port. 282, 27 Am. Dec. 651.

⁵⁶ See *Young v. Adams*, 6 Mass. 182; *Edmunds v. Digges*, 1 Gratt. 329; *Phillips v. Blake*, 1 Mete. (Mass.) 156; *Camidge v. Allenby*, 6 B. & C. 373; *Owenson v. Morse*, 7 T. R. 64; *Ex parte Blackburne*, 10 Ves. 204; *Emly v. Lye*, 15 East 7.

In *Corbit v. Bank*, 2 Harr. 235, 30 Am. Dec. 635, it was held that the receipt by a bank for deposit as money of the bills of a bank that had just suspended, but before either

The failure of a bank has the effect of depriving its bills of the distinctive character of money; it becomes insolvent when it ceases to redeem them with legal tender money.⁵⁷ Bank notes are the representative of money, and circulate as such by general consent and usage. But this consent and usage are based upon the convertibility of such notes into coin at the pleasure of the holder, upon their presentation to the bank for redemption. This fact is the vital principle which sustains their character as money. So long as they are in fact what they purport to be, payable on demand, common consent gives them the attributes of money. But upon the failure of the bank by which they were issued, when its doors are closed and the inability to redeem its bills is openly averred, they instantly lose that character, their circulation as currency ceases with the usage and consent upon which it rested, and the notes become the mere dishonored and depreciated evidences of debt. When this change in their character takes place the loss must necessarily fall upon him who is the owner of them at the time; and this, too, whether he is aware or unaware of the fact. His ignorance can give him no right to throw the loss he has already incurred upon an innocent third party.⁵⁸ Therefore, if such bills, after failure of the bank, are paid out and received as money by persons ignorant of the fact the receiver is entitled to return them and require their amount in good money on the ground of mistake.⁵⁹ The very time when a bank announces its failure, by closing its doors and ceasing to redeem, is that at which its failure is deemed to occur, without reference to its antecedent real condition between parties having no cause to anticipate

the bank or the depositor was informed of the failure, was at the risk of the bank receiving them. And a distinction was taken between the receipt of bank bills for a contemporaneous debt or consideration and receiving them for a precedent debt. In the former case the bills are supposed to be the thing bargained for, and therefore at the risk of the receiver; but

when received for a precedent debt it is not discharged unless the bills are of solvent banks when received.

⁵⁷ *Townsend v. Bank, Lightbody v. Ontario Bank, supra.*

⁵⁸ *Westfall v. Braley, supra.*

⁵⁹ *Id.*; *Frontier Bank v. Morse, supra*; *Roberts v. Fisher*, 43 N. Y. 159, 3 Am. Rep. 680; *Leger v. Bonnafle*, 2 Barb. 475; *Baldwin v. Van Deusen*, 37 N. Y. 487.

that event.⁶⁰ The doctrine that the loss falls upon him in whose hands the bills are at the time of the failure necessarily involves an implied guaranty in every payment of bank bills that at that time the bank has not suspended or failed, unless a contrary intention is manifested.

On the contrary, in Pennsylvania and some other states, as stated, where a payment in bank bills is made in good faith their acceptance is not deemed to be upon the faith of any such guaranty, but is governed by the rule of *caveat emptor*, and the maxim of *melior est conditio defendentis*.⁶¹

⁶⁰ Ware v. Street, 2 Head 609, 75 Am. Dec. 755. In this case a payment in bank bills was made on the 12th of July, 1858, late in the evening and was held good, although the suspension was resolved upon that same evening, but was not announced until the next day. The court say: "The loss must fall upon one of two innocent men, and the law must control it. At the time the payment was made the notes were circulating as currency and considered good by the community. But they were in fact of no value at the hour they were paid out, although a few hours before they were convertible into specie. . . . The supposed commercial interest of our country and the general convenience of the people have produced a course of legislation by which bank paper has become the circulating medium and the standard of value instead of specie. True, it has not been made a lawful tender and cannot be without a change of the Constitution. But by almost universal consent it has become the medium of exchange and the representative of property. It has taken the place of the precious metals and is regarded as money. This, however, is by consent and not by law. No man is bound to receive it in payment of debts or for

property. But if it gets into his hands by consent, and a loss comes by failure of the bank, the misfortune must and should be his in whose hands it happens to be at the time. The risk must follow the paper and not the former owners. It passes from hand to hand without recourse except in cases of fraud or concealment."

⁶¹ In Bayard v. Shunk, 1 W. & S. 92, 37 Am. Dec. 441, Gibson, C. J., expounds and enforces this view with great vigor of language and logic. He says: "Cases in which the bills and notes of a third party were transferred for a debt are not to the purpose; and most of those which have been cited are of that stamp. Where the parties to such a transaction are silent in respect to the terms of it, the rules of interpretation are few and simple. If the securities are transferred for a debt contracted at the time, the presumption is that they were received in satisfaction of it; but if for a precedent debt, it is that they are received as collateral security for it; and in either case it may be rebutted by direct or circumstantial evidence. But by the conventional rules of business, a transfer of bank notes, though they are of the same mould and obligation betwixt the

Where recourse is allowed to the party who paid out the bills it does not depend on their being worthless. Parker, C. J.,

original parties, is regulated by peculiar principles, and stands on a different footing. They are lent by the banks as cash; they are paid away as cash; and the language of Lord Mansfield in *Miller v. Race*, 1 Burr. 452, was not too strong when he said, 'they are treated as money, as cash, in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes; they are as much money as guineas themselves are, or any other coin that is used in common payments is money or cash.' If such were their legal character in England, where there was but one bank, how emphatically must it be so here where they have supplanted coin for every purpose but that of small change, and where they have excluded it from circulation almost entirely. It is true, as was remarked in *Young v. Adams*, 6 Mass. 182, that our bank notes are private contracts without a public sanction like that which gives operation to the lawful money of the country; but it is also true that they pass for cash, both here and in England, not by force of any such sanction, but by the legislation of general consent, induced by their great convenience, if not the absolute necessities of mankind. *Miller v. Race* is a leading case which has never been doubted in England, or, except in a case presently to be noticed, in America; and it goes very far to rule the point before us; for if the wheel of commerce is to be stopped or turned backwards in order to repair accidents to it from impurities in the medium which keeps it in motion,

except those which, few and far between, are occasioned by forgery, bank notes must cease to be a part of the currency, or the business of the world must stand still. The weight of authority bearing directly on the point is (1841) decisively in favor of the position that *bona fide* payment in the notes of a broken bank discharges the debt. . . . *Camidge v. Allenby*, 6 B. & C. 373; *Scruggs v. Gass*, 8 Yerg. 175, 29 Am. Dec. 114; *Young v. Adams*, 6 Mass. 182; against *Lightbody v. Ontario Bank*, 11 Wend. 9, affirmed, 13 id. 101. . . .

"To assume that the solvency of the bank at the time of the transfer is an inherent condition of it is to assume the whole ground of the argument. The conclusion concurred in by all, however, was that the medium must turn out to have been what the debtor offered it for at the time of payment. How does that consist with the equitable principle that there must be, in every case, a motive for the interference of the law, but that it must be stronger than any to be found on the other side; else the equity being equal, and the balance inclining to neither side, things must be left to stand as they are (Fonb. B. 1, ch. V. § 3; id. ch. IV. § 25); in other words, that the law interferes not to shift a loss from one innocent man to another equally innocent, and a stranger to the cause of it. The self-evident justice of this would be proof, were it necessary, that it is a principle of the common law. But we need go no further in search of authority for it than *Miller v. Race*, in which one who had received a stolen bank note for full considera-

said: "The case of a payment in bills of a broken bank cannot be distinguished in principle from a payment in counterfeit

tion in the course of his business was not compelled to restore it. It was intimated in the *Ontario Bank v. Lightbody* that there was a preponderance of equity in that case, not on the side of him who had lost the note, but of him who had *last* given value for it. Why *last*? The maxim, *prior in tempore potior in jure*, prevails between prior and subsequent purchasers indifferently of a legal or an equitable title. It is for that reason the owner of a stolen horse can reclaim him of a purchaser from the thief; and were not the field of commerce market overt for everything which performs the office of money in it, the owner of a stolen note might follow it into the hands of a *bona fide* holder of it. But general convenience requires that he should not; and it was that principle, not any consideration of the equities betwixt the parties, which ruled the case of *Miller v. Race*. But a more forcible illustration of the principle, were the case indisputably law, might be had in *Levy v. Bank of the United States*, 4 Dall. 234, 1 Bin. 27, in which the placing even a forged check to the credit of a depositor as cash—a transaction really not within any principle of conventional law—was held to conclude the bank; and to this may be added the entire range of cases in which the purchaser of an article from a dealer has been bound to bear a loss from a defect in the quality of it. And for the same reason that the law refuses to interfere between parties mutually innocent, it refuses to interfere between those who are mutually culpable; as in the case of an action for negligence. What is there, then,

in the case before us to take it out of this great principle of the common law? The position taken by the courts of New York is that every one who parts with his property is entitled to expect the value of it in coin. Doubtless he is. He may exact payment in precious stones, if such is the bargain. But where he has accepted without reserve what the conventional laws of the country declare to be cash, his claim to anything else is at an end. Bills of exchange and promissory notes enter not into the transactions of commerce as money; but it impresses even these with qualities which do not belong to ordinary securities. The holder of one of them, who has taken it in the ordinary course, can recover on it, whether there was a consideration between the original parties or not. . . .

"The assertion that it is always an original and subsisting part of the agreement that a bank note shall turn out to have been good when it was paid away can be conceded no farther than regards its genuineness. That genuine notes are supposed to be equal to coin is disproved by daily experience, which shows that they circulate by the consent of whole communities at their nominal value when notoriously below it. But why hold the payer responsible for the failure of the bank only when it has been ascertained at the time of the payment, and not for insolvency ending in an ascertained failure afterwards? As the bank may have been actually insolvent before it closed to let the world know it, we must carry his responsibility back beyond the time when it ceased to redeem

money. From the time of the failure of the bank they cease to be the proper representatives of money, whether they are at the

its notes, if we carry it back at all. Were it not for the conventional principle that the purchaser of a chattel takes it with its defects, the purchaser of a horse with the seeds of mortal disease in him might refuse to pay for him though his vigor and usefulness were yet unimpaired; and if we strip a payment in bank notes of the analogous cash principle, why not treat it as a nullity, by showing that the bank was actually, though not ostensibly, insolvent at the time of the transaction. It is no answer that the note of an unbroken bank may be instantly converted into coin by presenting it at the counter. To do that may require a journey from Boston to New Orleans, or between places still further apart, and the bank may have stopped in the meantime, or it may stop at the instant of presentation when situated where the holder resides. And it may do so when it is not insolvent at all, but perfectly able eventually to pay the last shilling. This distinction between previous and subsequent failure evinced by stopping before the time of the transaction or after it is an arbitrary and impracticable one. To such a payment we must apply the cash principle entire, or we must treat it as a transfer of negotiable paper, imposing on the transferee no more than the ordinary mercantile responsibility in regard to presentation and notice of dishonor. There is no middle ground. . . . The case of a counterfeit bank note is entirely different. The laws of trade extend to it only to prohibit the circulation of it. They leave it in all beside to what is the rule

both of the common and the civil law, which requires a thing parted with for a price to have an actual or at least a potential existence (2 Kent, 468), and a forged note, destitute as it is of the quality of legitimate being, is a *nonentity*. It is no more a bank note than a dead horse is a living one; and it is an elementary principle, that what has no existence cannot be the subject of a contract. But it cannot be said that the genuine note of an insolvent bank has not an actual and a legitimate existence, though it be little worth; or that the receiver of it has not got the thing he expected. It ceases not to be genuine by the bank's insolvency; its legal obligation as a contract is undissolved, and it remains a promise to pay, though the promisor's ability to perform it be impaired or destroyed. . . . The difference between forgery and insolvency in relation to a bank note is as distinctly marked as the difference between title and quality in relation to the sale of a chattel.

“What then becomes of the boasted principle that a man shall not have parted with his property until he shall have had value, or rather what he expected for it? Like many others of the same school, it would be too refined for our times, even did a semblance of justice lie at the root of it. But nothing devised by human sagacity can do equal and exact justice in the apprehension of all men. The best that can be done, in any case, is no more than an approximation to it; and when the incidental risks of a business are so disposed of as to consist with the general con-

time near to or at a distance from the bank. They may have a greater value than counterfeit bills, but in neither case has the party received what in the contemplation of both parties he was entitled to receive, if the contract was to pay a certain sum. In neither case has he received money or its representative. The sum contracted to be paid has not been paid in money or anything which by usage passes as money, or which was entitled at the time to represent it; and the party has therefore failed to pay what he contracted to pay. Counterfeit coin may contain a portion of good metal and thus have some value, but this would not make it a good medium of payment. Entire worthlessness, or not, is not, therefore, the criterion."⁶² A return of such paper by the receiver is required as a condition of the right to recover from the payer; and the necessity of returning it arises from the same considerations in the case of counterfeit money, to enable the party paying to secure himself with prior parties. But whether the rule requiring return within a reasonable time is confined to cases in which the payer has recourse does not appear to be decided. If the failure occurred while he was the owner of the bills he has no recourse; and if they are not returned why may not the party receiving and retaining them be charged with their value and the recovery be limited to the depreciation?⁶³

venience, no injustice will in the end be done to those by whom they are borne. Commerce is a system of dealing in which risk, as well as labor and capital, is to be compensated. But nothing can be more exactly balanced than the equities of parties to a payment in regard to the risk of the medium when its worthlessness was unsuspected by either of them. The difference between them is not the tithe of a hair or any other infinitesimal quantity that can be imagined; and in such a case the common law allows a loss from mutual mistake to rest where it has fallen, rather than to remove it from the shoulders of

one innocent man to the shoulders of another equally so."

⁶² *Fogg v. Sawyer*, 9 N. H. 365; *Frontier Bank v. Morse*, 22 Me. 88, 38 Am. Dec. 284; *Magee v. Carmack*, 13 Ill. 289.

⁶³ *Townsend v. Bank*, 7 Wis. 185; *Ontario Bank v. Lightbody*, 13 Wend. 104.

In *Magee v. Carmack*, 13 Ill. 289, the court remark as to the question of what is a reasonable time: "When from the nature of the subject a general rule can be applied to all cases, then what constitutes reasonable notice may be a question of law for the court, as notice to the indorser of a bill or note. But

§ 225. **Payment by note, bill or check.** A creditor may receive anything of value as payment.⁶⁴ A debtor, by agreement with his creditor, may pay his contemporaneous or antecedent debt in a note or bill against a third person; but there must be a mutual agreement that it shall be transferred and received as final satisfaction without recourse or condition of being productive.⁶⁵ Where goods are sold for a particular note it is an exchange or barter, and the note has the effect of payment.⁶⁶ In some states the rule is that the note of the vendee is presumed to have been taken by the vendor in payment of a contemporaneous debt unless the contrary be shown, or the note be void, or there has been fraud or misrepresentation respecting it;⁶⁷ but it is otherwise as to an antecedent debt.⁶⁸ And when the note

when, as in this case, the question of what would constitute a reasonable time must depend upon the peculiar circumstances of each case, and cannot reasonably be subjected to any general rule, then it is a question of fact for the jury to be determined from all the circumstances."

⁶⁴ *Kennedy v. Fidelity & C. Co.*, 100 Minn. 1, 117 Am. St. 658; *Louden v. Birt*, 4 Ind. 566; *Reed v. Bartlett*, 19 Pick. 273; *Tilford v. Roberts*, 8 Ind. 254.

⁶⁵ *Hutkoff v. Glazer*, 78 N. Y. Misc. 362; *American Ins. Co. v. McGehee L. Co.*, 93 Ark. 62; *Elm City L. Co. v. Mackenzie*, 77 Conn. 1; *Kinard v. First Nat. Bank*, 125 Ga. 228, 114 Am. St. 201; *Flannery v. Harley*, 117 Ga. 483; *Taylor v. Wahl*, 72 N. J. L. 10; *St. John v. Purdy*, 1 Sandf. 9; *New York State Bank v. Fletcher*, 5 Wend. 85; *Conkling v. King*, 10 N. Y. 410, affirming 10 Barb. 372; *Roberts v. Fisher*, 53 Barb. 69; *Wright v. First C. W. Co.*, 1 N. H. 281, 8 Am. Dec. 68; *Jaffrey v. Cornish*, 10 N. H. 505; *Elliot v. Sleeper*, 2 id. 527; *Randlet v. Herren*, 20 id. 102;

Brewer v. Branch Bank, 24 Ala. 440; *Hutchins v. Olcott*, 4 Vt. 549, 24 Am. Dec. 634; *Hart v. Boller*, 15 S. & R. 162, 16 Am. Dec. 536; *Citizens' Bank v. Carson*, 32 Mo. 191; *Smith v. Owens*, 21 Cal. 11; *Graves v. Friend*, 5 Sandf. 568. See *Gordon M. Co. v. Bartels B. Co.*, 206 N. Y. 528.

⁶⁶ *Ferdon v. Jones*, 2 E. D. Smith, 106; *Whitbeck v. Van Ness*, 11 Johns. 409, 6 Am. Dec. 383; *Breed v. Cook*, 15 Johns. 241; *Rew v. Barber*, 3 Cow. 272.

A creditor who accepts from his debtor notes of third persons which were to be received as payment if the former approves them is bound to determine whether they are to be so received or not within a reasonable time and to give his debtor notice of his decision. If he delays for forty days it is for the jury to find whether he has accepted them as payment. *Acme H. Co. v. Axtell*, 5 N. D. 315.

⁶⁷ *Ford v. Mitchell*, 15 Wis. 308; *Challoner v. Boyington*, 83 Wis. 399.

⁶⁸ *Willow River L. Co. v. Luger F. Co.*, 102 Wis. 636.

of a third person is taken without recourse, by indorsement or otherwise, for goods sold at the time the presumption is it is taken in payment.⁶⁹ There is no dissent from the proposition that an agent who has no authority to sell property and receive payment for his principal is not presumed to be empowered to take anything but money in payment therefor;⁷⁰ and this is true of an agent who is appointed to receive and collect demands due his principal.⁷¹ This view is qualified in some states as to

⁶⁹ *Challoner v. Boyington*, 83 Wis. 399; *Hall v. Stevens*, 116 N. Y. 201, 5 L.R.A. 802, reversing 40 Hun 578; *Gibson v. Tobey*, 46 N. Y. 637, 7 Am. Rep. 397; *Corbit v. Bank*, 2 Harr. 235, 239, 30 Am. Dec. 635; *Torry v. Hadley*, 27 Barb. 192; *Whitbeck v. Van Ness*, *supra*; *Noel v. Murray*, 13 N. Y. 167; *Rew v. Barber*, 3 Cow. 272; *Breed v. Cook*, 15 Johns. 241; *Bank of England v. Newman*, 1 Ld. Raym. 442; *Bayard v. Shunk*, 1 W. & S. 92, 37 Am. Dec. 441; *Fydell v. Clark*, 1 Esp. 447; *Clark v. Mundall*, 1 Salk. 124. But see *Darnell v. Morehouse*, 36 How. Pr. 511; *Turner v. Bank*, 3 Keyes, 425; *Yonngs v. Stahelin*, 34 N. Y. 258; *Owenson v. Morse*, 7 T. R. 64; *Burrows v. Bangs*, 34 Mich. 304; *Gardner v. Gorham*, 1 Doug. (Mich.) 507; *Van Cleef v. Therasson*, 3 Pick. 12; *Carroll v. Holmes*, 24 Ill. App. 453, and a *dictum* in *Morrison v. Smith*, 81 Ill. 221.

⁷⁰ *Ormsby v. Graham*, 123 Iowa, 202; *Runyon v. Snell*, 116 Ind. 164, 9 Am. St. 839; *Stewart v. Woodward*, 50 Vt. 78, 28 Am. Rep. 488; *Victor S. M. Co. v. Heller*, 44 Wis. 265; *Quinn v. Sewell*, 50 Ark. 380.

If the principal ships goods sold by the agent for other than a cash consideration the contract of sale is ratified. *Billings v. Mason*, 80 Me. 496.

⁷¹ *Cranston v. West Coast L. Ins. Co.*, 63 Ore. 427; *Davis v. Home Ins.*

Co., 127 Tenn. 330, 44 L.R.A.(N.S.) 626; *Roberts v. McKim*, 34 Nev. 191; *Becker v. Bluemel*, 129 Wis. 491; *Scott v. Gilkey*, 153 Ill. 168; *Cooney v. United States W. Co.*, 101 Ill. App. 468; *Morris v. Eufaula Nat. Bank*, 106 Ala. 383; *McCormick H. Mach. Co. v. Breeu*, 61 Ill. App. 528; *National Bank v. Grimm*, 109 N. C. 93; *Bank of Commerce v. Hart*, 37 Neb. 197, 40 Am. St. 479, 20 L.R.A. 780; *Sandy River Bank v. Merchants & M's Bank*, 1 Biss. 146; *Western Brass Mfg. Co. v. Maverick*, 4 Tex. Civ. App. 535; *Everts v. Lawther*, 165 Ill. 487; *Lawther v. Everts*, 63 Ill. App. 432; *Scully v. Dodge*, 40 Kan. 395; *McCormick v. Peters*, 24 Neb. 70; *Nicholson v. Pease*, 61 Vt. 534; *Lochenmeyer v. Fogarty*, 112 Ill. 572; *Wilcox & W. O. Co. v. Lasley*, 40 Kan. 521; *Deatherage v. Henderson*, 43 Kan. 684; *Mitchell v. Printup*, 68 Ga. 675.

If the agent of a mortgagee accepts a certificate of deposit in payment of a mortgage and deposits it in the bank which issued it to the credit of his own account, the payment is of cash. *Harrison v. Legore*, 109 Iowa 618; *Hare v. Bailey*, 73 Minn. 409.

It seems that an attorney, acting in good faith, has broader powers than other agents. It has been ruled where an attorney, under his employment, obtained judgment and

banks which are intrusted with collections if their usage is to accept checks in payment of claims, whether the customer has knowledge of the usage or not, if he has not given directions as to the mode of payment.⁷² But this is denied in Missouri.⁷³ A government revenue collector has no authority to receive in payment for stamps anything but money.⁷⁴

Whether the receipt by the creditor of the debtor's note, or the note of one of several debtors, with the agreement that it is received at the risk of the creditor and as full satisfaction, will have the effect to extinguish the debt, is not universally agreed. In New York it has been several times held, and perhaps the doctrine there may be deemed settled, that a debtor's note, although expressly received as satisfaction, cannot extinguish his precedent debt.⁷⁵

presented a certified transcript of it to the defendant, demanding payment, which was made in confederate funds in 1862, that such payment was binding, and that payment in such funds, they being current, to clerks, sheriffs and other officers authorized to collect money, was binding on the creditor, while it was otherwise as to payments so made to private agents. *East Tennessee, etc. R. Co. v. Williams*, 3 Tenn. Cas. 8. See § 211.

⁷² *Griffin v. Erskine*, 131 Iowa, 444; *Farmers' Bank & T. Co. v. Newland*, 97 Ky. 464; *Morse on Banks & Banking*, sec. 221.

⁷³ *National Bank of Com. v. American Exch. Bank*, 151 Mo. 320, 74 Am. St. 527.

⁷⁴ *American B. Co. v. United States*, 33 Ct. of Cls. 349; *Miltenberger v. Cooke*, 18 Wall. 421, 21 L. ed. 864.

⁷⁵ *Cole v. Sackett*, 1 Hill, 516. In this case Cowen, J., said: "It may be considered at present as entirely settled that to operate as a satisfaction the promise must be of some third person; in other words, some-
Suth. Dam. Vol. I.—42.

thing over and above the original debt. A promise by note is a security of no higher degree than an implied promise; and the logic of these pleas is no more than saying: 'Your precedent debt is discharged because I promised to pay it in another form, and you accepted the latter promise as a satisfaction.' What consideration is there for such an acceptance? The new promise to do a thing which the debtor was bound to do before—a thing which he now refuses to do, because he had promised again and again to do it! In these promising times, there are, I apprehend, few debts which on such a theory are not in danger of being barred much short of the statutes of limitations; for creditors, however unwilling, are many times obliged to accept promises as the only satisfaction they can obtain for the present. It is entirely settled that a promissory note in no way affects or impairs the original debt unless it be paid."

Notwithstanding the argument, from want of consideration, in the foregoing opinion, Judge Cowen

In England, and generally in this country, it is believed that the debtor's negotiable note or bill of a third person, when received by mutual agreement of the parties as satisfaction, has that effect; and the rule applies equally whether the debt be antecedent or contemporaneous.⁷⁶ Where any person is obligated to pay money a payment made in any mode, either

conceded to negotiable notes taken for an account some additional value to the creditor in *Myers v. Welles*, 5 Hill, 463: "Being negotiable, they might be used more beneficially than the account. Besides, they operate to liquidate the plaintiff's claim. *These advantages constituted sufficient consideration for the suspension.*" See *Frisbie v. Larned*, 21 Wend. 450; *Putnam v. Lewis*, 8 Johns. 389; *Hawley v. Foote*, 19 Wend. 516.

On principle, it might well be claimed that where the new note is supported by sufficient consideration for forbearance, that consideration is sufficient for a discharge of the original debt.

⁷⁶ *Roberts v. Vonnegut*, — Ind. App. —, 104 N. E. 321; *Lomax v. Colorado Nat. Bank*, 46 Colo. 229; *Sill v. Burgess*, 134 Ill. App. 373 (contemporaneous); *Citizens' C. & S. Bank v. Platt*, 135 Mich. 267; *Kirkpatrick v. Puryear*, 93 Tenn. 409, 22 L.R.A. 785; *Thum v. Wolstenholme*, 21 Utah, 446; *Holmes v. Laraway*, 64 Vt. 175; *Mulligan v. Hollingsworth*, 99 Fed. 216; *Kell v. Larkin*, 72 Ala. 493; *Dryden v. Stephens*, 19 W. Va. 1; *Mayer v. Mordecai*, 1 S. C. 398; *Smith v. Hobleman*, 12 Neb. 502; *Sard v. Rhodes*, 1 M. & W. 153; *Sibree v. Tripp*, 15 id. 23; 2 Am. Lead. Cas. (5th ed.) 273; 1 Smith Lead. Cas. pt. 1 (7th Am. ed.) *456; *Yates v. Valentine*, 71 Ill. 643; *Chitty on Bills*, 289 *et seq.* and p. 119; *Story*

on Prom. Notes, § 389, note 3, § 405; *Seltzer v. Coleman*, 32 Pa. 493; *Smith's Merc. L.* 542; *Cornwall v. Gould*, 4 Pick. 444; *Huse v. Alexander*, 2 Metc. (Mass.) 157; *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215; *Maillard v. Duke of Argyle*, 6 M. & G. 40; *Hart v. Boller*, 15 S. & R. 162, 16 Am. Dec. 536; *Jones v. Shawan*, 4 W. & S. 257; *Sutton v. The Albatross*, 2 Wall. C. C. 327; *Keough v. McNitt*, 6 Minn. 513. See *Goenen v. Schroeder*, 18 id. 66; *Bank v. Bobo*, 11 Rich. 597; *Haven v. Foley*, 19 Mo. 636; *Dougal v. Cowles*, 5 Day, 511; *Bonnell v. Chamberlin*, 26 Conn. 487; *McMurray v. Taylor*, 30 Mo. 263, 77 Am. Dec. 611; *Foster v. Hill*, 36 N. H. 526; *Moody v. Leavitt*, 2 N. H. 171; *Costelo v. Cave*, 2 Hill (S. C.) 528, 27 Am. Dec. 404; *Drake v. Mitchell*, 3 East, 251; *Foster v. Allanson*, 2 D. & E. 479; *Moravia v. Levy*, id. 483n.; *Watson v. Owens*, 1 Rich. 111; *The Kimball*, 3 Wall. 37, 18 L. ed. 50; *Brown v. Olmsted*, 50 Cal. 162; *Alley v. Rogers*, 19 Gratt. 366; *Burrows v. Bangs*, 34 Mich. 304.

"The giving and acceptance of a promissory note for a prior indebtedness will not be regarded as payment, unless there be an express agreement between the parties to that effect." *Chicago, B. & G. R. Co. v. Burns*, 61 Neb. 793; *Edwards & Bradford Lumber Co. v. Lamb*, 95 Neb. 263.

property, his negotiable paper, or other securities, if such payment is received as a full satisfaction of the demand, is equivalent for the purpose of payment to cash.⁷⁷ Though the general rule is otherwise, in Massachusetts,⁷⁸ Maine,⁷⁹

⁷⁷ *National Life Ins. Co. v. McDermott*, 186 Ill. App. 157; *O'Bryan v. Jones*, 38 Mo. App. 90; *Rice v. Dudley*, 34 id. 383; *Dryden v. Stephens*, 19 W. Va. 1; *Ralston v. Wood*, 15 Ill. 159, 58 Am. Dec. 604; *Gillilan v. Nixon*, 26 Ill. 52; *Cox v. Reed*, 27 id. 434; *Wilkinson v. Stewart*, 30 id. 48; *Leake v. Brown*, 43 id. 376; *Tinsley v. Ryon*, 9 Tex. 405; *Robson v. Watts*, 11 Tex. 764; *Van Middlesworth v. Van Middlesworth*, 32 Mich. 183; *Wright v. Lawton*, 37 Conn. 167; *Gage v. Lewis*, 68 Ill. 604; *Doolittle v. Dwight*, 2 Mete. (Mass.) 561; *Witherby v. Mann*, 11 Johns. 518; *McLellan v. Crofton*, 6 Me. 304; *Randall v. Rich*, 11 Mass. 494; *Pearson v. Parker*, 3 N. H. 366; *Atkinson v. Stewart*, 2 B. Mon. 348; *Howe v. Buffalo*, etc. R. Co., 37 N. Y. 297; *Keller v. Boatman*, 49 Ind. 104.

In *Pitzer v. Harmon*, 8 Blackf. 112, 44 Am. Dec. 738, a negotiable note was given by the surety and was taken in discharge and satisfaction; held not such a payment as would warrant a recovery against the principal for money paid. See *Bennett v. Buchanan*, 3 Ind. 47.

If a check given for a pre-existing debt is ultimately paid there is no "debt owing or accruing" to the creditor between the times of the delivery of the check and its payment so as to make the debtor who drew it subject to garnishment. *Elwell v. Jackson*, 1 Cab. & Ellis, 362; *Thompson v. Peck*, 115 Ind. 512, 1 L.R.A. 201; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544.

As to the payment of costs by

check, see *Burns v. Smith*, 180 Pa. 606.

⁷⁸ *Baldwin v. Porter*, 217 Mass. 15; *American M. Co. v. Souther B. Co.*, 194 Mass. 89 (though note accepted in state where the rule is otherwise if payable in Massachusetts and goods delivered there); *Melledge v. Boston I. Co.*, 5 Cush. 158, 51 Am. Dec. 59; *Thatcher v. Dinsmore*, 5 Mass. 299, 4 Am. Dec. 61; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Maneely v. McGee*, 6 Mass. 143, 4 Am. Dec. 105; *Chapman v. Durant*, 10 Mass. 47; *Johnson v. Johnson*, 11 id. 361; *Whitcomb v. Williams*, 4 Pick. 288; *Fowler v. Bush*, 21 id. 230; *Wood v. Bodwell*, 12 id. 268; *Scott v. Ray*, 18 id. 268; *French v. Price*, 24 id. 13; *Brewer L. Co. v. Boston & A. R. Co.*, 179 Mass. 228, 54 L.R.A. 435.

⁷⁹ *Dole v. Hayden*, 1 Me. 152; *Wise v. Hilton*, 4 id. 435; *Homes v. Smith*, 16 id. 181; *Gilmore v. Bussey*, 12 id. 418; *Trustees, etc. v. Kendrick*, id. 381; *Comstock v. Smith*, 23 id. 202; *Bunker v. Barron*, 79 id. 62, 1 Am. St. 282; *Varner v. Nobleborough*, 2 Me. 121, 11 Am. Dec. 48; *Bryant v. Grady*, 98 Me. 389.

In *Dole v. Hayden*, *supra*, upon a settlement of mutual accounts a promissory note was given for the balance supposed to be due, but by a mistake in computation the note was made for \$20 more than was due; it was held that the debtor might recover this sum from the creditor although the note still remained unpaid. The court treated

Indiana,⁸⁰ Louisiana⁸¹ and Vermont,⁸² it is thoroughly settled that when a creditor receives a negotiable note of the debtor, either for an antecedent or a contemporaneous simple contract debt, it is presumed to be received as absolute and not conditional payment. This is a presumption of fact only, liable to be controlled by evidence that such was not the intention of the parties.⁸³ In Wisconsin the taking of a bill of exchange on a previous indebtedness of the drawer to the payee is *prima facie* payment of the debt.⁸⁴

This presumption rests upon the theory that when a note is given for goods it is equally convenient for the creditor, and generally more so, to sue on it than on the original promise;

the mistake as substantially an omission to allow \$20 of the plaintiff's account, and the action as brought for it.

⁸⁰ "It is settled by the decisions of this court that the giving of a promissory note, governed by the law merchant, for a pre-existing indebtedness of the maker to the payee will discharge such debt unless it is shown that the parties did not intend it to have that effect. And the giving of a promissory note not governed by the law merchant does not operate as a payment thereof unless it is so agreed between the parties." *Sutton v. Baldwin*, 146 Ind. 361; *Stevenson v. Stunkard*, 44 Ind. App. 716; *Knight v. Kerfoot*, (Ind. App.) 102 N. E. 983.

Where a debtor gave his creditor notes payable to his wife the court refused to hold that they were given and accepted as payment, although they were payable in bank, because the creditor could not use them as commercial paper unless the wife indorsed them. *Bradway v. Groenendyke*, 153 Ind. 508.

The presumption of payment arising from the acceptance of bills of exchange is not difficult to over-

come, and parol evidence may be received for that purpose. *Keek v. State*, 12 Ind. App. 119.

⁸¹ *Hunt v. Boyd*, 2 La. 109.

⁸² *Hodges v. Fox*, 36 Vt. 74; *Street v. Hall*, 29 id. 165.

But if the creditor takes a note under a misapprehension as to the facts, he supposing that parties are bound by it who are not, the presumed intention to treat the note as payment is rebutted, and there may be a recovery upon the original debt. *Wait v. Brewster*, 31 Vt. 516, 527.

⁸³ *Reynolds v. Schade*, 131 Mo. App. 1; *Butman v. Howell*, 144 Mass. 66; *Green v. Russell*, 132 Mass. 536; *Fowler v. Ludwig*, 34 Me. 460; *Dodge v. Emerson*, 131 Mass. 467; *Melledge v. Boston I. Co.*, 5 Cush. 158, 51 Am. Dec. 59; *Maneely v. McGhee*, 6 Mass. 143, 4 Am. Dec. 105; *Watkins v. Hill*, 8 Pick. 522; *Howland v. Coffin*, 9 id. 54; *Reed v. Upton*, 10 id. 525; *Butts v. Dean*, 2 Mete. (Mass.) 76, 35 Am. Dec. 389; *Brewer L. Co. v. Boston & A. R. Co.*, *infra*, and cases cited in notes to the next paragraph.

⁸⁴ *Mehlberg v. Tisher*, 24 Wis. 607; *Schierl v. Baumel*, 75 id. 69.

and so there is no reason for considering the original simple contract as still subsisting and in force; therefore, it is presumed that it was intended by the parties that the note should be deemed a satisfaction.⁸⁵ The presumption, however, is founded on the negotiable character of the note, and does not apply to other instruments.⁸⁶ The same presumption arises in Massachusetts when payment is made by the note of a third person, unless there is an agreement to the contrary, or equivalent circumstances;⁸⁷ but it is otherwise in Indiana,⁸⁸ unless the creditor surrenders the debtor's notes and sues upon the note of the third person.⁸⁹ The presumption that a note is taken as satisfaction is affected by circumstances. Thus, where the note given is not the obligation of all the parties who are liable for the simple contract debt, and, *a fortiori*, when the note given is that of a third person, and if held to be in satisfaction would wholly discharge the liability of other parties previously liable, the presumption, if it exists at all, is of much less weight.⁹⁰ The fact that such presumption would deprive the party who takes the note of a substantial benefit has a strong tendency to show that it was not so intended;⁹¹ as where it would imply the discharge of a mortgage,⁹² or the lien of a vendor, including the right of

⁸⁵ Curtis v. Hubbard, 9 Metc. (Mass.) 322. See Brewer L. Co. v. Boston & A. R. Co., 179 Mass. 228, 234, 54 L.R.A. 435, for other reasons.

⁸⁶ Alford v. Baker, 53 Ind. 279; Trustees v. Kendrick, 12 Me. 381; Chapman v. Coffin, 14 Gray, 454; Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145; Wade v. Curtis, 96 Me. 309.

⁸⁷ Wiseman v. Lyman, 7 Mass. 286.

Taking the negotiable note of a third person and entering it on the books as payment is not conclusive. Brigham v. Lally, 130 Mass. 485.

⁸⁸ Godfrey v. Crisler, 121 Ind. 203; Bristol Mfg. Co. v. Probasco, 64 Ind. 406.

⁸⁹ Dick v. Flanagan, 122 Ind. 277, 7 L.R.A. 590. See Hooker v. Hubbard, 97 Mass. 175; Dewey v. Bell, 5 Allen 165.

⁹⁰ Paine v. Dwinel, 53 Me. 52, 87 Am. Dec. 533; Kidder v. Knox, 48 Me. 555; Strang v. Hirst, 61 id. 15; Melledge v. Boston I. Co., 5 Cush. 158, 51 Am. Dec. 59; Maneely v. McGee, 6 Mass. 143, 4 Am. Dec. 105; Emerson v. Providence H. Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; French v. Price, 24 Pick. 13; Barnard v. Graves, 16 id. 41; Curtis v. Hubbard, 9 Metc. (Mass.) 328.

⁹¹ Spitz v. Morse, 104 Me. 447.

⁹² Beach v. Huntsman, 42 Ind. App. 205; Taft v. Boyd, 13 Allen, 86; Bunker v. Barron, 79 Me. 62, 1 Am. St. 282; Watkins v. Hill, 8 Pick. 522; Pomeroy v. Rice, 16 id.

stoppage *in transitu*.⁹³ The taking of a note is to be regarded as payment only when the security of the creditor is not thereby impaired.⁹⁴ In some states, and upon very good reasons, a distinction is made as to the effect to be given to security executed by the debtor. If it is not of higher rank than the evidence of indebtedness held by the creditor it is not presumed to be accepted in payment, but if he takes a higher security or a better assurance of payment than he was before possessed of the presumption is to the contrary.⁹⁵ Where the debtor executes a note in which he waives his right to claim exemptions and gives it to his creditor it is presumed to be taken by him in payment of a book account.⁹⁶ The general distinction was made by Judge Story; he thought, however, that it ought not to be extended to security given by a third person.⁹⁷ Whether a note is to have the effect of payment or to be considered as collateral only is

22; *Zerrano v. Wilson*, 8 Cush. 424.
See *Fowler v. Bush*, 21 Pick 230.

In *Weddigen v. Boston, etc. Co.*, 100 Mass. 422, a buyer sent the seller a third person's check to pay for a bill of goods; the seller sent a receipt for the amount as received in settlement of the bill. At the time of sending the check the buyer supposed it to be good, but it was seasonably presented and dishonored; held not a payment or accord and satisfaction.

Where a debtor gave his negotiable note for the amount of his debt, and included more than lawful interest in consideration of further delay of payment, the note being void for usury, held the original debt was not discharged and might still be recovered, though a receipt was given at the time the note was taken. *Johnson v. Johnson*, 11 Mass. 359; *Stebbins v. Smith*, 4 Pick. 97; *Ramsdell v. Soule*, 12 Pick. 126; *Meshke v. Van Doren*, 16 Wis. 319; *Lee v. Peckham*, 17 id. 383. See *Webster v. Stadden*, 14 id. 277.

A negotiable note given in New York for goods sold there by a citizen of that state is no satisfaction of the original debt, so as to bar an action in Massachusetts for the same, although the note was lost and the vendor had given the vendee a receipt stating that the note was received in full for the goods. *Vancleef v. Therasson*, 3 Pick. 12.

⁹³ *Brewer L. Co. v. Boston & A. R. Co.*, *supra*.

⁹⁴ *Bryant v. Grady*, 98 Me. 389; *Paddock v. Simmons*, 186 Mass. 152; *Paine v. Dwinel*, 53 Me. 52, 87 Am. Dec. 533; *Lovell v. Williams*, 125 Mass. 442; *Walker v. Mayo*, 143 id. 42; *Vallier v. Ditson*, 74 Me. 553; *Hercules I. Works v. Hummer*, 4 Ill. App. 598.

⁹⁵ *Keys v. Keys*, 217 Mo. 48; *Chalmers v. Turnipseed*, 21 S. C. 126; *Pelzer v. Steadman*, 22 id. 279; *Gardner v. Hust*, 2 Rich. 608.

⁹⁶ *Lee v. Green*, 83 Ala. 491.

⁹⁷ *Lang v. Shaw*, 6 Ga. App. 747; *United States v. Lyman*, 1 Mason, 482, 505.

to be determined by the law of the state in which it was made and is payable, though the creditor resides in another state and the indebtedness which was the consideration for the note was incurred there.⁹⁸

§ 226. **Same subject.** The rule in the states above named is exceptional. It is held generally in this country, as well as in England, that a note, bill or check of the debtor or of a third person, given and received on account of a previous debt or one contemporaneously contracted,⁹⁹ is not absolute, but conditional, payment, unless it is accepted as such, or unless it produces payment.¹ The principle is applicable to a check which

⁹⁸ *Gilman v. Stevens*, 63 N. H. 342; *Thomson-H. E. Co. v. Palmier*, 52 Minn. 174, 38 Am. St. 536.

⁹⁹ Wisconsin is apparently another exception so far as contemporaneous debts are concerned. *Challoner v. Boyington*, 83 Wis. 399; but not as to antecedent debts. *Willow River L. Co. v. Luger F. Co.*, 102 Wis. 636. But see *Emigh v. Earling*, 134 Wis. 565, 27 L.R.A. (N.S.) 243.

¹ The cases which expressly hold the doctrine stated in the text are very numerous; a few only are cited here; those which will be cited in the subsequent discussion of the various branches of the subject under consideration are in harmony with those here collected, except the decisions in Massachusetts, Maine, Indiana, Louisiana and Vermont, and in Wisconsin as to bills of exchange and some cases there and elsewhere which make a distinction between the obligations of the debtor and third persons where they are given for a contemporaneous debt. See first paragraph of last section. *Hunter v. Moul*, 98 Pa. 13, 42 Am. Rep. 610; *White v. Boone*, 71 Tex. 712; *Caldwell v. Hall*, 49 Ark. 508; *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15;

Thomas v. Westchester County, 115 N. Y. 47, 4 L.R.A. 477; *Fry v. Patterson*, 49 N. J. L. 612; *Brabazon v. Seymour*, 42 Conn. 554; *Bank v. Gifford*, 79 Iowa, 300; *Bradley v. Harwi*, 43 Kan. 314; *Levan v. Wilten*, 135 Pa. 61; *Whitcher v. Dexter*, 61 N. H. 91; *Holmes v. Briggs*, 131 Pa. 233 (these last two cases qualify the proposition by the condition that the creditor must not so improperly conduct himself with respect to the note as to injure the debtor); *Selby v. McCullough*, 26 Mo. App. 66; *Knox v. Gerhauser*, 3 Mont. 267; *Salomon v. Pioneer Co-op. Co.*, 21 Fla. 374, 58 Am. Rep. 667; *Fleig v. Sleet*, 43 Ohio St. 53, 54 Am. Rep. 800; *First Nat. Bank v. Case*, 63 Wis. 504 (the rule is otherwise where a bill of exchange is accepted: see last paragraph); *Woodburn v. Woodburn*, 115 Ill. 427; *Heath v. White*, 3 Utah, 474; *Wiles v. Robinson*, 80 Mo. 47; *Hunt v. Higman*, 70 Iowa, 406; *Hess v. Dille*, 23 W. Va. 90; *Keel v. Larkin*, 72 Ala. 493; *Cheltenham S. & G. Co. v. Gates*, 1. Works, 23 Ill. App. 635, aff'd 124 Ill. 623; *Walsh v. Lennon*, 98 Ill. 27, 38 Am. Rep. 75; *Wilhelm v. Schmidt*, 84 Ill. 183; *Pritchard v. Smith*, 77 Ga. 463; *Costelo v. Cave*, 2 Hill (S. C.) 207;

is certified before its delivery to the creditor. The only effect of the certificate is to increase the currency of the check by

Slocomb v. Larty, Hempst. C. C. 431; People v. Howell, 4 Johns. 296; Bates v. Rosekrans, 37 N. Y. 409; Webster v. Stadden, 14 Wis. 277; Burrows v. Bangs, 34 Mich. 304; Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522; Owenson v. Morse, 7 T. R. 64; Chastain v. Johnson, 2 Bailey, 574; Alley v. Rogers, 19 Gratt. 368; The Kimball, 3 Wall. 37, 18 L. ed. 50; Newell v. Nixon, 4 id. 572; Lee v. Tinges, 7 Md. 215; Harris v. Johnston, 3 Cranch, 311, 2 L. ed. 450; Good v. Cheesman, 2 B. & Ad. 328; Winslow v. Hardin, 3 Dana, 543; Adger v. Pringle, 11 S. C. 527; Johnson v. Clarke, 15 id. 72; Scott v. Gilkey, 153 Ill. 168; Dellapiazza v. Foley, 112 Cal. 380; Angus v. Chicago T. & S. Bank, 170 Ill. 398; Hercules I. Works v. Hummer, 49 Ill. App. 598; Schumacher v. Edward P. Allis Co., 70 id. 556; Bradford v. Neil & Mahnke C. Co., 76 Ill. App. 488; Stone v. Evangelical Lutheran St. Paul's Church, 92 Ill. App. 77; Topeka Capital Co. v. Merriam, 60 Kan. 397; Kirkpatrick v. Bessalo, 116 Mich. 657; London & San Francisco Bank v. Parrott, 125 Cal. 472, 73 Am. St. 64; Woodward v. Holmes, 67 N. H. 494; Acme H. Co. v. Axtell, 5 N. D. 315; Carroll v. Sweet, 128 N. Y. 19, 13 L.R.A. 43; Willow River L. Co. v. Luger F. Co., 102 Wis. 636 (previous debt); Sutton v. Baldwin, 146 Ind. 361; Blair v. Wilson, 28 Gratt. 165; Holland v. Roncey, 168 Mo. 16; Nason v. Fowler, 70 N. H. 291; Kirby Planing Mill Co. v. Titus, 14 Ga. App. 1; Churchill v. Yeatman-Gray Grocer Co., 111 Ark. 529; In re Raslo, 217 Fed. 313; Bien v. Robinson, 208 U. S. 423, 52 L. ed. 556; Beall v. Hud-

son County W. Co., 185 Fed. 179; Stewart v. Laberee, id. 471, 109 C. C. A. 351; Bankers' T. Co. v. Gillespie, 181 Fed. 448, 104 C. C. A. 196; Pflueger v. Lewis F. & M. Co., 134 Fed. 28, 67 C. C. A. 102; Manser v. Sims, 157 Ala. 167; Sharp v. Fleming, 75 Ark. 556; Williams v. Braun, 14 Cal. App. 396; King v. McConnell, 57 Fla. 77; Baughman v. Lowe, 41 Ind. App. 1 (debtor's check); Dille v. White, 132 Iowa 327, 10 L.R.A.(N.S.) 510; Thompson v. Seek, 84 Kan. 674; Webb v. National Bank, 67 Kan. 62; Isackson v. Lowell, 115 Minn. 481; McFadden v. Follrath, 114 Minn. 85, 37 L.R.A.(N.S.) 201; First Nat. Bank v. McConnell, 103 Minn. 340, 14 L.R.A.(N.S.) 616, 123 Am. St. 336; Citizens' Bank v. Ketchmar, 91 Miss. 608; Peoples' Bank v. Stewart, 152 Mo. App. 314; Keyser v. Hinkle, 127 Mo. App. 62; Atterbury v. Edwa, 61 N. Y. Misc. 234; Fuller B. Co. v. Waldron, 112 App. Div. (N. Y.) 814; Bank v. Hollingsworth, 135 N. C. 556; Small v. Rush, (Tex. Civ. App.) 132 S. W. 874; Dudley v. Barrett, 66 W. Va. 363; Acme F. Co. v. Older, 64 W. Va. 255, 17 L.R.A.(N.S.) 807; Berger v. Berger, 44 Pa. Super. Ct. 305; Kennedy v. Groves, 50 Tex. Civ. App. 266; Jensen v. Wilslef, 36 Nev. 37; Edwards B. Works v. Jarnagin, 11 Ga. App. 162; McHenry v. Croft, 163 Ill. App. 426; Cranston v. West Coast L. Ins. Co., 63 Ore. 427.

That a check was received as absolute discharge of the indebtedness may be shown by circumstances. Rohrbach v. Hammill, 162 Iowa, 131.

adding to the liability of the drawer that of the bank. The creditor does not assume the risk of the solvency of the latter.² Renewal of a note is not always considered to be a payment,³ and will not discharge a mortgage security.⁴ But it seems where renewal is a discount of the new note and there is a payment

² *Born v. First Nat. Bank*, 123 Ind. 78, 7 L.R.A. 442, 18 Am. St. 312; *Bickford v. Same*, 42 Ill. 238; *Larsen v. Breene*, 12 Colo. 480; *Andrews v. German Nat. Bank*, 9 Heisk. 211, 24 Am. Rep. 300; *Mutual Nat. Bank v. Rotge*, 28 Ia. Ann. 933, 25 Am. Rep. 126; *Holland v. Mutual F. Co.*, 8 Ga. App. 714. *Contra*, *Hermann F. & P'S. C. W. v. German Exch. Bank*, (N. Y. Misc.) 87 N. Y. Supp. 462; *Davenport v. Palmer*, 152 App. Div. (N. Y.) 761.

But procurement of certification by the creditor works a discharge of the indebtedness *pro tanto*. *Adams v. Weissner*, — Misc. (N. Y.) —, 147 N. Y. Supp. 946.

³ *Daniel v. Gordy*, 84 Ark. 218; *McLaughlin v. Blake*, 46 Pa. Super. 274; *Adams v. Squires*, 61 Ill. App. 513; *Chisholm v. Williams*, 128 Ill. 115; *Tyler v. Hyde*, 80 Ill. App. 123; *Kemmerer's App.*, 102 Pa. 558; *Graham's Est.*, 14 Phila. 280; *National Bank v. Bigler*, 83 N. Y. 51; *Kibbey v. Jones*, 7 Bush, 243; *Jagger I. Co. v. Walker*, 76 N. Y. 521.

"The question whether renewal notes extinguish the debt is a vexed one, and is usually one of fact, and the courts have differed somewhat upon the presumptions which arise from the bare fact of renewal by note bearing the signature of other parties. The subject was discussed in the case of *Nightingale v. Chafee*, 11 R. I. 609, 23 Am. Rep. 531, where it was held that an agreement to discharge a retiring partner will not be inferred from the acceptance

of the note of the continuing partners. Whatever may be the rule in other cases, we concur with Prof. Parsons in the opinion that, unless there is evidence of a contrary intention, renewals at bank ought always to be regarded as payment because the banks themselves so regard them. See 2 Pars. Notes & B. (2d ed.), p. 203. In commenting on the opinion, the court in the Rhode Island case says: 'He does not tell us how he knows they so regard them.' This opinion of Prof. Parsons is not to be brushed away by a question. The practices of banks are well known, and from them their understanding may be inferred. Certainly, since the passage of the federal banking law, the whole course of national banks has been at variance with the idea that the original debt continued, and that successive renewals were additional and collateral security to the first obligation. The policy of the law is to require the banks to confine their loans to short-time paper, generally secured by indorsers, who may vary from time to time as the notes are renewed. We think it would be a surprise to those who indorse paper to be told that their obligation remains after the note has been taken up and canceled by several renewals, and each in its turn taken up and canceled." *Childs v. Pellett*, 102 Mich. 558, 566.

⁴ *Farmers' L. & T. Co. v. Madison Mfg. Co.*, 153 Fed. 310; *Reeder v. Nay*, 95 Ind. 164; *Williams v.*

of the old note out of the avails, it is a discharge of the old debt.⁵ Courts are in the habit of saying that when such paper is given for a debt it is not to be deemed a satisfaction unless there is an express agreement to that effect.⁶ It is probably not necessary that the proof should be just in that form; but it is doubtless essential that there be an express agreement or circumstances of approximately equal force to show that intention.⁷ There is such a lack of harmony in the adjudications that it is

Starr, 5 Wis. 534; Eastman v. Porter, 14 Wis. 39; Flower v. Elwood, 66 Ill. 438; Coles v. Withers, 33 Gratt. 186; Fowler v. Bush, 21 Pick. 230.

In the last case a mortgage was given as security for a debt payable in instalments; after the first instalment became due the mortgagee called on the mortgagor for payment, saying he could sell the note and mortgage if such instalment were paid. The mortgagor thereupon gave a negotiable note for such instalment, payable in four months, upon which the mortgagee proposed to raise the money at a bank; and the following indorsement was made on the original note: "Received the first instalment on the within \$402.78." The mortgagee subsequently sold the note and mortgage. It was held that this was a payment of such instalment and not a mere change of security for the same debt; that the mortgage was discharged *pro tanto*.

⁵ Fisher v. Marvin, 47 Barb. 159; Castleman v. Holmes, 4 J. J. Marsh. 1. *Contra*, Jagger I. Co. v. Walker, 76 N. Y. 521.

⁶ The Kimball, 3 Wall. 37, 18 L. ed. 50; Segrist v. Crabtree, 131 U. S. 287, 33 L. ed. 125; Pritchard v. Smith, 77 Ga. 463; Comptoir D'Escompte v. Dresbach, 78 Cal. 15; Willow River L. Co. v. Luger F. Co., 102 Wis. 636. See Case Mfg.

Co. v. Soxman, 138 U. S. 431, 34 L. ed. 1019; Rayfield v. Lincher, 180 Ill. App. 454.

⁷ Leschen & Sons R. Co. v. Mayflower G. M. & R. Co., 173 Fed. 855, 35 L.R.A.(N.S.) 1, 97 C. C. A. 465, 35 L.R.A.(N.S.) 1; Randle v. Herren, 20 N. H. 102; Johnson v. Cleaves, 15 id. 332; Slocomb v. Lurty, Hemp. C. C. 431; Youngs v. Stahelin, 34 N. Y. 258; Yates v. Valentine, 71 Ill. 643.

In Eastman v. Porter, 14 Wis. 39, it is said that where, in connection with the fact that negotiable paper is taken on account of a debt, it is alleged or acknowledged to have been received "as payment," or "in full," or "in full of all demands," these expressions must be considered with that fact, and interpreted as meaning *conditional payment*.

In La Fayette County M. Co. v. Magoon, 73 Wis. 627, 3 L.R.A. 761, the communications between the parties were to the effect that M. hereby subscribes and hands to the treasurer of said corporation \$1,000 in money to be used, etc. In acknowledging the receipt of this and the accompanying check it was said, "received from M. the sum of \$1,000 according to the foregoing letter." Held, that the check was received as money. Glenn v. Smith, 2 Gill & J. 493, 20 Am. Dec. 542; Johnson v. Weed, 9 Johns. 310, 6 Am. Dec. 279; Tobey v. Barber, 5

unsafe to attempt to formulate a rule from them. There is a marked tendency in the later cases to lessen the old rule which

Johns. 68, 4 Am. Dec. 326; Putnam v. Lewis, 8 Johns. 389; Bateman v. Bailey, 5 T. R. 512; Puckford v. Maxwell, 6 id. 52; Bradford v. Fox, 38 N. Y. 289; Comptoir D'Escompte v. Dresbach, 78 Cal. 15.

In Connecticut, as evidence that a new note is received in payment of an account, peculiar importance is attached to a receipt which expresses that the note is given in *full payment*. Such a receipt is a discharge unless it is executed under circumstances of mistake, accident or surprise, or is founded in fraud. *Bonnell v. Chamberlin*, 26 Conn. 487; *Fuller v. Crittenden*, 9 id. 401, 23 Am. Dec. 364; *Tucker v. Baldwin*, 13 Conn. 136, 33 Am. Dec. 384; *Hurd v. Blackman*, 19 Conn. 177. See *Bishop v. Perkins*, id. 300; *Beam v. Barnum*, 21 id. 202.

An effort to collect acceptances given by a debtor, when they were not received in payment, is not such an appropriation of them as satisfies the debt. *Olyphant v. St. Louis O. & S. Co.*, 28 Fed. 729.

Entering the amount of the negotiable note of a third person upon the creditor's books to the debtor's credit without making any other appropriation of it does not conclusively show that it was taken in payment. *Brighton v. Lally*, 130 Mass. 485. Nor does the subsequent rendering of monthly statements showing such credit. *Cheltenham S. & G. Co. v. Gates I. Works*, 23 Ill. App. 35, aff'd 124 Ill. 623.

If the check of a third person is taken the creditor's neglect to give the debtor prompt notice of its dishonor, his retention of it and collecting a dividend out of the drawer's estate do not raise a pre-

sumption that it was taken as absolute payment; these facts are for the jury. *Holmes v. Briggs*, 131 Pa. 233.

The English law is thus stated: "The debt may be considered as actually paid if the creditor at the time of receiving the note has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid, or if, from the conduct of the creditor or the special circumstances of the case, such an agreement is legally to be implied. But in the absence of any special circumstances throwing the risk of the note upon the creditor, his receiving the note in lieu of the present payment of the debt is no more than giving an extended credit, or giving time for payment on a future day, in consideration of receiving this species of security. Whilst the time runs payment cannot legally be enforced, but the debt continues till payment is actually made; and if payment be not made when the time has run out, payment of the debt may be enforced as if the note had not been given." Per Langdale, M. R., in *Sayer v. Wagstaff*, 5 Beav. 415, 423. If the creditor is offered cash but voluntarily takes a bill he is paid and cannot resort to his debtor if the bill is dishonored. *Marsh v. Pedder*, 4 Camp. 257; *Strong v. Hart*, 6 B. & C. 160; *Smith v. Ferland*, 7 id. 19; *Anderson v. Hillies*, 12 C. B. 499. But unless the creditor had an opportunity to receive money a bill if taken will be presumed to have been accepted as conditional payment. *Robinson v. Read*, 9 B. & C. 449. Under a contract for the sale of goods to be

required an express agreement in order that payment should follow the taking of security,⁸ and to regard the surrender or retention of the original security as decisive of the intention of the parties,⁹ because if the creditor intends to resort to security he already holds he will not surrender it. In the absence of an

paid for by the buyer's acceptances or other like forms of credit, the payment is conditional only, and upon dishonor of the bills the seller may sue upon the original contract for the price of the goods; upon a refusal to give the bills the remedy of the seller is for that breach of contract, and he cannot sue for the contract price until the expiration of the stipulated credit. *Leake's Contracts*, 894; *Paul v. Dodd*, 2 C. B. 800; *Helfs v. Winterbottom*, 2 B. & Ad. 431; *Gunn v. Bolekow*, L. R. 10 Ch. 500.

⁸ An express agreement to receive payment in something else than money need not be proved; it may be implied from the facts and circumstances. *Griffin v. Petty*, 101 N. C. 380; *Adams v. Squires*, 61 Ill. App. 513; *Chisholm v. Williams*, 128 Ill. 115.

A debtor proposed by letter to remit a draft "in payment of bill in full;" the creditor acknowledged the receipt of the draft in full payment. There was no cause of action against the debtor on the account; his liability rested upon his indorsement. *Day v. Thompson*, 65 Ala. 269.

An express agreement is not necessary to make the check, note or bill payment. *Riverside I. Works v. Hall*, 64 Mich. 165; *Brown v. Dunckel*, 46 Mich. 32; *Keel v. Larkin*, 72 Ala. 493; *Morris v. Harveys*, 75 Va. 726; *Hall v. Stevens*, 116 N. Y. 201, 5 L.R.A. 802 (contemporaneous debt).

The intention to receive a note and collaterals in payment is inferable from an entry in the creditor's books to the effect that they were received in settlement of balance, and a receipt expressing that they were in settlement of the above account. *Williams, Ex parte*, 17 S. C. 396.

In *Griffin v. Anderson*, 3 S. C. 105, the words "settled in full" in the bond of a commissioner were considered sufficient to indicate that a note was taken in payment of a balance due from him. See *In re Hurst*, 1 Flip. 462.

If notes secured by a mortgage nearly equal in amount to the debt are given and the balance is paid in cash, and part of the notes are used by the creditor, the debt is extinguished. *Quidnuck Co. v. Chafee*, 13 R. I. 438.

⁹ *Smith v. Pitts*, 167 Ala. 461; *Riverside Iron Works v. Hall*; *Brown v. Dunckel*; *Morris v. Harveys, supra*; *Fidelity Ins., etc. Co. v. Shenandoah Valley R. Co.*, 86 Va. 1, 19 Am. St. 858; *Burchard v. Frazer*, 23 Mich. 224; *Kirkpatrick v. Puryear*, 93 Tenn. 409, 22 L.R.A. 785.

A creditor cannot insist that a note taken by him does not discharge his claim unless he offers to surrender it. *Davis & R. B. & Mfg. Co. v. Montrose B. & C. Co.*, 59 Ill. App. 573.

Where the new note is made by a third person the surrender of the old will be, *prima facie*, a discharge

agreement or acts of the parties indicative of a contract, a negotiable note or bill of exchange taken as conditional payment will have the effect to suspend the right of action until it matures.¹⁰ And then it will not be presumed in favor of the creditor that it remains unpaid; he must account for it; and so if he receives a check. Such paper, unless it has been lost,

of it and a release of its maker from personal liability; but not if the holder of the old note had a specific lien on land as security for the debt and the result of giving the new note is to make the person liable on it the owner of the land, part of the consideration being the new note. *Hess v. Dille*, 23 W. Va. 90; *Merchants' Nat. Bank v. Good*, 21 id. 455.

Walker, C. J., in *Strong v. King*, 35 Ill. 9, 19, said: "The bare reception of a check from the drawer for the amount of the bill will not, ordinarily, be considered as payment, but only as a means of payment; and this is the rule whether the bill is surrendered to the drawer at the time of receiving the check or is retained by the holder until the payment is consummated. It may be imprudent to surrender the bill before actual payment is made, but such improvidence does not change the rule."

In *Flower v. Elwood*, 66 Ill. 438, 444, the same judge said: "And although the surrender of the notes by the mortgagee to the maker is *prima facie* evidence of their payment, still such presumption may be rebutted."

In *Yates v. Valentine*, 71 Ill. 643, his associate, apparently delivering the unanimous opinion of the court, said: "We can conceive of no act showing more decisively that it was intended by the parties that the note was satisfied and should be can-

celed. It was intended that the defendant should thereafter be bound by the terms of the notes then given, and the old note was given him that it might cease to exist as an evidence of indebtedness against him." *Chastain v. Johnson*, 2 Bailey, 574; *Eastman v. Porter*, 14 Wis. 39; *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 690.

Ordinarily the surrender by a creditor to the debtor of the promissory note of the latter on the acceptance of the note of a third person for that amount is *prima facie* evidence that it is taken in satisfaction of the note so surrendered. *Youngs v. Lee*, 12 N. Y. 551; *Pratt v. Coman*, 37 id. 440; *Phoenix Ins. Co. v. Church*, 81 id. 218, 225, 37 Am. Rep. 494. But whether the original debt is in fact discharged depends upon the parties' intention. *Noel v. Murray*, 13 N. Y. 167.

A note given by executors does not discharge an indebtedness due from the estate of their testator whose note was surrendered to them unless such was the understanding of the parties. *Glenn v. Burrows*, 37 Hun, 602.

¹⁰ *The Kimball*, 3 Wall. 37, 18 L. ed. 50; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756; *Griffith v. Grogan*, 12 Cal. 317; *Putnam v. Lewis*, 8 Johns. 389; *Brewster v. Bours*, 8 Cal. 501; *Lee v. Tinges*, 7 Md. 215; *Smith v. Owens*, 21 Cal. 11.

must be produced at the trial of an action on the original consideration that it may be surrendered or canceled.¹¹

§ 227. **Same subject.** By accepting the note, bill or check, either of the debtor or of a third person, as conditional payment the creditor assumes the duty of doing anything in respect to it which is necessary not only to obtain payment by due presentment, but also by protest and notice to fix the liability of the parties. And the onus is upon him to show that he has performed that duty.¹² If there are other parties to such paper to which the holder could resort in case of its dishonor any want of diligence on the part of the creditor receiving it, by which such parties are discharged, will preclude such creditor from returning it and suing upon the original debt.¹³

There is not the same arbitrary strictness in the rule of diligence and in respect to consequences of neglect where a check is received as a means of payment, or even as payment, that prevails in regard to notes and bills. The drawer is in no

¹¹ Goodall v. Norton, 88 Minn. 1; Southwestern Surety Ins. Co. v. Clay & Nowlin, 112 Ark. 220; Stevens v. Bradley, 22 Ill. 224; Heartt v. Rhodes, 66 id. 351; Carroll v. Holmes, 24 Ill. App. 453; O'Bryan v. Jones, 38 Mo. App. 90; McMurray v. Taylor, 30 Mo. 263, 77 Am. Dec. 611; Salomon v. Pioneer Co-op. Co., 21 Fla. 374, 58 Am. Rep. 667; McConnell v. Stettinius, 7 Ill. 707; Dangerfield v. Wilby, 4 Esp. 159; Hadwen v. Mendizabel, 10 Moore, 477; Jaffrey v. Cornish, 10 N. H. 505; Mehlberg v. Tisher, 24 Wis. 607; Dayton v. Trull, 23 Wend. 345; Burdick v. Green, 15 Johns. 247; Smith v. Rogers, 17 id. 340; Hughes v. Wheeler, 8 Cow. 78; Eastman v. Porter, 14 Wis. 39; Plant's Mfg. Co. v. Falvey, 20 Wis. 200; Cromwell v. Lovett, 1 Hall, 56; Taylor v. Allen, 36 Barb. 294.

¹² Kilpatrick v. Home B. & L. Ass'n, 119 Pa. 30; Phoenix Ins. Co.

v. Allen, 11 Mich. 501, 83 Am. Dec. 756; Dayton v. Trull, 23 Wend. 345; Cooper v. Powell, Anthon, 49; Little v. Phenix Bank, 2 Hill, 425, 7 id. 359; Jennison v. Parker, 7 Mich. 355; Heartt v. Rhodes, 66 Ill. 351; Bradford v. Fox, 39 Barb. 203, 16 Abb. Pr. 51, 38 N. Y. 289; Story on Prom. Notes, § 498; Roberts v. Thompson, 14 Ohio St. 1, 82 Am. Dec. 465; Schierl v. Baumel, 75 Wis. 69; Corbett v. Clark, 45 Wis. 406; Allan v. Eldred, 50 id. 135; Chicago, etc. R. Co. v. Wisconsin, etc. R. Co., 76 Iowa, 615.

The drawer does not waive anything by a subsequent promise to pay unless he made it with knowledge of the facts, which the holder has the burden of proving. Schierl v. Baumel, *supra*.

¹³ Id.; Sandy River Nat. Bank v. Miller, 82 Me. 137.

case discharged from his responsibility to pay the check unless he has suffered some loss or injury by the omission or neglect to make presentment, and then only *pro tanto*.¹⁴

Where the debtor is an indorser of the check he delivers to his creditor the latter must present it for payment within the time limited for so doing by the law merchant, otherwise, if the bank upon which the check is drawn fails and there was money to the credit of the drawer to meet the check if it had been presented without undue delay, the debtor's liability for the original indebtedness will be extinguished. The creditor has the onus of showing that the indorser was not injured by the delay, the latter having proved that the check was not duly presented, and this rule prevails whether the suit is on the check or on the indebtedness to pay which the check was

¹⁴ McWilliams v. Phillips, 71 Ala. 80; Hunter v. Moul, 98 Pa. 13, 42 Am. Rep. 610; Gibbs v. Cannon, 9 S. & R. 201; Overton v. Tracey, 14 id. 311; Holmes v. Briggs, 131 Pa. 233; Story on Prom. Notes, § 497; Cruger v. Armstrong, 3 Johns. Cas. 5; Conroy v. Warren, id. 259; Murray v. Judah, 6 Cow. 484; Commercial Bank v. Hughes, 17 Wend. 94; Harbeck v. Craft, 4 Duer, 122; Mohawk Bank v. Broderick, 10 Wend. 304; Little v. Phenix Bank, 2 Hill, 425; Serle v. Norton, 2 Mood. & Rob. 401; Hill v. Beebe, 13 N. Y. 556.

In Bradford v. Fox, 38 N. Y. 289, the defendant averred payment, and it was held that, though made by a check, the onus of proving that the check resulted in payment was on him. Grover, J., said: "To effect this, proof of the delivery and receipt of the check by the plaintiff not being sufficient, the defendant was bound to go further and show that by the laches of the plaintiff a loss had been incurred, to be borne by some one; and when this appeared, the law would cast the

loss upon the plaintiff, and would work out such result by making the check operate as payment of the debt."

It is believed, however, that after delivery of a check to a creditor as a means of payment, the weight of authority puts the burden of proof on him to show that the check was unproductive; and if there has been a want of diligence, that no loss or injury has resulted to the debtor. Murray v. Judah, 6 Cow. 484; Syracuse, etc. R. Co. v. Collins, 3 Lans. 29.

The drawer of a check has his remedy against the agent who accepted it for collection if harm resulted from his negligence. Morris v. Eufaula Nat. Bank, 106 Ala. 383, 389; Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690, 52 N. Y. 546; Chouteau v. Rowse, 56 Mo. 65; Clarke v. Gates, 67 Mo. 139.

As to the measure of diligence required in the case of a bank which has received a local check for collection, see Morris v. Eufaula Nat. Bank, 122 Ala. 580, overruling s. c., 106 Ala. 383.

indorsed and transferred.¹⁵ In an earlier case in the same state a debtor indorsed to his creditor a draft on a third party due in thirty days, the proceeds of which were to be credited to the debtor's account. The draft was not presented at maturity, and soon thereafter the drawee became insolvent. The creditor had no redress either upon the draft or the original indebtedness.¹⁶ "If the creditor had received of his debtor a check and failed to present it, the principle would have been the same precisely. If he had received part or all the money on the draft and failed to credit it, beyond question such receipt would have been a good defense *pro tanto* or in whole to the collection of the debt due by the account; so we think, on sound principle, a failure to receive when he ought to have received, such failure being the result of his own negligence or

¹⁵ Kirkpatrick v. Puryear, 93 Tenn. 409, 22 L.R.A. 785.

¹⁶ Betterton v. Roope, 3 Lea, 215, 31 Am. Rep. 633.

In Carroll v. Sweet, 128 N. Y. 19, 13 L.R.A. 43, the defense to an action to recover a claim was payment. The facts as stated by the reporter were that W. gave his check to the defendant for the amount of a loan. The defendant, the same day, indorsed and delivered the check to the plaintiff, at the place where the bank on which it was drawn was located, to apply upon the indebtedness in suit. W. requested the plaintiff to hold the check for a few days, stating that if the plaintiff would let him know when he wished to use the check he would then provide for it. W. testified on the trial that he had then money enough to pay the check and would have paid it had payment been insisted upon. The plaintiff kept the check for nine days before he presented it for payment. W. in the meantime had become insolvent. The cashier of the bank on which the check was drawn testified

that there were no funds to meet it, and that it would not have been paid if it had been presented any time after its date. There was no agreement that the check should be taken in satisfaction of the debt. *Held*, that it was error to direct a verdict for the plaintiff; that the delay in presenting the check discharged the defendant from liability as indorser; that the delay was not excused by the fact that the drawer had no funds, or was insolvent, or because presentment would have been unavailing as a means of procuring payment; that while the indorsement and transfer of the check operated as a provisional payment only, if the delay caused a loss to the defendant, to the extent of the loss the delay was tantamount to actual payment; that as there was evidence tending to show that the delay prevented a collection of the check in whole or in part, and that so much was lost to the defendant, the case was for the jury. See *Western Pacific L. Co. v. Wilson*, 19 Cal. App. 338.

the party to whom he had indorsed it, should equally work the same result. He fails to account in either case for the collateral. He has had the benefit of it as a security for his debt and took it as a means of payment, thus depriving the original holder of the right to control and putting himself in his place. He cannot impose upon him the entire loss when it results from his own neglect, while controlling or having the right to control the paper." A chose in action in any form received as conditional payment or as collateral security, to the extent collected or paid, or of the loss by the creditor's negligence, or when transferred by him to a third person, unless taken back, is payment on account of the debt for which it was received.¹⁷ So if the creditor take from his debtor an order or note payable to a third person.¹⁸

§ 228. Collaterals collected or lost by negligence of creditor are payments. When security is given for a debt and money is realized therefrom, it is, as has just been said, a payment *pro tanto*.¹⁹ The money thus received is deemed so appropriated

¹⁷ Life Ins. C. Co. v. Altschuler, 55 Neb. 341; Massachusetts B. L. Ass'n v. Robinson, 104 Ga. 256, 42 L.R.A. 261; Looney v. District of Columbia, 113 U. S. 258, 29 L. ed. 974; Brown v. Same, 17 Ct. of Cls. 402; Donnelly v. Same, 119 U. S. 339, 30 L. ed. 465; Loth v. Motlner, 53 Ark. 116; Smith v. Ferrand, 7 B. & C. 19; Harris v. Johnston, 3 Cranch, 311, 2 L. ed. 45; John v. John, Wright, 584; McCluny v. Jackson, 6 Gratt. 96; Parker v. United States, 1 Pet. C. C. 262; Lawrence v. Schnylkill N. Co., 4 Wash. C. C. 562; Bill v. Porter, 9 Conn. 23; Board of Directors v. Roach, 174 Fed. 949, 99 C. C. A. 453; La Fayette G. Co. v. Kelsay, 164 Ind. 563; Penn Mut. L. Ins. v. Norcross, 163 Ind. 379. See Smith R. & C. Co. v. Mitchell, 117 Ga. 772, 97 Am. St. 217; Case Mfg. Co. v. Soxman, 138 U. S. 431, 438, 34 L. ed. 1019.

Suth. Dam. Vol. 1.—43.

¹⁸ Shaw v. Gookin, 7 N. H. 16.

¹⁹ Montgomery v. Schenck, 82 Hun, 24; Pauly v. Wilson, 57 Fed. 548, § 227. See New London Bank v. Lee, 11 Conn. 112, 73 Am. Dec. 713.

A mortgage or other security to indemnify an accommodation indorser is not available as security for the debt, either to relieve the indorser or surety from paying it (Post v. Tradesmen's Bank, 28 Conn. 420; Horner v. Savings Bank, 7 id. 478), or as a means of payment at the instance of the creditor. Ohio L. Ins. & T. Co. v. Reeder, 18 Ohio, 35, 46. See Russell v. La Roque, 13 Ala. 149.

If collaterals have been exchanged for other securities which prove to be worthless, the debtor, whose paper was accepted conditionally, is not released except so far as he is injured. Hunter v. Moul, 98 Pa. 13,

by mutual agreement.²⁰ It is payment, not merely a set-off; ²¹ but if the debtor pays his debt after such collections on collaterals he may recover them from the creditor.²²

There is an implied obligation on the creditor to account for the proceeds of collaterals. His failure or refusal to give an account of the application thereof will operate as a bar to the recovery of the debt itself.²³ But where the collaterals are placed in the hands of a third person by the debtor, and were never in the hands or under the control of the creditor, he is entitled to recover against the debtor without accounting for them.²⁴ If bank bills have been received it lies on the creditor, in a suit against a surety, to show what has been done with them.²⁵ Taking a collateral does not suspend the right to bring suit on the debt secured.²⁶ Nor can the debtor obtain credit thereon for such collateral unless it has been collected or appropriated by the creditor, or lost by his negligence or fault.²⁷

42 Am. Rep. 610; *Girard F. & M. Ins. Co. v. Marr*, 46 Pa. 504.

²⁰ *Pope v. Dodson*, 58 Ill. 360; *Kemmil v. Wilson*, 4 Wash. C. C. 308; *Midgeley v. Slocomb*, 2 Abb. Pr. (N. S.) 275; *Lincoln v. Bassett*, 23 Pick. 154; *Kenniston v. Avery*, 16 N. H. 117; *Dismukes v. Wright*, 3 Dev. & Bat. 78.

²¹ *King v. Hutchins*, 28 N. H. 561; *In re Ouimette*, 1 Sawyer, 47.

²² *Overstreet v. Nunn*, 36 Ala. 666; *Dorrill v. Eaton*, 35 Mich. 302.

The consent of the holder of a note to the sale of the collateral securing it and the application of the proceeds to the payment of another indebtedness does not operate as a payment of the note. *Burns v. National Mining, Tunnel & Land Co.*, 23 Colo. App. 545.

²³ *Alden v. Camden A. R. Mach. Co.*, 107 Me. 508; *Simes v. Zane*, 1 Phila. 500; *Dussol v. Bruguire*, 50 Cal. 456.

²⁴ *Bank of United States v. Peabody*, 20 Pa. 454.

²⁵ *Spaulding v. Bank*, 9 Pa. 28.

²⁶ *Wilhelm v. Schmidt*, 84 Ill. 183; *Flanagan v. Hambleton*, 54 Md. 222; *Williams v. National Bank*, 72 id. 441, 450; *Dugan v. Sprague*, 2 Ind. 600; *Foster v. Purdy*, 5 Mete. (Mass.) 442; *Lincoln v. Bassett*, 23 Pick. 154.

²⁷ *Id.*; *Fiske v. Stevens*, 21 Me. 457; *Hawks v. Hincheliff*, 17 Barb. 492; *Cooke v. Chaney*, 14 Ala. 65; *Slevin v. Morrow*, 4 Ind. 425; *Hall v. Green*, 14 Ohio, 499; *Prettyman v. Barnard*, 37 Ill. 105; *Marschuetz v. Wright*, 50 Wis. 175; *Hunter v. Moul*, 98 Pa. 13, 42 Am. Rep. 610.

The holder of a note as collateral cannot receive another note in payment of it, and subsequently, without the consent of the pledgor or his assignee, return the note received and take back the original note, so as to reinstate the liability of the pledgor or deprive his assignee of the right to the surplus. *Post v. Union Nat. Bank*, 159 Ill. 421.

Where negotiable paper is received as a means of payment it is *prima facie* payment, and the creditor must show what has become of it; show diligence to obtain payment, or excuse non-presentment and produce it at the trial.²⁸ A note delivered as collateral continues a valid security until the debt is paid, notwithstanding it is changed in form, as into a judgment.²⁹ And a creditor who holds security, without special instructions for its application, for various notes due from his debtor, some of which bear the names of sureties, may, in case of the insolvency of the principal debtor and of some of the sureties, apply the same towards the payment of such of the notes as may be necessary for his own protection; and insolvent parties upon others cannot avail themselves thereof in any way, in equity, without paying or offering to pay the whole of the notes for which the security was given.³⁰ A creditor is only obliged to apply the net proceeds of collaterals. Expenses necessarily incurred in rendering them available are to be deducted, and the balance only is a payment upon the debt secured.³¹ But the equitable interest of the assignee of a non-negotiable promissory note assigned as collateral security extends only to the

²⁸ *Dayton v. Trull*, 23 Wend. 345; *Cooper v. Powell*, Anth. 49; *Roberts v. Gallagher*, 1 Wash. C. C. 156; *Brown v. Cronise*, 21 Cal. 386; *Plant's Mfg. Co. v. Falvey*, 20 Wis. 200; *Bullard v. Hascall*, 25 Mich. 132.

²⁹ *Fisher v. Fisher*, 98 Mass. 303; *Smith v. Strout*, 63 Me. 205; *Chapman v. Lee*, 64 Ala. 483; *Sonoma Valley Bank v. Hill*, 59 Cal. 107; *Duncombe v. New York, etc. R. Co.*, 84 N. Y. 193, 88 id. 1; *Waldron v. Zacharie*, 54 Tex. 503.

³⁰ *Wileox v. Fairhaven Bank*, 7 Allen, 270. F. and H. made and delivered to S. their joint and several note for \$4,500; before its maturity S. gave his note for \$1,000 to C., and indorsed and delivered as collateral the note of F. and H. C. subsequently assigned S.'s note to F. and delivered the note of F. and

H. as collateral security. After this S. sold and assigned the note of F. and H., then in the hands of F., to D., who thereafter demanded the \$4,500 of F., offering to credit the same with the amount of the \$1,000 note, which was refused. Held, that D. was entitled to recover on the note against F. and H. less the amount of the \$1,000 note.

A principal note is paid as against a surety thereon, when the holder receives payment of a larger note pledged as collateral security therefor, though a third note be taken in lieu of such collateral note. *Post v. Union Nat. Bank*, 159 Ill. 421.

³¹ *Starrett v. Barber*, 20 Me. 457; *Herrington v. Pouley*, 26 Ill. 94; *Van Blarcom v. Broadway Bank*, 37 N. Y. 540.

amount of the debt for the security of which it was assigned, and not to the costs which have accrued in a suit subsequently brought thereon. And a release from the payee, executed subsequent to the assignment, will be available for all of such collateral in excess of such debt.³² A chose in action which is transferred as collateral security is put under the control of the creditor to make his claim out of it, and is not in the nature or subject to the incidents of a pawn or pledge. It should be collected, not sold.³³

§ 229. **Same subject.** A creditor receiving collateral securities is required to use ordinary diligence, and to observe good faith in respect to the same; if they are lost or impaired through his act or neglect he is liable to the debtor to the extent of the injury; and such damages, or so much as is necessary therefor, will inure as a payment of the debt for which the collaterals were received as security.³⁴ If they be negotiable

³² *Blake v. Buchanan*, 22 Vt. 548. The defendant and one A. of Massachusetts exchanged notes of equal amounts and having equal time to run, in August, 1854. Later in the same month A. deposited defendant's notes and others as collateral, and procured a discount of his own note for \$8,000 by plaintiff. The note had ten days to run; A. failed to pay it, and was driven into insolvency. Separate suits were brought against the defendant on his notes when they became due. At the time of bringing these suits between \$3,000 and \$4,000 of the collaterals had been paid. When the actions (together) were tried, the collaterals had been paid in to an amount sufficient to pay the plaintiff's claim, except about \$200. Held, that the plaintiff should have judgment for the full amount of the notes, interest and costs, but the rights of the defendant should be provided for by an order in the judgment permitting him to be discharged by

paying the balance due the plaintiff with costs; the residue to be paid into court to be subject to its further order on the application of A.'s assignees, or of A. on notice. *Nantucket Bank v. Stebbins*, 6 Duer, 341.

In *Russell v. La Roque*, 13 Ala. 149, it was held that where a surety received from his principal a note as indemnity, and passed the same over to the creditor as collateral security for the principal, the creditor could not recover upon such note after the principal debt was barred by the statute of limitations; but it would have been otherwise if the note had been delivered to the creditor in discharge of the surety's liability.

³³ *Chambersburg Ins. Co. v. Smith*, 11 Pa. 120; *Nelson v. Wellington*, 5 Bosw. 178; *Brookman v. Metcalf*, id. 429.

³⁴ *Roberts v. Gallagher*, 1 Wash. C. C. 156; *Gallagher v. Roberts*, 2 id. 191; *Hanna v. Holton*, 78 Pa.

paper to mature at a future day, due diligence imposes on the creditor the necessity of doing those acts which will preserve the liability of indorsers or other secondary parties.³⁵ In case of neglect the creditor is liable for the actual loss, but no more:³⁶ and the onus is on the debtor to show the extent of the injury.³⁷ So if the creditor receives a check in payment of a debt and unreasonably delays presenting it, he is only liable for the actual injury to the drawer.³⁸

A transfer of the collateral by the creditor is an appropriation of it, and he will be held to have elected to take it for what appears by its face to be due thereon in satisfaction to

334, 21 Am. Rep. 20; Girard F. & M. Ins. Co. v. Marr, 46 Pa. 504; Miller v. Gettysburg Bank, 8 Watts, 192; Dyott's Est., 2 W. & S. 463; Lishy v. O'Brien, 4 Watts, 141; Bank of United States v. Peabody, 20 Pa. 454; Chambersburg Ins. Co. v. Smith, 11 id. 120; Sellers v. Jones, 22 id. 423; Muirhead v. Kirkpatrick, 21 id. 237; Foote v. Brown, 2 McLean, 369; Brown v. Cronise, 21 Cal. 386; Whitten v. Wright, 34 Mich. 92; Exeter Bank v. Gordon, 8 N. H. 66; Finnell v. Meaux, 3 Bush, 449; Kenniston v. Avery, 16 N. H. 117; In re Brown, 2 Story, 502; Chamberlyn v. Delarive, 2 Wilson, 353; Bonta v. Curry, 3 Bush, 678; Russell v. Hester, 10 Ala. 535; Powell v. Henry, 27 Ala. 612; Lee v. Baldwin, 10 Ga. 208; Cardin v. Jones, 23 Ga. 175; Kiser v. Rud-dick, 8 Blackf. 382; Noland v. Clark, 10 B. Mon. 239; Hoffman v. Johnson, 1 Bland Ch. 103; Steger v. Bush, Sm. & M. Ch. 172; Barrow v. Rhinelander, 3 Johns. Ch. 619; Jennison v. Parker, 7 Mich. 355; Goodhall v. Richardson, 14 N. H. 567; White v. Howard, 1 Sandf. 81; Nexsen v. Lyell, 5 Hill, 466; Montague v. Stelts, 37 S. C. 200, 34 Am. St. 736. See In re Sanderson, 150 Fed. 236.

If the creditor is negligent the debtor need not claim his damages by separate action or counter-claim, but may interpose the negligence as a defense to his creditor's action and require an accounting for the collaterals. *Montague v. Stelts, supra*. The loss of the collateral by theft, without negligence, before the maturity of the principal note, is not a defense to an action on the latter. *Winthrop Sav. Bank v. Jackson*, 67 Me. 570, 24 Am. Rep. 56.

³⁵ *Jennison v. Parker*, 7 Mich. 355; *Russell v. Hester*, 10 Ala. 535; *Kenniston v. Avery*, 16 N. H. 117; *Foote v. Brown*, 2 McLean, 369; *Brown v. Cronise*, 21 Cal. 386; *Phenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756.

³⁶ *Aldrich v. Goodell*, 75 Ill. 452; *Coonley v. Coonley*, Hill & Denio, 312.

³⁷ *Id.*; *Fiske v. Stevens*, 21 Me. 457.

³⁸ *Chemical Nat. Bank v. Kellogg*, 183 N. Y. 92, 111 Am. St. 717; *McWilliams v. Phillips*, 71 Ala. 80; *Hunter v. Moul*, 98 Pa. 13, 42 Am. Rep. 610; *Bell v. Alexander*, 21 Gratt. 1. See § 227.

that extent.³⁹ If he transfers the collateral for less than its face it is his loss.⁴⁰ He must settle with the debtor for the whole nominal value of the collateral, though he settled with the maker for less, or took a note in part satisfaction.⁴¹ A creditor may relinquish a collateral security to his debtor without the consent of other creditors, and not thereby lose his resort to the debtor's property.⁴² But a surety would be discharged by such relinquishment; for the creditor is bound to hold security for the benefit of the surety as well as for himself; and if he parts with it, without the knowledge or against the will of the surety, he will lose his claim against him to the value of what is so surrendered.⁴³ One who receives from his debtor as collateral negotiable paper of a third person, indorsed by the debtor, makes it his own and releases the debtor's indorsement if he neglects to protest it for non-payment.⁴⁴ A creditor having a

³⁹ *Hawks v. Hincheliff*, 17 Barb. 492; *Looney v. District of Columbia*, 113 U. S. 258, 29 L. ed. 974; *Donnelly v. Same*, 119 U. S. 339, 30 L. ed. 465; *Williams, Ex parte*, 17 S. C. 396; *Adger v. Pringle*, 11 id. 535; *Townsend v. Stevenson*, 4 Rich. 62.

⁴⁰ *Id.*

⁴¹ *Depuy v. Clark*, 12 Ind. 427. See *Garlick v. James*, 12 Johns. 146; *Phillips v. Thompson*, 2 Johns. Ch. 418, 7 Am. Dec. 535.

⁴² *Dyott's Est.*, 2 W. & S. 463.

⁴³ *Stewart v. Davis*, 18 Ind. 74. See ch. 17.

⁴⁴ *Whitten v. Wright*, 34 Mich. 92. In this case, upon the trial the plaintiff offered to show that at the time the note was given the maker was insolvent, that he was so at the time of its maturity, and continued so up to the time of the trial, for the purpose of showing that though the note was not properly protested the defendant lost nothing by it. *Marston, J.*, delivering the opinion of the court, said: "It is of the utmost importance that no uncer-

tainty should exist as to the rights and liabilities of parties to negotiable paper. Should the introduction of evidence upon the trial be sanctioned to show that an indorser had not suffered any injury from a want of protest and notice, an element of uncertainty would then exist, and the way would be opened for a new class of questions and much needless litigation. The value of a note cannot always be determined from the solvency or insolvency alone of the maker. As was said in *Rose v. Lewis*, 10 Mich. 485, 'the value of negotiable paper is well understood not to be absolutely dependent on the amount of property liable to execution which may be possessed by the maker. A very large portion of current securities of undoubted goodness would, under such a test, be worthless. And in cases where the holder of such paper is indebted to the maker, it may be as valuable to him, by way of set-off, as if the maker were wealthy and in sound credit. The value of commercial paper must always depend very much upon the

note for the purchase-money of a slave, on the death of the purchaser took possession of the slave; he was liable for the injury done to the estate as executor *de son tort*, and the amount of such liability payment so far upon the note.⁴⁵ A creditor who included in a mortgage a premium for a policy of insurance on the life of the debtor as additional security for the debt and neglected to effect the insurance was held liable as upon an express agreement to insure for the amount of the sum for which he should have procured insurance.⁴⁶

§ 230. **Who may make payments.** The general rule as to payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise, seems to be that it is not sufficient to discharge the debtor unless it is made as agent for him and on his account, and with his prior authority or subsequent ratification; but the debtor may ratify the payment by pleading it unless he has previously disavowed it.⁴⁷ The payment by a principal of a claim for goods delivered to his agent is not the satisfaction of it by a mere stranger, and it

integrity and business habits of those who issue it. And we cannot perceive the justice or good sense of any rule which should disregard the results of common experience.' If the note in this case had been properly protested and notice given to the defendant, he might have been able to collect it or secure its payment. We think the evidence was properly excluded." This seems in harmony with *Peacock v. Pursell*, 14 C. B. (N. S.) 728. The rule in Massachusetts is to the contrary. *Coleman v. Lewis*, 183 Mass. 485, 66 L.R.A. 482, 97 Am. St. 450.

⁴⁵ *Finnell v. Meaux*, 3 Bush, 449.

⁴⁶ *Soule v. Union Bank*, 45 Barb. 111, 30 How. Pr. 105.

⁴⁷ *Bradley v. Lehigh Valley R. Co.*, 153 Fed. 350, 82 C. C. A. 426; *Gray v. Herman*, 75 Wis. 453, 6 L.R.A. 691; *Walter v. James*, L. R. 6 Ex. 124; *Simpson v. Eggington*, 10 Ex. 845; *James v. Isaacs*, 12 C.

B. 791; *Belshaw v. Bush*, 11 id. 191; *Jones v. Broadhurst*, 9 id. 193; *Clow v. Borst*, 6 Johns. 37; *Stark v. Thompson*, 3 T. B. Mon. 296; *Woolfolk v. McDowell*, 9 Dana, 268; *Lucas v. Wilkinson*, 1 Hurl. & N. 420; *Atlantic D. Co. v. Mayor*, 53 N. Y. 64; *Bleakley v. White*, 4 Paige, 654.

In a note to *Simpson v. Eggington*, *supra*, it is said that "the rule which requires the consideration to move between the parties has been modified in many important particulars by the introduction of the action for money had and received, and it would seem only reasonable to permit a debt to be extinguished by a payment made to a creditor whenever the circumstances are such that the amount paid might have been recovered by the debtor had no debt existed."

The early cases are considered by *Creswell, J.*, in *Jones v. Broadhurst*,

extinguishes the demand of the creditors.⁴⁸ And so of the payment of a claim made by the principal stockholder in a corporation to one for services rendered it as general manager.⁴⁹ A payment made to the holder of a note by an indorser, not as agent for the maker, but in discharge of his own obligation, the note having been executed by the maker for value, does not inure to the benefit of the latter, and in an action upon the note he is liable for the whole amount for which it was given. So far as the indorser's payment is concerned it was an equitable purchase of the note by him.⁵⁰ In a Wisconsin case the defend-

supra, and also in the arguments of counsel in *Walter v. James*, *supra*. See *Hooper's Case*, 2 Leon. 110; *Grimes v. Blofield*, Cro. Eliz. 541; *Edgecombe v. Rodd*, 5 East, 294.

In *Belshaw v. Bush*, 11 C. B. 191 (1851), Maule, J., said: "If a bill given by the *defendant* himself on account of the debt operate as a conditional payment, and so be of the same force as an absolute payment by the defendant, if the condition by which it is to be defeated has not arisen, there seems no reason why a bill given by a *stranger* for and on account of the debt should not operate as a conditional payment by the stranger; and if it have that operation, the plea in the present case will have the same effect as if it had alleged that *the money* was paid by William Bush (the stranger) for and on account of the debt. But, if a stranger give money in payment, absolute or conditional, of the debt of another, and the causes of action in respect to it, it must be payment on behalf of the other, against whom alone the causes of action exist, and if adopted by him, will operate as payment by himself." Coke, Litt. 206b, 36 H. 6.

James v. Isaacs, 12 C. B. 791 (1852). In *assumpsit* for work and

labor the defendant pleaded that the money mentioned in the declaration accrued due to the plaintiff under an agreement for the building of a church; that the plaintiff having suspended the work another agreement was entered into between him and one A. under which the plaintiff, in consideration of certain stipulated payments, undertook to complete the work and to rely for the residue of the contract price upon certain subscriptions which were to be raised; and that A. duly made and the plaintiff received the payments stipulated for by the second agreement in satisfaction and discharge of the original agreement between the plaintiff and the defendants, and of the performance thereof by the latter. Held, that the plea was bad in substance inasmuch as it did not show that the agreement made by A. and the payments under it were intended to be made for the benefit of the defendants, and that they adopted A.'s acts. See 2 Am. Lead. Cas. (4th ed.) 270; *Wellington v. Kelly*, 84 N. C. 543; *Wolff v. Walter*, 56 Mo. 292.

⁴⁸ *Case v. Phillips*, 182 Ill. 187.

⁴⁹ *Porter v. Chicago, etc. R. Co.*, 99 Iowa. 351.

⁵⁰ *Madison Square Bank v. Pierce*, 137 N. Y. 444, 33 Am. St. 751, 20

ant became a debtor for the benefit of a third person, who made payment of his own volition and on his own behalf. The trial court ruled that it was not competent for the party sued to plead payment by another party who was not sued, and who could not be affected by the judgment. Cole, C. J., considered this ruling by asking: "Why not, if it is shown that the creditor accepts the payment in satisfaction of the debt? Can it be said that the obligation is still in force? What sense or reason is there in any such technical rule as that, if it exists? If a debt is fully paid it would seem, according to plain common sense, that the obligation was extinguished and is no longer in force as a contract. What concern is it to the creditor who pays his debt, especially where he accepts the payment made in satisfaction of his debt?"⁵¹ The demand of a creditor which is paid with the money of a third person, without an agreement that the security shall be assigned or kept alive for the benefit of such third person, is extinguished.⁵² Payment made by a third person at the request of the debtor inures to the latter's benefit.⁵³ After default in the performance of the conditions of a bill of sale providing that the title to the goods shall not pass until full performance, the vendor is not bound to receive payment from any person except his own vendee.⁵⁴ If the creditor accepts payment under a mistake of fact, as by erroneously supposing that the person who made it had authority to

L.R.A. 335, following *Jones v. Broadhurst*, 9 C. B. 175, the doctrine of which is recognized in England in *Thornton v. Maynard*, L. R. 10 C. P. 695. The New York case is of first impression in the United States.

⁵¹ *Gray v. Herman*, 75 Wis. 453, 6 L.R.A. 691; *Porter v. Chicago*, etc. R. Co., 99 Iowa 351.

In *Harrison v. Hicks*, 1 Port. 423, 27 Am. Dec. 638, the payment of a debt by a stranger to the contract was held an extinguishment of it, whether made by the debtor's consent or not.

In *Pearce v. Bryant C. Co.*, 121

Ill. 590, payment by a trustee at the request of an officer of the corporation owing the debt extinguished the evidence of the indebtedness so that the trustee could not enforce it.

Payment made by one who is primarily liable extinguishes the debt. *Smith v. Waugh*, 84 Va. 806.

⁵² *Grady v. O'Reilly*, 116 Mo. 346; *Penwell v. Flickinger*, 46 Mont. 526.

⁵³ *Ex parte Ziegler*, 83 S. C. 78, 21 L.R.A.(N.S.) 1005; *Crawford v. Tyng*, 10 N. Y. Misc. 143.

⁵⁴ *Lippincott v. Rich*, 19 Utah, 140.

do so, he may return the money and apply to his debtor for the payment of his demand.⁵⁵ Satisfaction by one joint tort-feasor or joint debtor is a bar to an action against another,⁵⁶ and a payment made by one of several joint debtors inures to the benefit of all as a credit upon the debt.⁵⁷ But one joint maker of a note cannot, by payment thereon, unless authorized by his co-obligor, stop the running of the statute of limitations. Where that statute is involved and the payments on a note are all indorsed in the payee's handwriting, made in the absence of the maker, the former must show that such payments were made by the latter or by his authority.⁵⁸ If a creditor, knowing the liability of his debtor, takes the individual note of his agent in payment, without at the same time doing anything to indicate a purpose to hold the principal, the latter is discharged.⁵⁹

Where an acceptance is payable at a designated bank it is tantamount to an order by the acceptor to the bank to pay the bill to any person entitled to receive payment.⁶⁰ A note payable at a bank where the maker has a deposit is equivalent to a check drawn by him upon such bank,⁶¹ at least if that has been the custom of business between the bank and the depositor.⁶² The implied authority of a bank to pay the notes of a depositor made by him payable there,⁶³ does not extend to notes made long before the maker became a depositor and made payable at another bank.⁶⁴

⁵⁵ *Walter v. James*, L. R. 6 Ex. 124.

⁵⁶ *Reynolds v. Schade*, 131 Mo. App. 1; *Livingston v. Bishop*, 1 Johns. 291, 3 Am. Dec. 330; *Thomas v. Rumsey*, 6 Johns. 31; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 635; *Woods v. Pangborn*, 76 id. 498; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830; *Knapp v. Roche*, 94 N. Y. 329; *Brick v. Bual*, 73 Tex. 511; *Goldbeck v. Kensington Nat. Bank*, 147 Pa. 267.

⁵⁷ *Goldbeck v. Bank*, *supra*.

⁵⁸ *Waughop v. Bartlett*, 165 Ill. 124.

⁵⁹ *Ames P. & P. Co. v. Tucker*, 8 Mo. App. 95; *Paige v. Stone*, 10

Metc. (Mass.) 169; *Wilkin v. Reed*, 6 Me. 220, 19 Am. Dec. 211; *French v. Price*, 24 Pick. 22; *Hyde v. Paige*, 9 Barb. 250. A less extended rule is applied in some cases. *Coleman v. First Nat. Bank*, 53 N. Y. 388; *Calder v. Dobell*, L. R. 6 C. P. 486.

⁶⁰ *Robarts v. Tucker*, 16 Q. B. 560.

⁶¹ *Indig v. National City Bank*, 80 N. Y. 100; *Wyman v. Fort Dearborn Nat. Bank*, 181 Ill. 279, 72 Am. St. 259, 48 L.R.A. 565.

⁶² *Nineteenth Ward Bank v. First Nat. Bank*, 184 Mass. 49.

⁶³ *Carr v. National S. Bank*, 107 Mass. 45, 9 Am. Rep. 6.

⁶⁴ *Elliott v. Worcester T. Co.*, 189 Mass. 542.

A purchaser of mortgaged property subject to the mortgage may pay the debt, and payment by him extinguishes the lien.⁶⁵ If a mere stranger or volunteer pays a debt for which another is bound he cannot be subrogated to the creditor's rights in respect to the security given by the real debtor; but if the person who pays is compelled to pay for the protection of his own interests and rights, he is entitled to such subrogation.⁶⁶

§ 231. **To whom payment may be made.** Payment must be made to the creditor or to one authorized by him to receive it as agent or assignee;⁶⁷ or to one whom the law substitutes in the creditor's place as executor, administrator, creditor by trustee process, or the like.⁶⁸ If it is made to one entitled to receive it the debt is extinguished though there was a mistake as to the right in which the amount paid accrued.⁶⁹ Payment of a judgment decree to an attorney of record who obtained it, before his authority is revoked and notice of it given, is valid as to the party making the payment,⁷⁰ but payment of a judgment or claim after it has been assigned and notice thereof given to one who is merely the beneficial owner is not a discharge of it; it is otherwise when payment is made to the person having the legal title without notice of his assignment.⁷¹ Payment of a judgment to the judgment creditor with notice of the lien of the attorney is ineffectual.⁷² Payment to the sheriff of the price bid at an execution sale discharges the purchaser.⁷³ But it has been ruled that a sheriff is only entitled to receive pay-

⁶⁵ *Appledorn v. Streeter*, 20 Mich. 9.

⁶⁶ *Hough v. Ætna L. Ins. Co.*, 57 Ill. 318, 11 Am. Rep. 18; *Grady v. O'Reilly*, 116 Mo. 346.

⁶⁷ *Littleton v. Wells, etc. Council*, 98 Md. 453; *Mendel v. Boyd*, 3 Neb. (Unof.) 473, 91 N. W. 860; *Lovett v. Eastern O. Co.*, 68 W. Va. 667.

⁶⁸ *McMahon v. German-Am. Nat. Bank*, 111 Minn. 313, 29 L.R.A. (N.S.) 67.

⁶⁹ *Hemphill v. Moody*, 64 Ala. 468. May be made by nonresident debtors to an executor. *Ousley v. Central T. Co.*, 196 Fed. 412.

⁷⁰ *Harper v. Harvey*, 4 W. Va. 539; *Yoakum v. Tilden*, 3 id. 167, 100 Am. Dec. 738; *Equitable Mort. Co. v. Montfort*, 121 Ga. 696; *Davis v. Gott*, 130 Ky. 486.

⁷¹ *Cummins' Est.*, In re, 143 Cal. 525; *Seymour v. Smith*, 114 N. Y. 481, 11 Am. St. 683; *Sykes v. Citizens' Nat. Bank*, 69 Kan. 134 (non-negotiable note before maturity to holder without notice of its assignment).

⁷² *Northrup v. Hayward*, 102 Minn. 307.

⁷³ *Fuller v. Exchange Bank*, 38 Ind. App. 570.

ment of an execution when he is in possession of a judicial mandate directing him to make the collection of the sum called for, unless he is the creditor's agent.⁷⁴ Payment made to the party designated by the creditor is good,⁷⁵ but such a designation may be changed, and if changed, the debtor pays to the person originally designated at his peril,⁷⁶ if he has notice of the substitution.⁷⁷ If an attorney who has a claim for collection places it in the hands of another for that purpose, the owner assenting, payment to the latter discharges the debt.⁷⁸ If a principal has clothed his agent with the *indicia* of authority to receive payment,⁷⁹ as by intrusting to him the possession of the goods to be sold, the purchaser is warranted in paying the price of such as he buys to the agent; but if the latter is not in possession of the goods and is only authorized to make sales payments made to him are at the risk of the payer.⁸⁰ An agent's authority to receive payment may be in-

⁷⁴ *Bailey v. Hester*, 101 N. C. 538; *Brooks O. Co. v. Weatherford*, 91 Miss. 501.

⁷⁵ *Superior Mfg. Co. v. Russell*, 127 Ga. 151; *La Fayette G. Co. v. Kelsay*, 164 Ind. 563; *Diamond D. Co. v. Gott*, 137 Ky. 585, 31 L.R.A. (N.S.) 643; *Walker v. Crosby*, 38 Minn. 34; *Sailer v. Barnousky*, 60 Wis. 169; *Fiske v. Fisher*, 100 Mass. 97.

⁷⁶ *Rice & B. M. Co. v. International Bank*, 185 Ill. 422, 86 Ill. App. 136; *Meeker v. Manina*, 162 Ill. 203; *Mechem on Agency*, § 224.

⁷⁷ The apparent authority of the person receiving payment may be relied upon if notice of the limitation upon it has not been given. *Fitzgerald v. Beckwith*, 182 Mass. 177.

⁷⁸ *Dentzel v. City & S. R. Co.*, 90 Md. 434.

⁷⁹ *Porter v. Roseman*, 165 Ind. 255, 112 Am. St. 222; *Indiana T. Co. v. International B. & L. Ass'n*, 36 Ind. App. 685; *Florida Cent. & P. R. Co. v. Ragan*, 104 Ga. 353.

⁸⁰ *Mitchell v. Boyer*, 160 App. Div. (N. Y.) 565; *Kellenberger v. Oskaloosa Nat. B., L. & I. Ass'n*, 129 Iowa, 582; *Dreyfus v. Goss*, 67 Kan. 57; *Robinson v. Corsicana C. Factory*, 124 Ky. 435, 8 L.R.A. (N.S.) 474; *Burstein v. Sullivan*, 134 App. Div. (N. Y.) 623; *Scarritt-C. F. Co. v. Hudspeth*, 19 Okla. 429; *Lakeside P. & P. E. Co. v. Campbell*, 39 Fla. 523; *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740; *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655; *Clark v. Murphy*, 164 Mass. 490; *Seiple v. Irwin*, 30 Pa. 513; *Hirshfield v. Waldron*, 54 Mich. 649; *Chambers v. Short*, 79 Mo. 204; *Clark v. Smith*, 88 Ill. 298; *Brown v. Lally*, 79 Minn. 38; *Crawford v. Whitaker*, 42 W. Va. 430; *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795; *Keown v. Vogel*, 25 Mo. App. 35; *Pardridge v. Bailey*, 20 Ill. App. 351; *Putnam v. French*, 53 Vt. 404, 38 Am. Rep. 682; *Hoskins v. Johnson*, 5 Sneed, 470; *Capel v. Thornton*, 3 C. & P. 352; *Dean v.*

plied if he has previously received payment of similar accounts and the debtor knows that his acts in that respect have been ratified.⁸¹ A selling agent authorized to receive payment may not bind his principal by accepting the cancellation of his own debt to the vendee if the latter knows or by reasonable diligence could know that the vendor was merely an agent.⁸² If payment is authorized to be made to two persons they constitute but one agent, and payment to one of them, without the consent of the other, is ineffectual.⁸³ Payment to an agent is unauthorized after the death of the principal,⁸⁴ unless the agency is coupled with an interest. The fact that the agent is entitled to commissions on sums collected does not give him such an interest as will continue his power after the principal's death; the interest which will work that result must be in the thing on account of which payment is made or in the money paid as such.⁸⁵ If a negotiable note, indorsed by the payee in blank, is in the hands of an agent for collection its payment in good faith, after the death of the principal and without notice thereof, is valid.⁸⁶ Possession of mercantile paper authorizes the receipt of the money, even before it is due,⁸⁷ if the possessor has authority from the owner to collect the amount payable on it.⁸⁸ But circumstances may impeach a payment made to one having posses-

International T. Co., 47 Hun, 319;
Higgins v. Moore, 34 N. Y. 417;
Artley v. Morrison, 73 Iowa, 132;
Adams v. Kearney, 2 E. D. Smith,
42. See Stanton v. French, 83 Cal.
194.

If money is paid to an agent not authorized to receive it the payment is ratified by the principal's bringing an action against him to recover it. *Bailey v. United States*, 15 Ct. of Cls. 490. And by suing to recover the purchase price of goods sold. *Pardridge v. Bailey*, *supra*. See *Estey v. Snyder*, 76 Wis. 624; *Payne v. Hackney*, 84 Minn. 195.

A broader rule is sometimes recognized. *Perry v. Sumrall L. Co.*, 95 Miss. 691.

⁸¹ *Grant v. Humerick*, 123 Iowa, 571.

⁸² *Grooms v. Neff H. Co.*, 79 Ark. 401.

⁸³ *Robbins v. Horgan*, 192 Mass. 443.

⁸⁴ *Lochenmeyer v. Fogarty*, 112 Ill. 572.

⁸⁵ *Farmers' L. & T. Co. v. Wilson*, 139 N. Y. 384.

⁸⁶ *Deweese v. Muff*, 57 Neb. 17, 42 L.R.A. 789, 73 Am. St. 488; *Johnson v. Hollensworth*, 48 Mich. 143.

⁸⁷ *Warnock v. Itavis*, 38 Wash. 144; *Bliss v. Cutter*, 19 Barb. 9; *Thornton v. Lawther*, 169 Ill. 228. For limitations on this rule see *Dilenebeck v. Rehse*, 105 Iowa, 749.

⁸⁸ *Merchants' Nat. Bank v. Camp*,

sion of the evidence of the debt. Thus, payment by the maker of a note before maturity to the son of the holder, who had been forbidden to take payment, with the knowledge of the party paying, is not a good payment, although the note is delivered up by the son; the father may maintain a suit for the note, not having ratified the payment.⁸⁹ The circumstances, however, must show payment in bad faith; it is not enough that there is gross negligence in not ascertaining the party entitled to the money.⁹⁰ Payment of a lost negotiable instrument, after notice of its loss, will not operate as a discharge against the loser unless the person presenting it establishes his title thereto. A notice previously given of the loss of a coupon, distinguishable by its number or other ear-mark, is sufficient to fix upon the maker the duty of inquiry and of refusal to pay a holder who cannot prove his right; especially is this the rule where an instrument is presented after it has matured.⁹¹ Payment to one not in possession of the evidence of debt and without a surrender of it, is at the risk of the payer; if the party receiving the money had no right to receive it the note is not discharged.⁹²

110 Ga. 780; *Cheney v. Libby*, 134 U. S. 68, 33 L. ed. 818.

⁸⁹ *Kingman v. Pierce*, 17 Mass. 247.

⁹⁰ *Cothran v. Collins*, 29 How. Pr. 113; *Haeseig v. Brown*, 34 Mich. 503.

A bank is not protected by a payment made to an agent designated in a certificate of deposit if it knew the money belonged to his principal when it issued the certificate. *Robards v. Hamrick*, 39 Ind. App. 134.

⁹¹ *Page Woven F. Co. v. Pool*, 133 Mich. 323; *Hinekey v. Union Pac. R. Co.*, 129 Mass. 52, 37 Am. Rep. 297. See *Hinckley v. Merchants' Nat. Bank*, 131 Mass. 147.

⁹² *Hughes v. Clifton*, 147 Ala. 531; *Goodyear v. Williams*, 73 Kan. 192; *Powers v. Woolfolk*, 132 Mo. App. 354; *Hoffmaster v. Black*, 78 Ohio 1, 28 L.R.A.(N.S.) 52, 125

Am. St. 679; *Marling v. Mommensen*, 127 Wis. 363, 115 Am. St. 1017, 5 L.R.A.(N.S.) 412; *Lane v. First Nat. Bank* (Tex. Civ. App.), 155 S. W. 307; *Fortune v. Stockton*, 182 Ill. 454, aff'g 82 Ill. App. 272 (*sub nom.* *Stockton v. Fortune*); *Leon v. McIntyre*, 88 id. 349; *Englert v. White*, 92 Iowa, 97; *Bank v. Ingerson*, 105 Iowa 349; *Hall v. Smith*, 3 Kan. App. 685; *Cummings v. Hurd*, 49 Mo. App. 139; *Dodge v. Birkenfeld*, 20 Mont. 115; *Hitchcock v. Kelley*, 18 Ohio C. C. 808; *Hollinshead v. Stuart*, 8 N. D. 35; *Stalzman v. Wyman*, 8 N. D. 108; *Rhodes v. Belchee*, 36 Ore. 141; *Wheeler v. Guild*, 20 Pick. 545, 32 Am. Dec. 231; *Rush v. Fister*, 23 Ill. App. 348; *Viskoeil v. Doktor*, 27 id. 232; *Stiger v. Bent*, 111 Ill. 328.

Payment of a pledged note to the pledgor will not discharge it. *Griswold v. Davis*, 31 Vt. 390.

But if the person who receives the money, though he had not possession of the evidence of the indebtedness or authority to receive payment, pays it to the person entitled and such person receives it, the debt is discharged.⁹³

The rule that payment to one who is without the evidence of indebtedness is at the risk of the debtor applies though the note is paid at the place designated in it for payment.⁹⁴ It was held in Iowa that if a note is made payable at a bank payment made there on the date of the maturity of the note is satisfaction though the note was not in possession of the bank.⁹⁵ But this position has been receded from, in deference to the almost unvarying current of authority, to the extent of holding that the fact that a note is so payable does not authorize the bank, in the absence of the note, to collect anything on it before maturity.⁹⁶ The authorities are reviewed by the New Jersey court, and the conclusion arrived at (which is concurred in by the Iowa court), that the contract of the

The authorities recognize the rule that "where a principal has, by his voluntary act, placed an agent in a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform, on behalf of his principal, a particular act, such particular act having been performed, the principal is estopped, as against such innocent third person, from denying the agent's authority to perform it." *Johnston v. Milwaukee & W. I. Co.*, 46 Neb. 480; *Reid v. Kellogg*, 8 S. D. 596. This doctrine has been applied where an agent who was not possessed of the mortgage or notes, or a satisfaction of them, received payment before it was due. *Harrison v. Legore*, 109 Iowa, 618; *Doyle v. Corey*, 170 Mass. 337, is in harmony with the cases referred to.

⁹³ *Second Nat. Bank v. Spotts-*

wood, 10 N. D. 114; *Coleman v. Jenkins*, 78 Ga. 605.

⁹⁴ *McNamara v. Clark*, 85 Ill. App. 439; *Englert v. White*, 92 Iowa, 97; *Klindt v. Higgins*, 95 Iowa, 529; *Cummings v. Hurd*, 49 Mo. App. 139.

⁹⁵ *Lazier v. Horan*, 55 Iowa, 75.

⁹⁶ *Bank v. Ingerson*, 105 Iowa, 349, distinguishing *Bank of Charleston Nat. Banking Ass'n v. Zorn*, 14 S. C. 444, and citing *Caldwell v. Evans*, 5 Bush, 380, 96 Am. Dec. 358; *Adams v. Haekensaek I. Com.*, 44 N. J. L. 638, 43 Am. Rep. 406; *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95, 24 Am. St. 189; *Hills v. Place*, 48 N. Y. 520, 8 Am. Rep. 568; *Cheney v. Libby*, 134 U. S. 68, 33 L. ed. 818; *Ward v. Smith*, 7 Wall. 447, 19 L. ed. 207; *Williamsport G. Co. v. Pinkerton*, 95 Pa. 62; *Wood v. Merchants' Sav., L. & T. Co.*, 41 Ill. 267; *Grisson v. Bank*, 87 Tenn. 350, 3 L.R.A. 273, 10 Am. St. 669; *Turner v. Hayden*, 4 B. & C. 1; *Walton v. Henderson, Smith*

maker, acceptor, or obligor is to pay the holder of the paper, and the place for payment is designated simply for the convenience of both parties. Making a bill or note payable at a banker's is authority to the banker to apply the funds of the acceptor or maker on deposit to the payment of the paper. If maturing paper be left with the banker for collection he becomes the agent of the holder to receive payment; but unless the banker is made the holder's agent by a deposit of the paper with him for collection, he has no authority to act for the holder. The naming of a bank in a note as the place of payment does not make the banker an agent for the collection of the note or the receipt of the money. No power, authority or duty is thereby conferred upon the banker in reference to the note; and the debtor cannot make the banker the agent of the holder simply by depositing with him the funds to pay it. Unless the banker has been made the agent of the holder by the indorsement of the paper or the deposit of it for collection, any money which the banker receives to apply in payment of it will be deemed to have been taken by him as the agent of the payer.⁹⁷

An attorney authorized to collect interest is not thereby authorized to receive the principal.⁹⁸ Such authority, in the absence of direct proof, may in some cases be inferred from the possession of the bond and mortgage; but according to the current of authority, it is incumbent upon the debtor who pays to the attorney to show that the securities were in his possession on each occasion when payments were made; their withdrawal would be a revocation of the authority.⁹⁹ If an attorney em-

(N. H.), 168, as sustaining the doctrine that the bank, in such a case, is not the agent of the payee of the note, though the latter be due, so as to be authorized to accept payment of it, unless the note is in its possession.

⁹⁷ *Adams v. Hackensack* 1. Com., *supra*; *First Nat. Bank v. Chilson*, 45 Neb. 257; *Bartel v. Brown*, 104 Wis. 493; *Hollinshead v. Stuart*, 8 N. D. 35, 42 L.R.A. 659.

⁹⁸ *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. 598; *Campbell v. O'Connor*, 55 Neb. 638.

⁹⁹ *Williams v. Walker*, 2 Sandf. Ch. 325; *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Crane v. Gruenewald*, 120 N. Y. 274, 17 Am. St. 643; *Henn v. Conisby*, 1 Ch. Cas. 93; *Gerard v. Baker*, *id.* 94; *Garrels v. Morton*, 26 Ill. App. 433; *Cox v. Cutter*, 28 N.

ployed to collect a note receives part of the sum due in cash and takes security in his own favor for the balance, the payment is good *pro tanto*; but the creditor may refuse to accept such security and recover on the note from the maker.¹ If payment of a loan is made to the attorney who negotiated it while he has the custody of the bond and mortgage, with the consent of the mortgagee, and the mortgagor knows the fact, he is discharged although the attorney was not in fact authorized to receive it.² If the attorney of a plaintiff comes into possession of money belonging to the defendant and the latter and the attorney agree that it should be paid on the plaintiff's claim, such agreement is payment.³

The court of errors and appeals of New Jersey has ruled, by a vote of eleven to one, reversing the vice-chancellor, that the mere possession of a bond and mortgage by one not the obligee will not warrant the payment thereof to such possessor. Many years before payment these papers were drawn by the person to whom payment was made, but of that fact it did not appear that the debtor had knowledge. The papers were in the possession of the mortgagee from the time of their execution until they were delivered to the scrivener for safe keeping in his vault, and were put up by the mortgagee in a bundle, tied with strings and sealed with wax. Interest had been paid to the scrivener under special authority from the mortgagee.⁴ A

J. Eq. 13; *Eaton v. Knowles*, 61 Mich. 625; *Brewster v. Carnes*, 103 N. Y. 556; *Lane v. Duchac*, 73 Wis. 646. *Contra*, *Shane v. Palmer*, 43 Kan. 481; *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. 138. *Compare* *Wileox v. Carr*, 37 Fed. 130.

A mortgagor who makes the agent of his mortgagee for the collection of the principal and interest due the latter his own agent for the purpose of securing a loan to be used in discharging a mortgage must stand a loss caused by the agent's embezzlement of the money so obtained, the mortgagor not having directed the agent to apply it to the mortgage in

his possession. *Boardman v. Blizzard*, 36 Fed. 26.

The apparent authority of an attorney to receive payment of interest does not depend upon his production to the debtor of the securities, but on his possession of them. *Crane v. Gruenewald*, *supra*.

¹ *Davis v. Severance*, 49 Minn. 528; *Willis v. Gorrell*, 102 Va. 740 (as to the last proposition).

² *Crane v. Gruenewald*, *supra*; *McConnell v. Mackin*, 22 App. Div. (N. Y.) 537.

³ *Millhiser v. Marr*, 130 N. C. 510.

⁴ *Lawson v. Nicholson*, 52 N. J.

late case in New York is hard to harmonize with the case just stated, and holds a rule more consonant with the authorities and the analogies of the law. The attorney to whom payment was made had not made the original loan, but had negotiated the purchase of an outstanding bond and mortgage. Of the latter fact it does not appear that the mortgagor had any knowledge; indeed, he did not know of the assignment of the bond and mortgage until informed of it by the receipt of the attorney for interest paid a short time before payment of the principal. The same attorney had been authorized to receive the interest from the assignor of the mortgage, and was so authorized by the assignee, the papers being left in the attorney's possession. It is said: The fact that the agent or attorney has made the loan does not give him authority to collect the debt,⁵ nor, it seems, does the mere possession of the security by such attorney give such authority.⁶ Both conditions must concur. It is said in the case last cited: "The reason of the rule that one who has made a loan as agent and taken the security is authorized to receive payment when he retains possession of the security is founded upon human experience that the payer knows that the agent has been trusted by the payee about the same business, and he is thus given a credit with the payer." The same rule was applied to the case before the court.⁷

In case of a mortgage or other non-negotiable evidence of debt, probably a payment in good faith to the original holder, in the absence of the paper evidence, would be treated as valid, although there had been an actual assignment of the debt.⁸ Payment, however, may not be made to an assignor after notice

Eq. 821, reversing *Lawson v. Carson*, 50 N. J. Eq. 370.

⁵ To that effect is *Heflin v. Campbell*, 5 Tex. Civ. App. 106; *Ortmeier v. Ivory*, 208 Ill. 577.

⁶ *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502. *Contra*, *O'Loughlin v. Billy*, 95 App. Div. (N. Y.) 99. Compare *McLeod v. Despain*, 49 Ore. 536, 124 Am. St. 1066, 19 L.R.A.(N.S.) 276.

⁷ *Central T. Co. v. Folsom*, 167

N. Y. 285, approving *Williams v. Walker*, 2 Sandf. Ch. 325.

⁸ *Bartholf v. Bensley*, 234 Ill. 336; *Gemkow v. Link*, 225 Ill. 21 (unless the existence of the note is subsequently recognized in favor of the transferee before maturity); *Swan v. Craig*, 73 Neb. 182; *Trustees of Union College v. Wheeler*, 61 N. Y. 88; *Foster v. Beals*, 21 id. 247. See *Richardson v. Ainsworth*, 20 How. Pr. 521; *Robinson v.*

of such assignment;⁹ and will not be recognized even if the assignor has possession of the securities;¹⁰ not even under garnishment proceedings and an order of court, if that defense is not made.¹¹ Where the demand has been assigned payment as garnishee of the original creditor is not good unless it is compulsory, though there has been no notice of the assignment, for assignment passes the title without notice.¹² Payment to the creditor after knowledge of the issuance of an execution is not authorized.¹³

The *bona fide* payment of a debt due a person who died intestate to his sole heir and the sole distributee of the funds of the estate, before administration is granted, will, if equity requires it, relieve the debtor from liability to an administrator subsequently appointed.¹⁴ If the executor of a deceased postmaster has made application for the readjustment of the latter's salary, requesting that payment be made to him, a payment to the widow of the deceased is not binding on the executor, though she also applied for readjustment.¹⁵ One who pays a note to a

Weeks, 6 id. 161; Muir v. Schenck, 3 Hill, 228, 38 Am. Dec. 633; Gamble v. Cummings, 2 Blackf. 235.

It is a fair legal presumption that the creditor who holds a non-negotiable chose in action is entitled to receive payment thereof. If it is assigned it is incumbent upon the assignee to show that the debtor was notified in order to protect himself against any payment made to the original creditor. Heermans v. Ellsworth, 64 N. Y. 115; Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. 138; Bank v. Jones, 65 Cal. 437.

Under the recording acts the record of the assignment of a mortgage is constructive notice to the world of the rights of the assignee; a purchaser of the equity of redemption cannot claim any benefit from payments made to the mortgagee after his assignment has been recorded. Brewster v. Carnes, 103 N. Y. 556; Viele v. Judson, 82 N. Y. 32.

The assignee of record may receive payment of a mortgage and note, the latter being in his possession, though the maker knows of the claim of another. Casner v. Johnson, 66 Kan. 404.

⁹ Lyman v. Cartwright, 3 E. D. Smith, 117; Meriam v. Bacon, 5 Metc. (Mass.) 95; Guthrie v. Bashline, 25 Pa. 80; Field v. Mayor, 6 N. Y. 179; Ten Eick v. Simpson, 1 Sandf. Ch. 244.

¹⁰ Chase v. Brown, 32 Mich. 225.

¹¹ Roy v. Bauens, 43 Barb. 310.

¹² Richardson v. Ainsworth, 20 How. Pr. 521; Robinson v. Weeks, 6 id. 161; Muir v. Schenck, 3 Hill, 228, 38 Am. Dec. 633.

¹³ Park v. McCauley, 67 W. Va. 104, 28 L.R.A. (N.S.) 1036.

¹⁴ Vail v. Anderson, 61 Minn. 552; Hannah v. Lankford, 43 Ala. 163; Lewis v. Lyons, 13 Ill. 117.

¹⁵ Holt v. United States, 29 Ct. of Cls. 56.

person who had sued upon it at law does so at his peril if, at the time of payment, he has notice of the pendency of an appeal in a chancery suit brought against him by another person to establish his right to the note.¹⁶ A husband is not authorized to accept payment for the personal labor of his wife rendered outside his family; but if the debtor sold property to the husband and wife jointly and she agreed that the money due her might be applied on the purchase price, her demand is satisfied.¹⁷

A compulsory payment under a foreign attachment from a court of competent jurisdiction is good, and will be recognized even in a foreign jurisdiction, though in the latter an earlier attachment had been levied for the same debt.¹⁸ A payment as trustee or garnishee is good though the trustee might have disputed the jurisdiction of the court ordering such payment.¹⁹ It is immaterial so far as the discharge from liability is concerned that the debtor was garnished while temporarily in the state of the residence of his creditor's creditor, he having paid the judgment rendered against him there.²⁰ A garnishee who knows that the claim sued upon has been assigned must set up that fact, though the assignee did not intervene in the proceedings, of which he knew.²¹ Money paid by the government to a receiver of the property of a citizen by the court of a state in which he is domiciled discharges the claim of the government's creditor.²²

Where a debt is owing to two or more persons jointly it may be paid to either.²³ Payment to the owner or master of a vessel

¹⁶ *McClintock v. Helberg*, 168 Ill. 384, aff'g 64 Ill. App. 190.

¹⁷ *Strickland v. Hamlin*, 87 Me. 81.

¹⁸ *Minor v. Rogers Coal Co.*, 25 Mo. App. 78; *Allen v. Watt*, 79 Ill. 284; *Lieber v. St. Louis A. & M. Ass'n*, 36 Mo. 382; *Holmes v. Remsen*, 4 Johns. Ch. 460, 20 Johns. 229, 11 Am. Dec. 269; *McDaniel v. Hughes*, 3 East, 367.

¹⁹ *Reed v. Parsons*, 11 Cush. 255; *Sauntry v. Dnnlap*, 12 Wis. 364.

²⁰ *Harris v. Balk*, 198 U. S. 215, 49 L. ed. 1023.

²¹ *Greenwich Ins. Co. v. Columbia Mfg. Co.*, 73 Ill. App. 560.

²² *Borcherling v. United States*, 35 Ct. of Cls. 311, 329.

²³ *Waters v. Travis*, 9 Johns. 450; *Flanigan v. Seelye*, 53 Minn. 231; *Oatman v. Walker*, 33 Me. 67; *Moore v. Bevier*, 60 Minn. 240; *Henry v. Mt. Pleasant*, 70 Mo. 500; *Mosby v. United States*, 194 Fed. 346, 116 C. C. A. 74; *Thacke v. Hensheim*, — Misc. (N. Y.) —, 115 N. Y. Supp. 216. *Compare*, *Linville v. Jones* (Tex. Civ. App.), 137 S. W. 415.

for the owner of salvage compensation extinguishes the claims of all co-salvors.²⁴ If the survivor of two joint payees of a note is the sole devisee of the deceased payee payment may be made to him.²⁵ But payment made to a third person is not valid unless such person was authorized by all the obligees to receive it.²⁶ Payment of money to a part of the heirs of a person insured for their benefit does not discharge the insurer's liability; the indebtedness was not joint.²⁷ Payment of a debt due to a deceased person, made before letters granted, to a person who afterward takes them out, is made good by the subsequent letters.²⁸

The secondary liability of the owner of a building for the services of workmen employed by the contractor and for materials supplied does not arise until the steps prescribed by statute to acquire a lien therefor have been taken; hence payment made to other persons than the contractor does not bind him.²⁹ The right to the emoluments of an office follows the true title to it.³⁰ As between the person entitled to an office and the public, there is no obligation upon the latter until the duties of the office have been assumed. The salary fixed therefor is the reward for express or implied services, and therefore cannot belong to one who has not performed services although he is wrongfully hindered from occupying the position in which he might have rendered them.³¹ Where disbursing officers pay compensation for official services, pursuant to law, they

²⁴ *The Managua*, 126 Fed. 208; *McConochin v. Kerr*, 15 id. 545; *Roff v. Wass*, 2 Sawy. 538.

²⁵ *Perry v. Perry*, 98 Ky. 242.

²⁶ *Moore v. Bevier*, 60 Minn. 240.

²⁷ *Brown v. Iowa Legion of Honor*, 107 Iowa, 439.

²⁸ *Priest v. Watkins*, 2 Hill, 225, 38 Am. Dec. 584; *In re Faulkner*, 7 Hill, 181.

²⁹ *Walker v. Newton*, 53 Wis. 336.

³⁰ *Conner v. New York*, 2 Sandf. 370; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730; *People v.*

Tieman, 30 Barb. 193; *Dolan v. Mayor*, 68 N. Y. 274, 23 Am. Rep. 168; *McVeany v. Mayor*, 80 N. Y. 185, 36 Am. Rep. 600; *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 131; *Dorsey v. Smith*, 28 Cal. 21; *Hunter v. Chandler*, 45 Mo. 452; *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Douglass v. State*, 31 Ind. 429; *Warden v. Bayfield County*, 87 Wis. 181.

³¹ *Smith v. Mayor*, 37 N. Y. 518; *Connor v. Mayor*, 5 id. 285; *Auditors v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382.

are justified, by the weight of authority, on grounds of public policy in paying to a *de facto* officer, and such payment is a good defense to an action against the public by the *de jure* officer to recover the salary after he has been placed in possession of the office.³² The public is liable for the salary due and unpaid a *de jure* officer before judgment in his favor.³³ This is the rule whether the compensation arises from fees payable from the public treasury or an annual salary payable at intervals, and whether the officer was appointed or elected.³⁴ If payment is made after notice of an adjudication against the right of the person in office the public is liable to the *de jure* officer for the amount.³⁵ Notice to the government from a corporation that it has changed its treasurer is not effective to prevent payment to the former treasurer in pursuance of a contract in his name.³⁶ Payment of a private debt due to a member of a firm to the firm of which the creditor is a member will not support a plea of payment in the absence of evidence, express or implied, that

³² *Dolan v. Mayor*, 68 N. Y. 274, 23 Am. Rep. 160; *McVeany v. Mayor*, 80 N. Y. 185, 36 Am. Rep. 600; *Auditors v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382; *Coughlin v. McElroy*, 74 Conn. 397, 409; *State v. Clark*, 52 Mo. 508; *Westberg v. Kansas*, 64 Mo. 493; *Steubenville v. Culp*, 38 Ohio St. 18, 23, 43 Am. Rep. 417; *Commissioners of Saline County v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171; *State v. Milne*, 36 Neb. 301, 19 L.R.A. 689, 38 Am. St. 724; *Shannon v. Portsmouth*, 54 N. H. 183; *Shaw v. Prina County*, 2 Ariz. 399. *Contra*, *Dorsey v. Smyth*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal. 193; *Andrews v. Portland*, 79 Me. 484; *Rasmussen v. Carbon County*, 8 Wyo. 277, 45 L.R.A. 295; *Philadelphia v. Rink* (Pa.), 2 Atl. 505.

In Tennessee the test applied is, could the person wrongfully in office compel the payment of the salary to him? The case ruled was this: A.

was elected to succeed L.; the latter obtained an injunction restraining A. and the authorities who were about to induct him into office from interfering with his enjoyment of it. The injunction was made perpetual and L. remained in possession and drew the salary. After the injunction was dissolved and A.'s title established by the appellate court, he recovered from the public the salary provided for the office and paid L. during his incumbency. The injunction did not require the officers to make payment thereof to L. *Memphis v. Woodward*, 12 Heisk. 499.

³³ *Dolan v. Mayor*, *supra*; *Comstock v. Grand Rapids*, 40 Mich. 397; *People v. Brennan*, 30 How. Pr. 417.

³⁴ *McVeany v. Mayor*, *supra*.

³⁵ *Id.*

³⁶ *Chapter of Calvary Cathedral v. United States*, 29 Ct. of Cls. 269.

the creditor has authorized the receipt of the money by the firm as his agents.³⁷

§ 232. **Pleading payment.** By the theory of common-law pleading in the action of *assumpsit*, as well as by the provisions of the modern code, payment, either full or partial, being in confession and avoidance, must be pleaded.³⁸ It cannot be proved under the general issue or general denial.³⁹ The issue in debt was upon the existence of present indebtedness; and therefore in that action the rule was different. The general issue in *assumpsit*, however, by a later practice, came to be so expanded as to materially infringe this logical rule; and it was held to embrace many defenses which admitted all the essential facts stated in the declaration, and avoided their effects by matter subsequent, including payment.⁴⁰ If the plaintiff alleges non-payment and must establish it to show a cause of action, payment may be proven under a general denial.⁴¹ Under

³⁷ Powell v. Brodhurst, [1901] 2 Ch. 160.

³⁸ Trimble v. Texarkana, etc. R. Co., 199 Mo. 44.

³⁹ In McDonald v. Place, 88 Vt. 80, it was held that while payment cannot usually be shown under the general issue without notice, yet when a case is referred, the pleadings are to be treated as adapted to the facts found, when by so doing no new cause of action is brought in.

⁴⁰ McKyring v. Bull, 16 N. Y. 297. In this case the opinion of Selden, J., interestingly and instructively discusses the subject and reviews many English cases; the conclusion reached being that the code requires the defendant to plead any new matter constituting either an entire or partial defense, and prohibits him from giving such matter in evidence upon the assessment of damages when not set up in the answer. Skipworth v. Morton, 3 Call, 234. See Edson v. Dellage, 8 How. Pr. 273. But see Hirsch v.

Caler, 21 Cal. 71; Davaney v. Eggenhoff, 43 id. 397; Conkling v. Weatherwax, 181 N. Y. 258.

In Kentucky it is settled that a partial payment on or before the day on which the debt is due may be pleaded; and full payment after the day is pleadable by statute; but the courts there have not gone so far as to sanction a plea of partial payment after the day, but have decided that it cannot be pleaded. Gearhart v. Olmstead, 7 Dana, 445; McWaters v. Draper, 5 T. B. Mon. 494; Young v. Park, 6 J. J. Marsh. 540; Craigs v. Whips, 1 Dana, 375. Nor is either partial or full payment after the day provable under the general issue. Hamilton v. Coons, 5 Dana, 317.

When the petition states facts constituting the plaintiff's claim a general denial does not present an issue authorizing the defendant to prove payment. St. Louis, etc. R. Co. v. Grove, 39 Kan. 731.

⁴¹ Pinckard v. Bramlett, 165 Ala. 327; Metzger v. Metzger, 35 App.

a general allegation of payment the defendant may, in some jurisdictions, give in evidence any facts which in law amount to payment;⁴² while in others only such facts can be shown as tend to establish a common-law or actual payment.⁴³ Under a plea of payment particular applications of payments may be shown and objections made thereto.⁴⁴ A plea of payment need not allege the amount paid, the date of payment nor the person who received it;⁴⁵ under such plea partial payment may be proven.⁴⁶ But if payment in property is relied on the answer must be specific as to its value.⁴⁷ And this is necessary in some cases where partial payment is admitted and the suit is on a contract for the payment of money. The defendant may plead a payment in excess of the admission, but should allege the amount paid and not merely that the plaintiff has been fully paid as to some or all of the items of the demand, especially where the amount payable is dependent upon another amount, also

D. C. 389; *Shore v. Powell*, 71 W. Va. 61; *Knapp v. Roche*, 94 N. Y. 329; *Quin v. Lloyd*, 41 id. 349; *McElwee v. Hutchinson*, 10 S. C. 436; *State v. Roche*, 94 Ind. 372; *Robertson v. Robertson*, 37 Ore. 339; *Marley v. Smith*, 4 Kan. 155; *State v. Peterson*, 142 Mo. 526.

⁴² *Edmunds v. Black*, 13 Wash. 490; *Bush v. Sprout*, 43 Ark. 416; *Morehouse v. Northrop*, 33 Conn. 380, 89 Am. Dec. 211; *Hart v. Crawford*, 41 Ind. 197; *Farmers' & C.'s Bank v. Sherman*, 33 N. Y. 69; *Whittington v. Roberts*, 4 T. B. Mon. 173. See *Day v. Clarke*, 1 A. K. Marsh. 521; *Columbia Digger Co. v. Rector*, 215 Fed. 618.

Under an oral plea of payment the delivery of a deed may be shown. *Dawson v. Owen*, 78 Ark. 93.

⁴³ *Lovegrove v. Christman*, 164 Pa. 390.

This doctrine is said to have no application to suits in justices'

courts. *Rider v. Culp*, 68 Mo. App. 527.

An equitable defense cannot be proven without leave and upon notice. *Steiner v. Erie Dime S. & L. Co.*, 98 Pa. 491; *Hawk v. Geddis*, 16 S. & R. 28.

In Massachusetts the discharge of a note payable in money by the delivery and acceptance of property must be the result of a subsequent and independent agreement resting upon substantial facts which the answer must set forth. *Ulsch v. Muller*, 143 Mass. 379.

⁴⁴ *Columbia Digger Co. v. Rector*, 215 Fed. 618.

⁴⁵ *Johnson v. Breedlove*, 104 Ind. 521; *Stacy v. Coleman*, 10 Ky. L. Rep. 78 (Ky. Super. Ct.).

⁴⁶ *Elm City L. Co. v. McKenzie*, 7 Conn. 1; *Keyes v. Fuller*, 9 Ill. App. 528; *State v. Roche*, 94 Ind. 372.

⁴⁷ *Choate v. Hoogstraet*, 46 C. C. A. 174, 105 Fed. Rep. 713.

traversable.⁴⁸ An allegation of the place of payment is surplusage and will not prejudice.⁴⁹ It has been held in Kentucky not necessary for a jury, when sworn on an inquiry of damages, or, indeed, on the trial of an issue, to notice credits indorsed on a note, unless under the issue of payment; but under the practice in that state whenever a note on which an action is brought is filed the courts of original jurisdiction notice it so far as to cause the clerk to note on the record all credits indorsed thereon as credits on the judgment, and this after a writ of inquiry or verdict when the jury has not noticed them.⁵⁰ Payment of a debt and costs while suit is pending for its recovery extinguishes the claim.⁵¹ Payment is an affirmative defense and must be pleaded,⁵² and with great particularity.⁵³ An accord and satisfaction must also be pleaded.⁵⁴ The defense of payment may be made to an action upon contract under an answer to a declaration in set-off alleging that if the defendant shall prove that the plaintiff ever owed the defendant the

⁴⁸ *Shipman v. State*, 43 Wis. 381.

⁴⁹ *Brown v. Gooden*, 16 Ind. 444.

⁵⁰ *Phelps v. Taylor*, 4 T. B. Mon. 170.

⁵¹ *Root v. Ross*, 29 Vt. 488.

⁵² *In re Raffo*, 217 Fed. 313; *American Slicing Machine Co. v. Kuchukian*, — Misc. (N. Y.) —, 147 N. Y. Supp. 352; *Jarvis v. Andrews*, 80 Ark. 277; *Light v. Stevens*, 159 Cal. 288; *Welles v. Colorado Nat. L. Ins. Co.*, 49 Colo. 508; *Harvey v. Denver, etc. R. Co.*, 44 Colo. 258, 130 Am. St. 120; *Florence O. & R. Co. v. First Nat. Bank*, 38 Colo. 119; *Stalker v. Hayes*, 81 Conn. 711 (unless it can be inferred as a legal conclusion from the allegations of the complaint); *International H. Co. v. Smith*, 51 Fla. 222; *Archibald v. Banks*, 203 Ill. 380; *Gas Belt T. Co. v. Ward*, 43 Ind. App. 537; *Howerton v. Augustine*, 130 Iowa 389; *Galbraith v. Starks*, 117 Ky.

915; *Lee v. Prudential L. Ins. Co.*, 203 Mass. 299; *Miller v. Snyder*, 149 Mo. App. 97; *Fuller v. Manhattan C. Co.*, 44 N. Y. Misc. 219; *Rosenthal v. Rudnick*, 84 App. Div. (N. Y.) 611; *Pickle v. Anderson*, 62 Wash. 552; *Dodrill v. Gregory*, 60 W. Va. 118; *Drake v. Drake*, 142 Wis. 602; *Gregory v. Hart*, 7 Wis. 532, 540; *Martin v. Pugh*, 23 id. 184; *Hawes v. Woolcock*, 30 id. 213; *Ros-siter v. Schultz*, 62 id. 655; *Chris-tian v. Bryant*, 102 Ga. 561; *Hander v. Baade*, 16 Tex. Civ. App. 119; *Posner v. Rosenberg*, 149 App. Div. (N. Y.) 272; *Williams v. Uzzell*, 108 Ark. 241; *Garrett v. Grisham* (Tex. Civ. App.), 156 S. W. 505. But see *Altman v. Bungay Co. of New York*, 161 App. Div. (N. Y.) 583.

⁵³ *National D. Bank v. Mawson*, 46 Pa. Super. 85.

⁵⁴ *Fogil v. Boody*, 76 Conn. 194.

amounts alleged he has paid the same in full.⁵⁵ The party alleging payment has the *onus*; and if it is claimed that payment was made in anything but money he has also the burden of proving that what was received was taken in satisfaction and at the creditor's risk.⁵⁶ Under a plea of payment the laws of the state in which the note sued upon was made may be received in evidence to show that such note was there paid and extinguished by another note.⁵⁷

§ 233. **Evidence of payment.** Possession of the evidence of debt is presumptive evidence of authority to receive payment.⁵⁸ But, as evidence of agency, the presumption ceases on the death of the principal.⁵⁹ So possession of the evidence of debt by the maker, or one who succeeds to his rights or estate, is *prima facie* evidence of payment.⁶⁰ Thus the possession of a bank check by the bank on which it is drawn is such evidence that the bank has paid it.⁶¹ The possession of a canceled

⁵⁵ *Goss v. Calkins*, 164 Mass. 546; *Sweet v. Southworth*, 125 Mass. 417.

An allegation of payment made upon information and belief is good. *First Nat. Bank v. Roberts*, 2 N. D. 195.

⁵⁶ *Essex Fertilizer Co. v. Danforth*, 111 Me. 212; *Baldwin v. Porter*, 217 Mass. 15; *Van Seeiver v. King*, 176 Mich. 605; *In re Rallo*, 217 Fed. 313; *Todd v. Guffin*, 55 Ind. App. 605; *Tonn v. Pier*, 82 N. J. 422; *Hill v. Waight*, 140 Iowa 584; *Atkinson v. Linden S. Co.*, 138 Ill. 187; *Marshall I. Bank v. Child*, 76 Minn. 173; *Griffith v. Creighton*, 61 Mo. App. 1; *Godfrey v. Crisler*, 121 Ind. 203; *Cheltenham S. & G. Co. v. Gates I. Works*, 124 Ill. 623, aff'g 23 Ill. App. 35; *Hunter v. Moul*, 98 Pa. 13, 42 Am. Rep. 610; *Brown v. Olmsted*, 50 Cal. 162; *Bradley v. Harwi*, 43 Kan. 314; *Runyon v. Snell*, 116 Ind. 164, 9 Am. St. 839; *McWilliams v. Phillips*, 71 Ala. 80; *Insurance Co. v. Dunscomb*, 108 Tenn. 724, 735, 58 L.R.A. 694.

But see *Winter v. Pollak*, — Ala. —, 66 So. 11, holding that an administrator suing for the value of services of the deceased must prove nonpayment.

⁵⁷ *Thomson-H. E. Co. v. Palmer*, 52 Minn. 174, 38 Am. St. 536.

⁵⁸ *Lochenmeyer v. Fogarty*, 112 Ill. 572; *Williams v. Walker*, 2 Sandf. Ch. 325; *Megary v. Funtis*, 5 id. 376. See § 231.

⁵⁹ *Id.*

⁶⁰ *Hill v. Buchanan*, 71 N. J. L. 301; *Dodrill v. Gregory*, 60 W. Va. 118; *Hall v. O'Brien*, 160 App. Div. (N. Y.) 851; *Gibbon v. Featherstonhaugh*, 1 Stark. 92; *Hollenberg v. Lane*, 47 Ark. 394; *Potts v. Coleman*, 67 Ala. 221; *Grimes v. Hilbiary*, 150 Ill. 141; *Smith v. Gardner*, 36 Neb. 741. When such presumption arises it is inferred that payment was made to a person authorized to receive it. *Lipscomb v. De Lanos*, 68 Ala. 592.

⁶¹ *Wilson v. Goodin, Wright*, 219.

check by the drawer who testifies that on the day of its date he made and delivered it to the payee in payment of a debt is sufficient *prima facie* proof of the payment of the amount it calls for.⁶² It is presumed, where a check payable to bearer was one day the property of A. and the following day was in the possession and apparent ownership of B., that it was delivered by A. to B. in payment of a debt, though it is not presumed that the transfer was direct.⁶³ Possession of the evidence of the indebtedness by the payee is *prima facie* proof that the debt has not been paid,⁶⁴ and if no indorsements appear it is presumed that nothing has been paid.⁶⁵ The execution and delivery of a deed which acknowledges the receipt of the purchase-money, in the absence of any other proof, is *prima facie* evidence of its payment.⁶⁶ But possession of a note by the maker is such evidence only after maturity;⁶⁷ nor is the presumption of payment from such possession rebutted by proof of the mere fact that the payee or former holder is dead.⁶⁸ The

⁶² *Patterson v. First Nat. Bank*, 73 Neb. 384. See *Bailey v. Robison*, 233 Ill. 614; *Miller v. Pratz*, 179 Ill. App. 204; *Peavy v. Hovey*, 16 Neb. 416; *Magruder v. De Haven*, 21 Ky. L. Rep. 580. See also, *R. Pierce & Son v. Davis*, 155 Ky. 270.

But possession by a debtor of a canceled check signed by him in a representative capacity is not *prima facie* evidence of payment of an individual indebtedness. *Ball v. Elliott*, — Misc. (N. Y.) —, 143 N. Y. Supp. 938.

⁶³ *Poucher v. Scott*, 98 N. Y. 422. See *Stimson v. Vroman*, 99 id. 74.

⁶⁴ *Keyes v. Fuller*, 9 Ill. App. 528; *Humpeler v. Hickman*, 13 id. 537; *Brooks v. Holt*, 65 Mo. App. 613; *Light v. Stevens*, 159 Cal. 288; *Sarraile v. Calmon*, 142 Cal. 651.

But such presumption of nonpayment is overcome by the production by the debtor of a receipt in full the genuineness of which the creditor has failed to successfully con-

trovert. *McKenzie v. Ray*, 168 Cal. 618.

⁶⁵ *Collins v. Maude*, 144 Cal. 289.

⁶⁶ *Brown v. Crown G. M. Co.*, 150 Cal. 376; *Wherley v. Rowe*, 106 Minn. 494; *Doherty v. Doherty*, 155 Mo. App. 481; *Devencenzi v. Cas-sinelli*, 28 Nev. 222; *Komp v. Raymond*, 175 N. Y. 102; *Guano Co. v. Marks*, 135 N. C. 59; *Gregory v. Huslander*, 227 Pa. 607; *Crowe v. Colbeth*, 63 Wis. 643; *Coles v. Soulsby*, 21 Cal. 47; *Kinster v. Babcock*, 26 N. Y. 378; *Clark v. Deshon*, 12 Cush. 589.

⁶⁷ *Erwin v. Shaffer*, 9 Ohio St. 43; *Baring v. Clark*, 19 Pick. 220; *McGee v. Prouty*, 9 Mete. (Mass.) 547, 43 Am. Dec. 409. See *Heald v. Davis*, 11 Cush. 319.

A note found among the maker's papers after his death is presumed to have been paid. *Brady v. Brady*, 110 Md. 656.

⁶⁸ *Larimore v. Wells*, 29 Ohio St. 13.

force of the presumption varies with the circumstances of the case in which it is sought to be applied; and the amount of evidence necessary to overcome it is for the jury.⁶⁹ A debtor's books of account are not evidence to prove payments made by him to his creditor.⁷⁰ It is otherwise as to an entry in the account books of a creditor if made when against his interest,⁷¹ and as to the books of an agent who received payment, the entry being made contemporaneously therewith.⁷²

"A bond and mortgage taken for the same debt, though distinct securities possessing dissimilar attributes and subject to remedies which are as unlike as personal actions and proceedings *in rem*, are, nevertheless, so far one that payment of either discharges both, and a release or extinguishment of either, without actual payment, is a discharge of the other, unless otherwise intended by the parties;" hence, an acknowledgment upon the record of full satisfaction of the mortgage, no mention being made of the debt or the bond, *prima facie* imports the extinguishment of the debt.⁷³

The receipt of rent for a specified period is presumptive evidence of the payment of previous rent.⁷⁴ So of board⁷⁵ and taxes.⁷⁶ So where A., in consideration of a bill of goods sold to him by B., agreed to pay the amount of the bill in discharge of certain notes signed by B. and indorsed by A., it is like evidence of the payment of a previous indebtedness of B. to A.⁷⁷ The conveyance of land to a son to whom the grantor was indebted is evidence of payment.⁷⁸

⁶⁹ Davidson v. Browning, 73 W. Va. 276, L.R.A.1915C, 976; Grimes v. Hilliary, 150 Ill. 141; Gray v. Gray, 47 N. Y. 552; Larimore v. Wells, 29 Ohio St. 13.

⁷⁰ Hess' App., 112 Pa. 168.

Such entries are competent to show payment in goods. Blackshear v. Dekle, 120 Ga. 766.

⁷¹ Van Name v. Barber, 115 App. Div. (N. Y.) 593.

⁷² Hastie v. Burrage, 69 Kan. 560.

⁷³ Fleming v. Parry, 24 Pa. 47; Seiple v. Seiple, 133 id. 460.

⁷⁴ Mercer Electric Mfg. Co. v. Connecticut Electric Mfg. Co., 87 Conn. 691; Southwestern Tel. & T. Co. v. Luckett, — Tex. Civ. App. —, 127 S. W. 856.

⁷⁵ Morrow v. Frankish, 27 Del. 534.

⁷⁶ Brewer v. Knapp, 1 Pick. 332; Attleborough v. Middleborough, 10 Pick. 378.

⁷⁷ Colvin v. Carter, 4 Ohio, 354.

⁷⁸ Heber v. Heber, 139 Wis. 472.

If a debtor is placed in an official or fiduciary relation, in which it becomes his duty to receive money, the law will in general presume payment of the debt—but the presumption may be rebutted.⁷⁹ Payment received on Sunday, though in violation of the law for the observance of that day, if it is retained, is good.⁸⁰

An indorsement of credit on an evidence of debt by the payee, within the period that raises the legal presumption of payment, is evidence for him for the purpose of repelling that presumption;⁸¹ but for that purpose it has reference to the time when such payment purports to have been made.⁸² And on indorsement on a note in the plaintiff's possession is evidence of payment.⁸³ No presumption of payment arises from the fact of long delay in prosecuting a claim because the alleged debtor had property near the creditor's place of residence if such property could not have been reached without giving a bond.⁸⁴ Though a presumption of payment arises from a delay of 20 years in instituting proceedings to collect a debt due on a specialty or judgment not subject to the statute of limitations,⁸⁵ such presumption does not arise where within the 20 years there has been a bona fide though unsuccessful attempt to make collection thereon.⁸⁶ If no obstacle has existed to bringing suit or making other demand of payment long delay in doing either raises a presumption of payment,⁸⁷ unless the relation between

⁷⁹ *Wilson v. Wilson*, 17 Ohio St. 150, 91 Am. Dec. 125. See § 222.

⁸⁰ *Johnson v. Willis*, 7 Gray, 164; *Shields v. Klopff*, 70 Wis. 69; *Jameson v. Carpenter*, 68 N. H. 62.

⁸¹ *Dabney v. Dabney*, 2 Rob. (Va.) 622, 40 Am. Dec. 761.

But in Missouri it has been held that marking a note "paid" will not raise a prima facie presumption of payment. *Powell v. Blow*, 34 Mo. 485; *Commercial Bank of Boonville v. Varnum*, 176 Mo. App. 78.

⁸² *Hayes v. Morse*, 8 Vt. 313.

⁸³ *Iberia C. Co. v. Christen*, 112 La. 451.

⁸⁴ *Ludwig v. Blackshere*, 102 Iowa, 366. See *McAllister v. Chambers*, 71 Wash. 521.

⁸⁵ *Parsons v. Cannon's Ex'r*, 27 Del. 298; *Farmers' Bank v. Leonard*, 4 Har. 536; *Maxwell v. De Valinger*, 2 Pennewill, 504.

⁸⁶ *James v. Jarrett*, 17 Pa. 370; *In re Miller's Estate*, 243 Pa. 328.

⁸⁷ *Love v. Love*, 72 Kan. 658; *Elliott v. Capital City S. Bank*, 149 Iowa, 309; *Holway v. Sanborn*, 145 Wis. 151; *Kuhn v. Bercher*, 114 La. 602; *Dowling v. Hastings*, 211 N. Y. 199.

the parties is one of social intimacy with a view to marriage.⁸⁸ In England "where a person serves in the capacity of a domestic servant, and no demand for the payment of wages is made by the servant for a considerable period after such service has terminated, the inference is either that the wages have been paid, or that the service was performed on the footing that no payment was to be made."⁸⁹ This doctrine is fully recognized in Pennsylvania.⁹⁰

No presumption of payment for services arises because the person to whom they were rendered paid the plaintiff for board.⁹¹ In connection with failure to demand the payment of a note, the neglect to return any credits for taxation is to be considered.⁹² Whenever the presumption of payment arising from lapse of time comes into operation it increases in strength year by year.⁹³ Such presumption, whether arising from lapse of time,⁹⁴ or the continued possession by a mortgagor of the premises in question⁹⁵ is rebuttable, and the course of dealing between the parties may be shown for the purpose of overcoming it.⁹⁶

SECTION 2.

APPLICATION OF PAYMENTS.

§ 234. **General rule.** The general rule on this subject is that a debtor paying money to a creditor to whom he owes several debts may appropriate it to which he pleases. In the absence of an appropriation by the debtor the creditor has a right to make the application. If both omit to make an appropriation the law will apply it according to the justice and

⁸⁸ *Schrader v. Beatty*, 206 Pa. 184.

⁸⁹ *Sellen v. Norman*, 4 C. & P. 80; *Gough v. Findon*, 7 Ex. 49.

⁹⁰ *Taylor v. Beatty*, 202 Pa. 120, 125; *Winfield v. Beavers T. Co.*, 229 Pa. 530; *Hatfield's Est.*, 50 Pa. Super. 450.

⁹¹ *Fry v. Fry*, 119 Mo. App. 476.

⁹² *Norton v. Ailen*, 134 Ga. 21.

⁹³ *Cannon v. Hileman*, 229 Pa.

414.

⁹⁴ *Swinley v. Force*, 78 N. J. Eq.

52.

⁹⁵ *Jenkins v. Andover Theological Seminary*, 205 Mass. 376.

⁹⁶ *Shuman's Est.*, 45 Pa. Super.

587.

equity of the case.⁹⁷ That some of the claims are secured is immaterial so far as the right of either party to make the application is concerned.⁹⁸

§ 235. **By debtor.** The right of the debtor who makes a voluntary payment to direct how it shall be applied is absolute if he signifies his election at the time of making it⁹⁹ or at any time

⁹⁷ *P. Ballantine & Sons v. Fenn*, 88 Vt. 166; *French v. Richardson*, 167 N. C. 41; *Columbia Digger Co. v. Rector*, 215 Fed. 618; *Hall v. Nix*, 156 Ala. 423; *National Bank v. Bigler*, 83 N. Y. 51; *Wetherell v. Joy*, 40 Me. 325; *Thayer v. Denton*, 4 Mich. 192; *Hall v. Constant*, 2 Hall, 185; *Baker v. Stackpoole*, 9 Cow. 420, 18 Am. Dec. 508; *Parker v. Green*, 8 Metc. (Mass.) 137; *Truscott v. King*, 6 N. Y. 147; *Stewart v. Hopkins*, 30 Ohio St. 502; *McDaniel v. Barnes*, 5 Bush 183; *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153; *Bosley v. Porter*, 4 J. J. Marsh. 621; *Reed v. Boardman*, 20 Pick. 441; *Shaw v. Picton*, 4 B. & C. 715; *Scott v. Fisher*, 4 T. B. Mon. 387; *Bayley v. Wynkoop*, 10 Ill. 449; *Nutall v. Brannin*, 5 Bush, 11; *Hall v. Marston*, 17 Mass. 575; *Goddard v. Cox*, 2 Str. 1194; *Peters v. Anderson*, 5 Taunt. 596; *Bosanquet v. Wray*, 6 id. 597; *Brooke v. Enderby*, 2 B. & B. 70; *Bodenham v. Purchas*, 2 B. & Ald. 39; *Brady v. Hill*, 1 Mo. 315; *Sprinkle v. Martin*, 72 N. C. 92; *Dent v. State Bank*, 12 Ala. 275; *Wooten v. Buchanan*, 49 Miss. 386; *Hamilton v. Benbury*, Mart. & Hayw. 586; *James v. Malone*, 1 Bailey, 334; *Mills v. Kellogg*, 7 Minn. 469; *Bobe v. Stickney*, 36 Ala. 492; *Dennis v. McLaurin*, 31 Miss. 606; *Gaston v. Barney*, 11 Ohio St. 506; *Jones v. Smith*, 22 Mich. 360; *Waterman v. Younger*, 49 Mo. 413; *Starrett v. Barber*, 20 Me. 457; *Irwin v. Panlett*, 1 Kan. 418; *Pearl v. Clark*,

2 Pa. 350; *Moorehead v. West Branch Bank*, 3 W. & S. 550; *Selleck v. Sugar Hollow T. Co.*, 13 Conn. 459; *Whetmore v. Murdock*, 3 Woodb. & M. 390; *Dulles v. De Forest*, 19 Conn. 190; *Souder v. Schechterly*, 91 Pa. 83; *Clarke v. Scott*, 45 Cal. 86; *Hargroves v. Cooke*, 15 Ga. 321; *Haynes v. Nice*, 100 Mass. 327; *Cardinell v. O'Dowd*, 43 Cal. 586; *Putnam v. Russell*, 17 Vt. 54, 42 Am. Dec. 478; *Robson v. McKoin*, 18 La. Ann. 544; *Early v. Flannery*, 47 Vt. 253; *Holmes v. Pratt*, 34 Ga. 558; *McMillan v. Grayston*, 83 Mo. App. 425; *Underhill v. Wynkoop*, 15 Pa. Super. Ct. 230; *Burnett v. Sledge*, 129 N. C. 114.

⁹⁸ *Post-Intelligencer Pub. Co. v. Harris*, 11 Wash. 500; *Wood v. Callaghan*, 61 Mich. 402, 1 Am. St. 597; *Arbuckles v. Chadwick*, 146 Pa. 393.

⁹⁹ *Benton-Shingler Co. v. Mills*, 13 Ga. App. 632; *Remm v. Landon*, 44 Ind. App. 430; *Sparks v. Jasper County*, 213 Mo. 218; *Lincoln v. Lincoln St. R. Co.*, 67 Neb. 469; *Lee v. Manley*, 154 N. C. 244; *Mulherin v. Stansell*, 70 S. C. 568; *Carrson v. Cook County L. Co.*, 37 Okla. 12; *Eppinger v. Kendrick*, 114 Cal. 620; *Longworth v. Aslin*, 106 Mo. 155; *Brown v. Brown*, 124 Mo. 79; *Koch v. Roth*, 150 Ill. 212, 226; *Aderholt v. Embry*, 78 Ala. 185; *McCurdy v. Middleton*, 82 id. 131; *Baldwin v. Flash*, 59 Miss. 61; *Miles v. Ogden*, 54 Wis. 573; *Long v. Miller*, 93 N. C. 233; *Libby v.*

before application of it has been made by the creditor.¹ The debtor will not lose that right unless he has an opportunity to exercise it and neglects to do so.² The rule is the same in respect to a partial payment accepted by the creditor.³ The direction of the debtor may be inferred from circumstances, and if his intention can thus be shown it is of the same force as though it had been expressed.⁴ The intention to appropriate a payment to a particular debt may be collected from the nature of the transaction, and be referred to the jury as a question of fact.⁵ Thus, where two charges of unequal amounts exist, one

Hopkins, 104 U. S. 303, 26 L. ed. 769; Washington N. G. Co. v. Johnson, 123 Pa. 576; Bray v. Crain, 59 Tex. 649; Robinson v. Doolittle, 12 Vt. 246; Wendt v. Ross, 33 Cal. 650; Gaston v. Barney, 11 Ohio St. 506; Selleck v. Sugar Hollow T. Co., 13 Conn. 453; Reynolds v. McFarlane, 1 Overt. 488; McDaniel v. Barnes, 5 Bush, 183; Parks v. Ingram, 22 N. H. 283, 55 Am. Dec. 153; Bosley v. Porter, 4 J. J. Marsh. 621; Parker v. Green, 8 Mete. (Mass.) 144; Mann v. Marsh, 2 Cal. 99; Trotter v. Grant, 2 Wend. 413; Allen v. Culver, 3 Denio 284; Van Rensselaer v. Roberts, 5 id. 470; Walther v. Wetmore, 1 E. D. Smith 7; Pattison v. Hull, 9 Cow. 747; Baker v. Stackpoole, id. 420, 18 Am. Dec. 508; Webb v. Dickinson, 11 Wend. 62; Stone v. Seymour, 15 id. 19.

Payments made by an agent to his principal's creditor after the death of the principal cannot be applied to the discharge of indebtedness existing before his death in a proceeding against the testator's estate, at least when the estate is insolvent. Gifford v. Thomas' Est., 62 Vt. 34.

Under the Louisiana code a debtor who has the opportunity of ascertaining that his creditor has made

an application cannot, after failing to avail himself of the right to object thereto and allowing a long time to pass, be heard to ask for a different application. Baker v. Smith, 44 La. Ann. 925.

¹ Lynn v. Bean, 141 Ala. 236; Petty v. Dill, 53 Ala. 645.

² Jones v. Williams, 39 Wis. 300; Waller v. Lacy, 1 M. & G. 54.

³ Gaston v. Barney, 11 Ohio St. 506; Wetherell v. Joy, 40 Me. 325.

⁴ Smith v. Mould, 87 Misc. (N. Y.) 199; French v. Richardson, 167 N. C. 41; P. Ballantine & Sons v. Fenn, 88 Vt. 166; Cavanaugh v. Marble, 80 Conn. 389, 15 L.R.A. (N.S.) 127; Snell v. Cottingham, 72 Ill. 124; Tayloe v. Sandiford, 7 Wheat. 13; Mayor v. Patten, 4 Cranch, 317, 2 L. ed. 633; Terhune v. Colton, 12 N. J. Eq. 233, 312; Howland v. Rench, 7 Blackf. 236; Mitchell v. Dall, 2 Har. & G. 159; Robinson v. Doolittle, 12 Vt. 246; Shaw v. Pieton, 4 B. & C. 715; Scott v. Fisher, 4 T. B. Mon. 387; Keane v. Branden, 12 La. Ann. 20; Smuller v. Union C. Co., 37 Pa. 68; Lanten v. Rowan, 59 N. H. 215; Roakes v. Bailey, 55 Vt. 542; Bray v. Crain, 59 Tex. 649; Hansen v. Romsavell, 74 Ill. 238; Plain v. Roth, 107 id. 588.

⁵ Pritchard v. Comer, 71 Ga. 18;

legal and the other illegal, the former not due, and a general payment of an amount not in excess of the illegal claim is made on account, it was held to have been paid upon that claim although there was no direction given.⁶ And so where a payment is made to a creditor who holds an original claim against the debtor, of which the latter has knowledge, and also claims which have been purchased without the debtor's knowledge, it will be presumed that the payment was intended to be applied upon the former.⁷ If the debtor, at the time of making the payment, makes an entry in his own book, stating that it is upon a particular demand, and shows the entry to the creditor it is a sufficient appropriation.⁸ The fact of the entries being made must be communicated to the debtor,⁹ unless the right to make them was exercised pursuant to a previous direction.¹⁰ The proper time to direct the application of the proceeds of personal property delivered or consigned to a licensee for sale is when the delivery or consignment is made.¹¹

But this right of the debtor to elect to which of several debts a payment shall be applied is confined to voluntary payments; it does not extend to moneys collected by legal process.¹² The

West Branch Bank v. Morehead, 5 W. & S. 542; *Morehead v. West Branch Bank*, 3 id. 550.

Paying money on account, without specifying any particular account, is not an application of it, the payer owing the creditor on more than one account. *Orr v. Nagle*, 87 Hun, 12.

⁶ *Caldwell v. Wentworth*, 14 N. H. 431; *Frazer v. Bunn*, 8 C. & P. 704; *Dorsey v. Wayman*, 6 Gill, 59. See *McCarty v. Gordon*, 16 Kan. 35.

⁷ *Holley v. Hardeman*, 76 Ga. 328; *Moose v. Marks*, 116 N. C. 785.

⁸ *Frazer v. Bunn*, 8 C. & P. 704.

⁹ *Reiss v. Scherner*, 87 Ill. App. 84.

¹⁰ *First Nat. Bank v. Roberts*, 2 N. D. 195.

¹¹ *Bell v. Bell*, 20 S. C. 34; *Frost Suth. Dam. Vol. I.*—45.

v. Weathersbee, 23 id. 368; *Baum v. Trantham*, 42 id. 104, 46 Am. St. 697.

The same right exists in the debtor to direct the application of payments made by services as if they were made in money, and such direction may be given when the contract for the services was made. *Carson v. Cook County L. Co.*, 37 Okla. 12.

¹² *Kinckad v. Peet*, 164 Iowa, 65; *Citizens' Sav. Bank v. Wood*, 134 Iowa, 232; *Blackstone Bank v. Hill*, 10 Pick. 129; *Barrett v. Lewis*, 2 id. 123; *Wooten v. Buchanan*, 49 Miss. 386; *Forelander v. Hicks*, 6 Ind. 448; *Nichols v. Knowles*, 3 McCrary 477, 17 Fed. 494; *Monson v. Meyer*, 190 Ill. 105, aff'g 92 Ill. App. 127; *Blair v. Teel* (Tex. Civ. App.), 152 S. W. 878.

right of the debtor to so direct, however, cannot be defeated by the creditor obtaining possession of the debtor's funds without his consent, except by legal proceedings binding upon him. Where a debtor intrusted funds to an agent with directions to apply them by way of compromise in satisfaction of two demands held against him by the same person, and the creditor, knowing this fact, levied an attachment on the money so confided to the agent and also on the money of the agent, and thereupon the latter, to regain possession of his own money, assented, under protest, to the application of the debtor's money to one of the debts which was unsecured, it was not binding upon the debtor, and he was allowed, when afterwards sued, to apply it to either at his option.¹³ So where a surety sends money by the principal to the creditor and such principal so informs the creditor, they can make no other application than that directed by the surety.¹⁴

Where money is paid by the principal debtor a surety cannot interfere to control the application contrary to the intention of the party paying.¹⁵ Nor can subsequent incumbrancers or other third parties control the application of moneys made by the parties.¹⁶ But sureties on official bonds will not be rendered liable as for defalcation by application of funds received in their time to cancel prior balances or defalcations.¹⁷ Nor will an intention of the principal debtor to apply a payment in favor of a surety be presumed, and thus exclude the right

¹³ *Dennis v. McLaurin*, 31 Miss. 606; *Pearl v. Clark*, 2 Pa. 350.

¹⁴ *Reed v. Boardman*, 20 Pick. 441. See *Lansdale v. Graves*, Sneed, 215.

¹⁵ *Mathews v. Switzler*, 46 Mo. 301; *Gaston v. Barney*, 11 Ohio St. 506; *Field v. Holland*, 6 Cranch 8, 3 L. ed. 136; *Allen v. Jones*, 8 Minn. 202; *Halsted v. Griefen*, 173 Ill. App. 551.

¹⁶ *Kline v. Miller*, 107 Va. 453; *Richardson v. Washington Bank*, 3 Mete. (Mass.) 536; *Mills v. Kellogg*, 7 Minn. 469. But see *Green v. Tyler*, 39 Pa. 361.

¹⁷ In *United States v. Eckford*, 1 How. 250, 11 L. ed. 120; *McLean, J.*, said: "The treasury officers are the agents of the law. It regulates their duties, as it does the duties and rights of the collector and his sureties. The officers of the treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current, in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the right of sureties.

of the creditor to make the application.¹⁸ The right of a debtor to apply money regardless of his surety exists only where the payment is made by his own funds free from any equity in favor of the surety to have the application made in payment of the debt for which he is liable. Where the specific money paid to the creditor and applied on a debt of the principal, for which the surety is not held, is the money for the collection and payment of which the surety is bound the latter is entitled to have the money applied to the payment of the debt for which he is surety unless the creditor shows a superior equity to sustain the application made. The surety has the burden

The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires. And in the faithful performance of this trust the parties have a direct interest, and their rights cannot be disregarded. It is true, as argued, if the collector shall misapply the public funds, his sureties are responsible. But that is not the question under consideration. The collector does not misapply the funds in his hands, but pays them over to the government without any special direction as to their application. Can the treasury officers say, under such circumstances, that the funds currently received and paid over shall be appropriated in discharge of a defalcation which occurred long before the sureties were bound for the collector, and by such appropriation hold the sureties bound for the amount? The statement of the case is the best refutation of the argument. It is so unjust to the sureties, and so directly in conflict with the law and its policy, that it requires but little consideration." *Jones v. United States*, 7 How.

681, 12 L. ed. 870; *Boody v. Same*, 1 Woodb. & M. 150; *Postmaster-General v. Norvell*, Gilpin, 106; *United States v. January*, 7 Cranch, 572, 3 L. ed. 443; *Seymour v. Van Slyck*, 8 Wend. 403; *Stone v. Seymour*, 15 id. 19; *United States v. Linn*, 2 McLean, 501; *State v. Smith*, 26 Mo. 226, 72 Am. Dec. 204, holds that if the officer receiving the payment knew that the money was derived from current collections the state cannot apply it to the injury of sureties upon the current bond. It is said in *First Nat. Bank v. National S. Co.*, 130 Fed. 401, 64 C. C. A. 601, 66 L.R.A. 777, that the cases cited are in conflict with *Gwynne v. Barnes*, 7 Cl. & F. 571; *State v. Sooy*, 39 N. J. L. 538; *Seymour v. Van Slyck*, 8 Wend. 403; *Stone v. Seymour*, 15 id. 19, and *Sandwich v. Fish*, 2 Gray, 208.

¹⁸ *Smith's Mere. L.* 672; *Plomer v. Long*, 1 Stark. 153; *Hargroves v. Cooke*, 15 Ga. 321; *Clark v. Burdett*, 2 Hall, 197; *James v. Malone*, 1 Bailey, 334. See *Lansdale v. Graves*, Sneed, 215; *Gard v. Stevens*, 12 Mich. 292, 86 Am. Dec. 52.

of showing that the application made is inequitable to him.¹⁹ The absolute right of directing the application of payments which a debtor has does not pass to his personal representatives; nor does it pertain to any one making payments in a fiduciary capacity.²⁰ If the terms of an express trust do not determine the order of payments, their order, it is believed, must be fixed by law.

A series of cases in Pennsylvania have dealt with the right of members of building and loan associations to direct the application of payments made to the latter. Originally it was determined that all payments were to be credited to the debt created by the loan made to the member.²¹ But this doctrine was qualified and is not to be regarded as laying down the rule that payment of dues on the stock, *ipso facto*, works an extinguishment of so much of the mortgage. "The debtor may so apply it, but the payment itself is not an application of the money to the reduction of the mortgage."²² The right of the debtor to direct the application of the payments on the stock to the extinguishment of the debt is now recognized if the rights of creditors, based on the assignment of the stock, are not affected,²³ or legal process has not been resorted to or insolvency has not intervened.²⁴ An application made at the inception of the contract for the loan cannot be subsequently

¹⁹ Merchants' Ins. Co. v. Herber, 68 Minn. 420.

A surety may insist upon the application of the very moneys for the collection and payment of which he is bound in discharge of the liability assumed. Crane Co. v. Pacific H. & P. Co., 36 Wash. 95.

²⁰ Putnam v. Russell, 17 Vt. 54, 42 Am. Dec. 478; Barrett v. Lewis, 2 Pick. 123; Cole v. Trull, 9 id. 325.

But in Marshall v. Nagel, 1 Bailey, 308, it was held that if a debtor pays a sum of money on account of distinct debts due to different creditors to a common agent of all and gives no directions as to

the order in which the money is to be applied the agent may make the application according to his discretion and the debtor will be bound by it. Carpenter v. Goin, 19 N. H. 479.

²¹ Kupfert v. Guttenberg B. Ass'n, 30 Pa. 465; Hughes's App., id. 471.

²² Building Ass'n v. Sutton, 35 Pa. 463, 78 Am. Dec. 349.

²³ Wadlinger v. Washington German B. & L. Ass'n, 153 Pa. 622.

²⁴ Strohen v. Franklin S. & L. Ass'n, 115 Pa. 273; York Trust, R. E. & D. Co. v. Gallatin, 186 Pa. 150.

interfered with.²⁵ Where a borrowing member of such an association gives it his obligation for the payment of the principal debt in equal monthly instalments until the whole is paid according to the statute and the rules of the association, such instalments cannot be appropriated to a direct payment on account of the loan with the effect of leaving dues on the stock unpaid.²⁶

§ 236. Same subject. An agreement between debtor and creditor for a particular application of moneys expected from a specific source will preclude any diversion by either, without the consent of the other, when the money is received.²⁷ Thus, where money is realized by a creditor from a collateral security for a debt, such money is deemed appropriated to that debt.²⁸ The plaintiff, an equitable mortgagee for 600*l.*, lent the title deeds of the property to the defendant E, the mortgagor, to enable him to negotiate a sale of it, the deeds to be

²⁵ York, etc. Co. v. Gallatin, *supra*.

²⁶ Freemansburg B. & L. Ass'n, v. Watts, 199 Pa. 221.

²⁷ Van Buren County Sav. Bank v. Sterling W. M. Co., 125 Iowa, 645; Planters' State Bank v. Schlamp, 124 Ky. 295; Thompson v. Hudson, L. R. 6 Ch. 320; Lansdale v. Mitchell, 14 B. Mon. 348; Hughes v. McDougle, 17 Ind. 399; King of Spain v. Oliver, Pet. C. C. 276; Sproule v. Samuel, 5 Ill. 135; Stackpole v. Keay, 45 Me. 297; Gwathney v. McLane, 3 McLean, 371; White v. Toles, 7 Ala. 569; Smith v. Wood, 1 N. J. Eq. 74; Hahn v. Geiger, 96 Ill. App. 104; Hansen v. Rounsavell, 74 Ill. 238. See § 235, last paragraph.

In *Ross v. Crane*, 74 Iowa, 375, the purchaser of a note and mortgage agreed with their maker in writing to employ him and apply his wages in payment of the mortgage debt. After money enough had been earned to pay the mort-

gage the holder applied the amount to another account and assigned the security and the note to a third person. The agreement was binding and the debt to have been satisfied before the assignment was made.

²⁸ *Howard v. Schwartz*, 22 Tex. Civ. App. 400; *Caldwell v. Hall*, 49 Ark. 508; *Strickland v. Hardie*, 82 Ala. 412; *Greer v. Turner*, 47 Ark. 17; *Pritchard v. Comer*, 71 Ga. 18; *Hatcher v. Comer*, 73 id. 418; *Taylor v. Cockrell*, 80 Ala. 236; *Marzion v. Pioche*, 8 Cal. 522; *Buckley v. Garrett*, 47 Pa. 280; *Sanford v. Clark*, 29 Conn. 457; *Masten v. Cummings*, 24 Wis. 623; *Cross v. Johnson*, 30 Ark. 396; *McCune v. Belt*, 45 Mo. 174; *Paine v. Bouney*, 6 Abb. Pr. 99; *Donally v. Wilson*, 5 Leigh, 329; *Windsor v. Kennedy*, 52 Miss. 164; *Hicks v. Bingham*, 11 Mass. 300; *Hall v. Marston*, 17 Mass. 575. See *Green v. Ford*, 79 Ga. 130; *Baum v. Frantham*, 24 S. C. 104.

returned. E. paid plaintiff 300*l.* received by him as part of the purchase-money; afterwards E. became bankrupt. Before such payment was made E. was indebted to the plaintiff on a trade account for a larger amount. E. made no application of the 300*l.* he paid, and the plaintiff contended that he might apply it to the trade account, thus leaving the mortgage undischarged. This contention was disapproved of, it being inferable from the nature of the transaction that E. made the payment only in respect to the plaintiff's right to the mortgage, and that it must, from the circumstances, be understood that the payer meant the money to be applied toward the satisfaction of the mortgage.²⁹ If money is advanced by a factor to purchase property, upon the security of its being shipped to him, it will be implied that the advances were made upon the condition that they should be paid out of the proceeds of the property; after the factor has obtained possession of it the debtor cannot direct the application of the amount realized from it to another debt.³⁰ But the agreement to control the debtor's choice must be such as to give the creditor a right in the nature of a lien which can be specifically enforced.³¹

Where the debtor has directed the application of his payment to a particular debt, he has a right to treat it as actually so applied. The debt will be deemed extinguished to the extent of such payment.³² The creditor has no option to disregard the direction,³³ and no different application by him will avail unless afterwards ratified or acquiesced in by the debtor;³⁴

²⁹ *Young v. English*, 7 Beav. 10; *Buster v. Holland*, 27 W. Va. 510, 533; *Illinois T. & S. Bank v. Stewart L. Co.*, 119 Wis. 54. See *Stoveld v. Eade*, 4 Bing. 154; *Waters v. Tompkins*, 2 Cr., M. & R. 273; *Pearl v. Deacon*, 24 Beav. 186.

³⁰ *Frost v. Weathersbee*, 23 S. C. 354.

³¹ *Whitney v. Traynor*, 74 Wis. 289; *Stewart v. Hopkins*, 30 Ohio St. 502. See *Mellendy v. Austin*, 69 Ill. 15; *Clarke v. Scott*, 45 Cal. 86.

³² *Libby v. Hopkins*, 104 U. S.

303, 26 L. ed. 769; *Washington N. G. Co. v. Johnston*, 123 Pa. 576; *Lauten v. Rowan*, 59 N. H. 215; *Irwin v. Paulett*, 1 Kan. 418.

³³ *Runyon v. Latham*, 5 Ired. 551; *Wetherell v. Joy*, 40 Me. 325; *Scott v. Fisher*, 4 T. B. Mon. 387; *Blanton v. Rice*, 5 id. 253; *Rugeley v. Smalley*, 12 Tex. 238; *Farmers, etc. Bank v. Franklin*, 1 La. Ann. 393; *Stewart v. Hopkins*, 30 Ohio St. 502; *Bank v. Carpenter*, 7 Ohio, 21, 28 Am. Dec. 616.

³⁴ *Sherwood v. Haight*, 26 Conn. 432; *Jackson v. Bailey*, 12 Ill. 159;

nor will the direction of the latter be overruled or changed in equity.³⁵ After a debtor has made application of a payment he cannot himself revoke it, and apply it otherwise, without the creditor's consent.³⁶ He will be held to the application made, though it was made for interest on a debt not bearing interest;³⁷ to a debt on which the statute of frauds does not allow an action to be brought;³⁸ or to an illegal claim.³⁹ But where usurious interest has been paid it is deemed an extortion and the payment may be recovered or applied to the principal debt.⁴⁰

Forelander v. Hicks, 6 Ind. 448; Semmes v. Boykin, 27 Ga. 47; Hall v. Marston, 17 Mass. 575; Solomon v. Dreschler, 4 Minn. 278; Tayloe v. Sandiford, 7 Wheat. 13, 20 L. ed. 384; Bonaffe v. Woodberry, 12 Pick. 463; Hussey v. Manufacturers' etc. Bank, 10 Pick. 415; Bloodworth v. Jacobs, 2 La. Ann. 24; Adams v. Bank, 3 id. 351; Robson v. McKoin, 18 id. 544; Treadwell v. Moore, 34 Me. 112; Black v. Shooler, 1 McCord, 293; Martin v. Draher, 5 Watts, 544; Mitchell v. Dall, 2 Har. & G. 159; McDonald v. Pickett, 2 Bailey 617; Reed v. Boardman, 20 Pick. 441; McKee v. Stroup, 1 Rice, 291; Moorehead v. West Branch Bank, 3 W. & S. 550; Jones v. Perkins, 29 Miss. 139; Smith v. Wood, 1 N. J. Eq. 74; Cardinell v. O'Dowd, 43 Cal. 586. See Bird v. Benton, 127 Ga. 371.

Mere failure of the debtor to object to an application made otherwise than in accordance with his directions will not amount to ratification of such application. P. Balantine & Sons v. Fenn, 88 Vt. 166.

³⁵ Selfridge v. Northampton Bank, 8 W. & S. 320.

It has been held that the debtor cannot impute a payment to principal when interest is due thereon without first paying the interest. Johnson v. Robbins, 20 La. Ann. 569. This may be doubted if the

creditor receives the money. Unless the interest was due as damages it might, notwithstanding, be recovered. See Williams v. Houghtaling, 3 Cow. 86; Pindall v. Bank, 10 Leigh, 484.

³⁶ Riverside Milling & Power Co. v. Bank of Cartersville, 141 Ga. 578; Long v. Miller, 93 N. C. 233; York Trust, R. E. & D. Co. v. Galatin, 186 Pa. 150.

³⁷ Beard v. Brooklyn, 31 Barb. 142.

³⁸ Haynes v. Nice, 100 Mass. 327, 1 Am. Rep. 109.

³⁹ Tomlinson C. Co. v. Kinsella, 31 Conn. 268; Hubbell v. Flint, 15 Gray, 550; Dorsey v. Wayman, 6 Gill, 59; Richardson v. Woodbury, 12 Cush. 279; Feldman v. Gamble, 26 N. J. Eq. 494; Caldwell v. Wentworth, 14 N. H. 431. See Plummer v. Erskine, 58 Me. 59; Mueller v. Wiebracht, 47 Mo. 468.

A debtor may direct the application of a payment upon an illegal item of the account against him, neither party believing it to be illegal, and the transaction involving it not being *malum in se*, but *malum prohibitum*. Johnston v. Dahlgren, 48 App. Div. (N. Y.) 537, 166 N. Y. 354.

⁴⁰ Wood v. Lake, 13 Wis. 84, and cases cited; Gill v. Rice, id. 549; Lee v. Peckham, 17 id. 383; Fay v. Lovejoy, 20 id. 403; State Bank v.

A different rule prevails in Ohio,⁴¹ in the District of Columbia,⁴² and in Illinois.⁴³ By mutual consent of the debtor and creditor, where no other parties are interested, the application of a payment may be changed; and in that case the indebtedness first discharged will be revived by implication, without any express promise.⁴⁴ If there are other parties interested as a surety,⁴⁵ co-debtor,⁴⁶ or a subsequent incumbrancer,⁴⁷ their consent is essential;⁴⁸ but a debtor's general creditor cannot be heard to complain.⁴⁹

Ensminger, 7 Blackf. 105; Smead v. Green, 5 Ind. 308; Browning v. Morris, 2 Cow. 790; Smith v. Bromley, 2 Doug. 695, note; Williams v. Hedley, 8 East, 378; Wheaton v. Hibbard, 20 Johns. 290, 11 Am. Dec. 284; Burrows v. Cook, 17 Iowa, 436; Stanley v. Westrop, 16 Tex. 200; Parchman v. McKinney, 12 Sm. & M. 631. See Second Nat. Bank v. Fitzpatrick, 23 Ky. L. Rep. 610; Citizens' Nat. Bank v. Forman, 23 Ky. L. Rep. 613.

In an action to recover payments made on account of usury the application to the principal debt will be made as of the date of the writ, if the party who made them so requests. Peterborough Sav. Bank v. Hodgdon, 62 N. H. 300.

⁴¹ See Conant v. Seneca County Bank, 1 Ohio St. 298; Shelton v. Gill, 11 Ohio, 417; Graham v. Cooper, 17 id. 605; Williamson v. Cole, 26 Ohio St. 207.

⁴² Kendall v. Vanderlip, 2 Mackey, 105.

⁴³ Drake v. Lux, 233 Ill. 522 (under the statute usury can be interposed only as a defense.)

⁴⁴ Rundlett v. Small, 25 Me. 29.

Where by mutual agreement between a debtor and creditor an application of payment is made otherwise than in accordance with a prior agreement between them, the debtor's co-debtors, not parties

to the prior agreement nor taking part in the payment and application thereof have no cause for complaint. Riverside Milling & Power Co. v. Bank of Cartersville, 141 Ga. 578.

⁴⁵ P. Ballantine & Sons v. Fenn, 88 Vt. 166; Columbia Digger Co. v. Rector, 215 Fed. 618; Brockschmidt v. Hagebusch, 72 Ill. 562; Ruble v. Norman, 7 Bush 532; Ware v. Otis, 8 Me. 387.

⁴⁶ Thayer v. Denton, 4 Mich. 192; Miller v. Montgomery, 31 Ill. 350; Brown v. Brabham, 3 Ohio, 275.

⁴⁷ Chancellor v. Schott, 23 Pa. 68; Tooke v. Bonds, 29 Tex. 419.

⁴⁸ In a suit to foreclose a mortgage which the defendant alleged had been paid, the plaintiff proved an agreement to change the appropriation of the payments, previously stipulated to be applied to the mortgage debt, to another debt. Held, that the defendant might then prove that the agreement to change the appropriation was made after he had applied for the benefit of the insolvent laws, and was therefore invalid. Richmond I. Works v. Woodruff, 8 Gray, 447. See Cremer v. Higginson, 1 Mason, 323; Bank v. Meredith, 2 Wash. C. C. 47.

⁴⁹ Whitney v. Traynor, 74 Wis. 289.

§ 237. **Same subject; evidence.** Parol evidence is admissible to show that at the time a note was given for money lent an agreement was made to pay a certain sum as extra interest and that all the payments made were for such interest and not upon the note.⁵⁰ A copy of a letter addressed by a creditor to his debtor, contained in the letter book of the former, advising the debtor that he had drawn on him for the amount of a particular purchase is not evidence for such creditor in an action against a guarantor to establish that a payment made shortly afterwards by the debtor, who was indebted on several accounts, was made in discharge of such purchase, though the draft itself or evidence of its contents, if lost, accompanied by a letter from the debtor to the creditor regretting his inability to meet the draft and promising speedy payment of that demand, followed by a payment a few days after the date of such letter, is evidence to show that it was a payment made in discharge of that particular claim.⁵¹ The letter of a debtor, or of his acknowledged general agent to his creditor, directing him to which of two debts a payment he is about to make shall be applied, is the best evidence to show on what account such payment was received by the creditor.⁵² Such an act of the debtor in an action against his guarantor for one of the debts, where several were due, is not considered as merely the declaration of a third person, but is the act of the party who had the legal right to make the application.⁵³ The creditor's receipt is not conclusive as to a direction of the debtor concerning the application of a payment,⁵⁴ and a memorandum by a clerk of the creditor on a note is not conclusive.⁵⁵ The burden of proof as to the particular application of a payment is upon the party asserting it.⁵⁶

§ 238. **By creditor.** Where the debtor omits to make any appropriation at the time of payment the right to make the

⁵⁰ Rohan v. Hanson, 11 Cush. 44.

⁵⁵ Dollar S. & T. Co. v. Crawford,

⁵¹ Mitchell v. Dall, 2 H. & G. 159.

69 W. Va. 109, 33 L.R.A.(N.S.) 587.

⁵² Id.

⁵⁶ Van Seeiver v. King, 176 Mich.

⁵³ Id.

605.

⁵⁴ Lynn v. Bean, 141 Ala. 236.

application devolves on the creditor. But its exercise is subject to limitations. In one respect, however, it is less restricted than that of the debtor. The creditor is not required to decide at once on receiving the money. Within what time he must exercise the choice has been much discussed. The weight of opinion seems to be that he must make the application within a reasonable time, in view of the circumstances of the particular case, at the latest, before any controversy arises or any material change occurs in the relations of the parties.⁵⁷ The

⁵⁷ *Van Seeiver v. King*, 176 Mich. 605; *Jackson v. Moore* (Okla.) 134 Pac. 1114; *Boynton v. Salinger*, 147 Iowa, 537; *People v. Grant*, 139 Mich. 26; *Padgett v. Bank*, 141 Mo. App. 374; *Stone v. Pettus*, 47 Tex. Civ. App. 14; *American W. Co. v. Maaget*, 86 Conn. 234; *Compton v. Ahrens & O. Mfg. Co.*, (Tex. Civ. App.) 151 S. W. 884; *Applegate v. Koons*, 74 Ind. 347; *Robinson v. Doolittle*, 12 Vt. 246; *Mills v. Fowkes*, 5 Bing. N. C. 455; *Philpott v. Jones*, 2 Ad. & El. 41; *Smith's Merc. L.* 650; *Peters v. Anderson*, 5 Taunt. 596; *Norris v. Beaty*, 6 W. Va. 477; *Bridenbecker v. Lowell*, 32 Barb. 9; *Haynes v. Waite*, 14 Cal. 446; *Allen v. Culver*, 3 Denio, 284; *Parker v. Green*, 8 Mete. (Mass.) 144; *Whetmore v. Murdock*, 3 Woodb. & M. 390; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. ed. 199; *Backhouse v. Patton*, 5 Pet. 160, 8 L. ed. 82; *Hill v. Southerland*, 1 Wash. (Va.) 128; *Van Rensselaer v. Roberts*, 5 Denio 470; *McCartney v. Buck*, 8 Houst. 34.

In *Marsh v. Oneida Cent. Bank*, 34 Barb. 298, it was held that a bank which holds a note against one of its depositors is not bound to apply his deposits immediately when it becomes due. If not made then, and a judgment is recovered on the note, the right to make such application

is not thereby waived or lost, and the bank may afterwards avail itself of the right against an assignee of the deposit. See *Long Island Bank v. Townsend, Hill & Denio*, 204; *Mayor v. Patten*, 4 Cranch, 317, 2 L. ed. 663.

In some cases it is held that an application made after an action has been begun is too late. *Taylor v. Coleman*, 20 Tex. 772; *Sanford v. Van Arsdall*, 53 Hun 70; *Huffstater v. Hayes*, 64 Barb. 573. But it has been sustained when made after suit brought where it harmonized with the intention of the parties. *Bank v. Webb*, 48 N. Y. Super. Ct. 175. It is said in the same case (94 N. Y. 467) that the application may be made any time before the court makes it unless the debtor previously requests the creditor to exercise his right of election.

In South Carolina the creditor has until verdict or judgment to apply the payments. *Heilbron v. Bissell*, *Bailey's Eq.* *430; *Price v. Hamilton*, 12 S. C. 32; *Thatcher v. Massey*, 20 id. 542; *Baum v. Trantham*, 42 id. 104, 46 Am. St. 697. These cases are rested upon the principle that until the debtor pays the money it is his, and he has the right to control its disposition. After the creditor receives it he may exercise such right, and it con-

bringing of a suit may determine the creditor's election, as where he holds two notes and an unappropriated payment large enough to pay one of them is made, his suit on one of the notes is an election to apply the money to the payment of the other.⁵⁸ But if he brings separate suits on them he will not be allowed on the trial of one to elect to apply to the satisfaction of the other a payment previously made, and not before specially applied by either party.⁵⁹ If there is no provision given in securities, the payment of which is enforced by law, as to the application of their proceeds the creditor has no right to make an appropriation thereof,⁶⁰ unless several notes are secured and the amount realized is insufficient to pay them all.⁶¹ A stipulation in a note that if the maker became otherwise indebted to the payee before its payment the latter might apply the first payment to such claims as he chose does not include property taken by virtue of a mortgage securing such note, especially as against sureties on the latter.⁶² A creditor cannot appropriate payments after third persons have acquired rights against the debtor, so as to affect their rights if an application can be made which will protect them,⁶³ if their rights were known to the creditor.⁶⁴ In Arkansas the rule is that where there is a single running account in which third persons are not interested, and a general payment is made without applica-

tinues until the court has exerted its power over the payment.

Whenever the application is made effect must be given to it as of the time the money was received. *Poulson v. Collier*, 18 Mo. App. 583; *Bray v. Crain*, 59 Tex. 649.

⁵⁸ *Allen v. Kimball*, 23 Pick. 473; *Starrett v. Barber*, 20 Me. 457; *Bohe v. Stickney*, 36 Ala. 492; *Dent v. State Bank*, 12 Ala. 275.

⁵⁹ *Stone v. Talbot*, 4 Wis. 442.

⁶⁰ *Sengel v. Patriek*, 80 Ark. 384; *Citizens' Sav. Bank v. Wood*, 134 Iowa, 232; *Berner v. German State Bank*, 125 Iowa, 438; *Orleans County Nat. Bank v. Moore*, 112 N. Y. 543, 8 Am. St. 775, 3 L.R.A. 302;

Snider v. Stone, 78 Ill. App. 17; *Matter of Georgi*, 21 N. Y. Misc. 419.

It is said in *Sanford v. Van Arsdall*, 53 Hun, 70, 77, that payments made by a third person, who is not the debtor's agent, are not voluntary, though they were made pursuant to arrangement or understanding between the parties.

⁶¹ *Avery Mfg. Co. v. Leathers*, 130 Mo. App. 202.

⁶² *Barrett v. Bass*, 105 Ga. 421.

⁶³ *Willis v. McIntyre*, 70 Tex. 34, 8 Am. St. 574; *Lee v. Storz B. Co.*, 75 Neb. 212.

⁶⁴ *Thacker v. Bullock L. Co.*, 140 Ky. 463.

tion by the debtor the creditor has no election to make the application; the law applies the payment to the several items of the account in the order of their priority.⁶⁵

A banker is not required to apply a balance due by him on an account current to his depositor upon the liability of such customer on a note or bill. And in a suit by a banker against the acceptor of a bill the fact that the drawer had an account with the banker, and that after protest of the bill there were balances in favor of the drawer would not be evidence in favor of the acceptor to show a payment or satisfaction by the drawer.⁶⁶ The proceeds of property received by mistake in the name of one without right thereto cannot be applied to a debt owing by him.⁶⁷ A deposit made for a special purpose or under a special agreement may not be applied to a matured demand.⁶⁸ The authorities are not agreed as to the right of a bank which receives money from an agent, which is credited to him in his own name without notice of the agency, to apply it to his past due debt with his consent. It has been ruled that the mere making of the deposit authorizes the application to meet an overdraft.⁶⁹ A bank may not apply a deposit to a matured obligation of its depositor if the money was received after his death.⁷⁰ Generally an application acquiesced in by the debtor will bind him.⁷¹

If a debtor owes his creditor several debts it is generally said that the creditor may apply a payment which the debtor does not appropriate to either at his pleasure.⁷² This is not true

⁶⁵ *Hughes v. Johnson*, 38 Ark. 295; *Dunnington v. Kirk*, 57 Ark. 595.

⁶⁶ *Citizens' Bank v. Carson*, 32 Mo. 191; *Long Island Bank v. Townsend, Hill & Denio*, 204. But see *State Bank v. Armstrong*, 4 Dev. 519; *State Bank v. Locke*, id. 529; *Commonwealth v. Wathen*, 126 Ky. 573.

⁶⁷ *McLennan v. Farmers' Sav. Bank*, 131 Iowa 696, 117 Am. St. 439.

⁶⁸ *Smith v. Sanborn State Bank*, 147 Iowa 640, 30 L.R.A. (N.S.) 517.

⁶⁹ *Kimmel v. Bean*, 68 Kan. 598, 64 L.R.A. 785, 104 Am. St. 415, approving *Smith v. Des Moines Nat. Bank*, 107 Iowa 620, and disapproving *Davis v. Panhandle Nat. Bank (Tex.)* 29 S. W. 926; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756, 49 Neb. 125. The cases cited may be consulted with profit.

⁷⁰ *Padgett v. Bank*, 141 Mo. App. 374.

⁷¹ *Calvert Bank v. Katz*, 102 Md. 56.

⁷² *Payne v. Seagars*, 13 Ga. App. 101; *Hawkins v. Bouie*, 121 Md.

in an absolute and unqualified sense. He is not at liberty to apply a payment to a disputed,⁷³ contingent,⁷⁴ or unliquidated demand in preference to one admitted, absolute or certain, nor to one not due in lieu of another past due.⁷⁵ Where one debt is secured by mortgage and payment is made from the proceeds of the mortgaged property it must be applied to the extinguishment of the secured debt unless the debtor consents to a different application.⁷⁶ This rule does not govern where the mortgagor

147; *Larry v. Brown*, 153 Ala. 452; *Harper v. Concrete Pub. Co.*, 166 Mich. 429; *Giles v. Vandiver*, 91 Ga. 192; *Skinner v. Walker*, 98 Ky. 729; *Coney v. Laird*, 153 Mo. 408; *Orr v. Nagle*, 87 Hun. 12; *Burt v. Butterworth*, 19 R. I. 127; *Perry v. Bozeman*, 67 Ga. 643; *Greer v. Burnam*, 71 id. 31; *Trotter v. Grant*, 2 Wend. 413; *Robbins v. Lincoln*, 12 Wis. 1; *Peters v. Anderson*, 5 Taunt. 596; *Arnold v. Johnson*, 2 Ill. 196; *Brady v. Hill*, 1 Mo. 225; *Brewer v. Knapp*, 1 Pick. 332; *Holmes v. Pratt*, 34 Ga. 558; *Washington Bank v. Prescott*, 20 Pick. 339; *Goddard v. Cox*, 2 Str. 1194; *Allen v. Kimball*, 23 Pick. 473; *Brooke v. Enderby*, 2 B. & B. 70; *Bodenham v. Purchas*, 2 B. & Ald. 39; *Bosanquet v. Wray*, 6 Taunt. 597.

⁷³ *Stone v. Talbot*, 4 Wis. 442. See *Ayer v. Hawkins*, 19 Vt. 26; *Lee v. Early*, 44 Md. 80; *McLendon v. Frost*, 57 Ga. 448.

⁷⁴ *Baker v. Stackpoole*, 9 Cow. 420, 18 Am. Dec. 508; *Cremer v. Higginson*, 1 Mason, 338; *Whetmore v. Murdock*, 3 Woodb. & M. 390. See *Kidder v. Norris*, 18 N. H. 532; *Wright v. Laing*, 3 B. & C. 165.

⁷⁵ *McWhorter v. Blumenthal*, 136 Ala. 568; *Cain v. Vogt*, 138 Iowa, 631; *Richardson v. Coddington*, 49 Mich. 1; *Lamprell v. Bellericay Union*, 3 Ex. 283; *Baker v. Stackpoole*,

supra; *Early v. Flannery*, 47 Vt. 253; *Niagara Bank v. Rosevelt*, 9 Cow. 409; *Bohe v. Stickney*, 36 Ala. 482; *Burks v. Albert*, 4 J. J. Marsh. 97, 20 Am. Dec. 209; *Heintz v. Cahn*, 29 Ill. 308; *Bacon v. Brown*, 1 Bibb, 334, 4 Am. Dec. 640; *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153; *Cloney v. Richardson*, 34 Mo. 370; *Smith v. Applegate*, 1 Daly, 390. See *Dedham Bank v. Chickering*, 4 Pick. 314; *Gass v. Stinson*, 3 Summ. 99; *Hunter v. Osterhoudt*, 11 Barb. 33; *Ellinger v. Henderson*, 3 Miss. 449.

In *Arnold v. Johnson*, 2 Ill. 196, it is held the creditor may apply the payment to any debt he sees proper, unless there are circumstances which would render the exercise of such discretion on the part of the creditor unreasonable and enable him to work injustice to his debtor. See *Bridenbecker v. Lowell*, 32 Barb. 9; *Lindsey v. Stevens*, 5 Dana, 107.

⁷⁶ *Nolen v. Farrow*, 154 Ala. 269; *Larry v. Brown*, 153 Ala. 452, and local cases cited; *Lee v. Manley*, 154 N. C. 244.

A mortgagee who holds real estate mortgages and several chattel mortgages to secure successive debts may apply the proceeds of the property so as to obtain the security bargained for, and may realize on the former in satisfaction of the notes they secured and waive his chattel

voluntarily sells the incumbered property and pays the proceeds to the mortgagee without giving direction as to their application.⁷⁷ Money realized on collateral given by a trustee must be applied to the claim secured thereby if sufficient to discharge it.⁷⁸ The holder of a note secured by a lien which has priority as to part of the property subject to it, but is subordinate as to the remainder, must apply the proceeds of the property on the note; the holder of the second lien may object to any other application.⁷⁹ Money collected on an execution should be credited on the writ; the plaintiff cannot take a part of it and apply it to an unsecured debt, though it may be that it could have been applied to an execution of older date than that which was levied.⁸⁰ This principle does not seem to be recognized in Missouri. In a case where a deed of trust secured two notes, with different sureties, the proceeds of the foreclosure sale being sufficient to pay either note, but not both, the creditor was sustained in applying the money so as to retain the benefit of both securities, without regard to the dates when the notes matured.⁸¹ The test as to whether the application made is valid or not, as applied to payments for goods sold, is whether the debtor could recover the money paid, which, as a rule, can only be done where payment has been made in consequence of fraud, or under duress, or under a mistake of fact. This principle does not extend to a case where liquors are sold for the purpose of being resold in violation of law. Hence the application of money paid to the items of an account covering such liquors is valid, though no action would lie to recover their price.⁸²

Where part of a debt is barred by the statute and a part is collectible, and the debtor makes a payment, requiring and receiving a receipt in full of all demands, the law will imply

security therefor in favor of the subsequent chattel mortgages. *Bank v. Ryan*, 144 Iowa 725.

The transferee of a chattel mortgage and the holder of a second mortgage both of which provide for the application of payments thereon, may apply payments equally to each mortgage. *Collerd v. Tully*, 77 N. J. Eq. 439.

⁷⁷ *Cain v. Vogt*, 138 Iowa 631; *Mercer v. Tift*, 79 Ga. 174.

⁷⁸ *Melson v. Travis*, 133 Ga. 710.

⁷⁹ *Davis v. Carlisle*, 142 Fed. 106, 73 C. C. A. 330.

⁸⁰ *Smith v. Smith*, 105 Ga. 717.

⁸¹ *Sturgeon Sav. Bank v. Riggs*, 72 Mo. App. 239.

⁸² *Mayberry v. Hunt*, 34 New Bruns. 628.

an application of the payment to the collectible portion.⁸³ But where a debtor pays money, without any specific directions, on account of several debts, all of which are barred, the creditor may apply it to either at his option; he may apply it to the largest and thus revive it as to a balance. But he is not at liberty to apply a part of the payment to each of the several demands and thereby revive them all.⁸⁴ And it has been held that where a payment made is less than either of several distinct demands the creditor having a right to apply it is not allowed to divide it and apply a part to each demand;⁸⁵ but in a later case, the indebtedness consisting of two notes and an account of different dates, the creditor was sustained in applying a general payment in such manner as to keep all the debts alive.⁸⁶ This is in accordance with the prevailing doctrine, none of the debts being barred by statute.⁸⁷

⁸³ Berrian v. Mayor, 4 Robert. 538. See Hill v. Robbins, 22 Mich. 475.

⁸⁴ Ayer v. Hawkins, 19 Vt. 26. See *contra*, Jackson v. Burke, 1 Dill. 311. See Armistead v. Brooke, 18 Ark. 521.

⁸⁵ Wheeler v. House, 27 Vt. 735.

⁸⁶ Rowell v. Est. of Lewis, 72 Vt. 163; Beck v. Haas, 111 Mo. 264, 33 Am. St. 516; National D. Bank v. Mawson, 46 Pa. Super. 85.

⁸⁷ Where money is paid by a debtor to a creditor who has several demands against him, and no directions are given how he shall apply it, the creditor may apply it as he pleases; therefore, when he holds two bonds of his debtor, both due, and payable with interest, and money is so paid to him, he may apply it to the part extinguishment of both bonds; and he is not bound to apply it on one bond until it be satisfied, and the residue to the other. Smith v. Sereven, 1 McCord, 368. See James v. Malone, 1 Bailey, 334.

In Washington Bank v. Prescott, 20 Pick. 339, four notes were made

by the same person, and indorsed by the defendant; they were in the hands of the same holder; and the defendant, before any of them became due, gave the holder an order for the payment of the notes without expressing any priority out of property conveyed by the maker to assignees by an indenture to which the indorser was a party, for the payment of the notes in full or proportionably, which property proved to be insufficient. The assignees, in pursuance of the order, made a payment after all the notes had fallen due, and the holder applied the money to all the notes *pro rata*, instead of applying it wholly to those which had first fallen due, and it was held that he had a right to make such application. In an action on two of the notes, it was held that the other two, with the indorsements thereon, were admissible in evidence in order to explain the appropriation of the money paid on the order. And it was also held that the jury in assessing the damages were not to regard any dividend which might in the future be

The rule of *Clayton's Case*,⁸⁸ which is that, where an account current is kept between parties, as a banking account, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account, is not an invariable rule; the circumstances of a case may afford ground for inferring that the transactions of the parties were not intended to come under that rule, as where there is no account current, and no setting off of one item against another, but credit is given for the entire sum paid at the end of all the items. In such a case the creditor may make the application up to the last moment, by action or, otherwise, by intention expressed, implied or presumed.⁸⁹ A partial payment may be applied to the discharge of interest due and the balance to the principal.⁹⁰

§ 239. **Same subject.** It has been held that a creditor may apply money paid by the debtor without directions to a debt on which the statute of frauds does not allow an action to be maintained,⁹¹ or on a bill void for want of a stamp,⁹² or to one of

paid on such order. See *Blackstone Bank v. Hill*, 10 Pick. 129; *Blackman v. Leonard*, 14 La. Ann. 59; *White v. Trumbull*, 15 N. J. L. 314, 29 Am. Dec. 687.

In order that the partial payment of a debt part of which is barred shall take it all out of the statute of limitations "there must be reasonable evidence that the debtor recognized and admitted the whole of the indebtedness to be due; but if he did so admit, and made a general payment on account of it, there is no reason for applying the admission and payment to either of the notes rather than to the others, but it would carry out the intentions of the parties to apply the acknowledgment and payment to each of the notes, that is, to the whole indebtedness." *Taylor v. Foster*, 132 Mass. 30.

In *Mills v. Fowkes*, 5 Bing. N. C. 455, it is ruled that a creditor may

apply a general payment to a barred debt, though he holds claims which are not barred. But see *Reed v. Hurd*, 7 Wend. 408; *Heath v. Grenell*, 61 Barb. 190; *Harrison v. Dayrics*, 23 La. Ann. 216.

The application of a payment to a barred note does not show that the debtor recognized or acknowledged the debt. *McBride v. Noble*, 40 Colo. 372.

⁸⁸ *Merivale*, 585.

⁸⁹ *Cory v. Owners of Turkish Steamship Mecca*, [1897] App. Cas. 286.

⁹⁰ *Dollar S. & T. Co. v. Crawford*, 69 W. Va. 109, 33 L.R.A.(N.S.) 587.

⁹¹ *Haynes v. Nice*, 100 Mass. 327; *Philpott v. Jones*, 4 Nev. & Man. 14, 2 A. & E. 41; *Rohan v. Hanson*, 11 Cush. 44; *Ramsay v. Warner*, 97 Mass. 13.

⁹² *Biggs v. Dwight*, 1 M. & Ry. 308.

two bills, or one of two debts barred by the statute of limitations.⁹³ The general rule, however, is that the creditor cannot make an application of moneys to any demand for which he could not sustain an action.⁹⁴ He is not permitted to apply them to an illegal demand, although a debtor may do so.⁹⁵ A more precise and accurate statement of the rule in respect to a creditor's right to apply a payment not appropriated by the debtor is that the creditor may apply it on either of several demands at his pleasure where they are all equally valid, payable absolutely, liquidated, due, and not in fact contested.⁹⁶ A creditor will not be allowed to make such an application of a payment as the debtor might reasonably object to, or as would work injustice to him.⁹⁷ He may not, by applying it to a con-

⁹³ *Mills v. Fowkes*, 7 Scott, 444, 5 Bing. N. C. 458; *Hopper v. Hopper*, 61 S. C. 124, 137. See last note to § 238.

⁹⁴ *Samuel v. Samuel*, 151 Ky. 235; *Citizens' Nat. Bank v. Donnell*, 172 Mo. 384; *Kidder v. Norris*, 18 N. H. 532; *Wright v. Laing*, 3 B. & C. 165; *Baneroff v. Dumas*, 21 Vt. 456; *Nash v. Hodgson*, 6 De G., M. & G. 474; *Kuker v. McIntyre*, 43 S. C. 117 (void bond executed by married woman); *Mullooly v. Huatau*, 1 New Zeal. L. R. 151.

⁹⁵ *Bondy v. Hardina*, 216 Mass. 44; *Armour P. Co. v. Vinegar Bend L. Co.*, 149 Ala. 205; *Rohan v. Hanson*, 11 Cush. 44; *Greene v. Tyler*, 39 Pa. 361; *Robinson v. Allison*, 36 Ala. 525; *Gill v. Rice*, 13 Wis. 549. See *McCarty v. Gordon*, 16 Kan. 35; *Fay v. Lovejoy*, 20 Wis. 407; *Phillips v. Moses*, 65 Me. 70.

In *Clark v. Mershon*, 2 N. J. L. 70, it was held where a tavern-keeper was indebted to his customer, the items of liquor were to be considered as payment *pro tanto*, and not a *trust* or *credit*, within the tavern act.

In *Adams v. Mahnken*, 41 N. J. Eq. 332, it is held that creditors
Suth. Dam. Vol. I.—46.

who hold a bond containing a void usurious agreement and other indebtedness unaffected by such agreement can only appropriate payments so far as they might have been recovered. *Edwards v. Rumph*, 48 Ark. 479; *Dunbar v. Garrity*, 58 N. H. 75.

But see *Cotton v. Beatty*, — Tex. Civ. App. —, 162 S. W. 1007, holding that though payments be applied by agreement of creditor and debtor to the interest of a usurious loan, the court will, in a proper case, re-apply it to the principal.

⁹⁶ *Holloway v. White-D. S. Co.*, 151 Fed. 216, 10 L.R.A.(N.S.) 704, 80 C. C. A. 568, 10 L.R.A.(N.S.) 704; *Anderson v. Griffith*, 51 Ore. 116; *Kelso v. Russell*, 33 Wash. 474; *Samuel v. Samuel*, *supra*; *Wellman v. Miner*, 179 Ill. 326. See *Stone v. Talbot*, 4 Wis. 442.

⁹⁷ *Belcher v. Case T. M. Co.*, 78 Neb. 798; *Bonnell v. Wilder*, 67 Ill. 327; *Bridenbecker v. Lowell*, 32 Barb. 9; *Taylor v. Coleman*, 20 Tex. 772; *Lindsey v. Stevens*, 5 Dana 107; *Arnold v. Johnson*, 2 Ill. 196; *Ayer v. Hawkins*, 19 Vt. 26. See *Bean v. Brown*, 54 N. H. 395; *Gass v. Stinson*, 3 Sumn. 99.

tested claim, throw the burden upon the debtor of disproving the demand.⁹⁸ An application by the creditor, contrary to the debtor's directions, but acquiesced in by him, will be binding.⁹⁹ It is not necessary that the demands be all of the same grade or dignity; part may be specialties, and part simple contract debts, and the creditor has the choice on which he will apply a general payment.¹ As between a legal and equitable demand it would seem that preference must be given to the legal; the creditor is not at liberty to pay a later equitable claim instead of an older legal debt;² and it is not certain that he has the option to apply the money to a prior equitable demand in preference to a later legal one.³ He may apply a payment to a demand not secured in lieu of one secured, or to one the security for which is more precarious.⁴ Such right is not affected by a clause in a chattel mortgage to the effect that, upon the mortgagor's default, the mortgagee might sell the property and apply the net proceeds to the payment of the debt, returning

⁹⁸ *Stone v. Talbot*, *supra*.

⁹⁹ *Pennsylvania C. Co. v. Blake*, 85 N. Y. 226; *Flarsheim v. Brest-rup*, 43 Minn. 298; *Turner v. Osborn*, — Miss. —, 64 So. 721.

¹ *Meggot v. Wild*, 1 Ld. Raym. 287; *Mayor v. Patten*, 4 Cranch, 317, 2 L. ed. 633; *Peters v. Anderson*, 5 Taunt. 596; *Hargroves v. Cooke*, 15 Ga. 321; *Pierce v. Knight*, 31 Vt. 701; *Pennypacker v. Umberger*, 22 Pa. 492; *Heintz v. Cabn*, 29 Ill. 308; *Brazier v. Bryant*, 2 Dowl. P. C. 477; *Chitty v. Naish*, *id.* 511.

² *Goddard v. Hodges*, 1 Cr. & M. 33.

³ See *Bosanquet v. Wray*, 6 Taunt. 597; *Birch v. Tebbutt*, 2 Starkie, 74; 2 Pars. on Cont. 631.

⁴ *Payne v. Seagars*, 13 Ga. App. 101; *Bankers' T. Co. v. Gillespie*, 181 Fed. 448, — C. C. A. —; *Cain v. Vogt*, 138 Iowa, 631, 128 Am. St. 216; *Philadelphia Cas. Co. v. Can-*

non & B. M. Co., 133 Ky. 745; *Lee v. Manley*, 154 N. C. 244; *Chestnut St. T. & S. F. Co. v. Hart*, 217 Pa. 506; *Halsted v. Griefen*, 173 Ill. App. 551; *Compton v. Ahrens & O. Mfg. Co. (Tex. Civ. App.)*, 151 S. W. 884; *Crane Co. v. United States F. & G. Co.*, 74 Wash. 91; *Hargroves v. Cooke*, 15 Ga. 321; *Waterman v. Younger*, 49 Mo. 413; *Jenkins v. Beal*, 70 N. C. 440; *Simmons v. Cates*, 56 Ga. 609; *Driver v. Fortner*, 5 Porter, 9; *Burks v. Albert*, 4 J. J. Marsh. 97, 20 Am. Dec. 209; *Wood v. Callaghan*, 61 Mich. 402, 1 Am. St. 597; *White v. Beem*, 80 Ind. 239; *Sweeney Co. v. Fry*, 151 Ind. 178; *Northern Nat. Bank v. Lewis*, 78 Wis. 475; *Haynes v. Nice*, 100 Mass. 327, 1 Am. Rep. 109; *Henry Bill Pub. Co. v. Utley*, 155 Mass. 366; *Risher v. Risher*, 194 Pa. 164; *Montague v. Stelts*, 37 S. C. 200, 34 Am. St. 736; *Hall v. Johnston*, 6 Tex. Civ. App. 110.

the overplus to the mortgagor.⁵ Payments made on a continuous account of several items, the whole constituting but one debt, will be applied to the items in the order of their date though some of the items are subject to a mechanic's lien.⁶

The particular circumstances may give the creditor a right to infer the consent of the debtor to an application not otherwise admissible. He may apply an unappropriated payment to a contingent liability, to a debt not due, to one barred by the statute of limitations, or even to an illegal demand if he has no other. The payment of money under such circumstances necessarily implies a consent to apply it to the demands actually existing.⁷ If the debtor agrees that his creditor may apply payments to any indebtedness due when they are made, they may be applied to the satisfaction of an account due instead of a matured note.⁸

Some distinctions have been made in respect to the creditor's right of application between debts which the debtor paying owes separately and alone and those which he owes jointly with others; and also between debts owing to the person receiving the payment alone and those to which he and others are jointly entitled. It has been held that if one member of a firm makes a payment to a person who has an account against him and also against the firm of which he is a member, the creditor must apply the money to the individual account unless he can show a consent to have it otherwise applied.⁹ The law will appropriate it to the individual debt in the absence of any application by the parties if the money paid is not shown to have been derived from the fund from which the joint liability was to be met.¹⁰ This strict rule has not been

⁵ *Baum v. Trantham*, 42 S. C. 104, 46 Am. St. 697.

⁶ *Pond & H. Co. v. O'Connor*, 70 Minn. 266.

⁷ *Hall v. Clement*, 41 N. H. 166; *Bowe v. Gano*, 9 Hun, 6; *Treadwell v. Moore*, 34 Me. 112; *Ayer v. Hawkins*, 19 Vt. 26. See *Rackley v. Pearce*, 1 Ga. 241; *Bancroft v. Dunmas*, 21 Vt. 456; § 238; *Arnold v. Prole*, 4 M. & G. 860.

⁸ *Everton v. Day*, 66 Ark. 73.

⁹ *Johnson v. Boone*, 2 Harr. 172; *Gass v. Stinson*, 3 Sumn. 98; *Sneed v. Wiester*, 2 A. K. Marsh. 277.

¹⁰ *Baker v. Stackpoole*, 9 Cow. 420, 18 Am. Dec. 508; *Camp v. Smith*, 136 N. Y. 187; *Livermore v. Claridge*, 33 Me. 428. See *Lee v. Fountaine*, 10 Ala. 755, 44 Am. Dec. 505.

After the dissolution of a partner-

uniformly recognized. The creditor has been given the choice, in the absence of directions, to apply it upon the joint debt.¹¹ Payments made by a surviving partner, while carrying on the partnership business for the joint benefit of himself and the estate of the deceased partner, pursuant to a stipulation in the partnership articles, upon an account, some items of which were contracted before and some after the death of the other partner, must be applied to the discharge of the first items.¹² Where the debtor making a general payment owes a debt to a firm, and also one to the member of it to whom the payment is personally made, the receiver is precluded by his relation of agent for the firm from preferring his own claim. It is implied in the very nature of an agent's or trustee's contract that he will take the same care, at least, of the property intrusted to him that he does of his own.¹³ Therefore, he should apply the payment *pro rata* to both debts.¹⁴ If the debtor is a firm the creditor cannot apply moneys paid by it to the individual debts of one or more of the partners.¹⁵

ship one of its members continued the business, agreeing to pay all the partnership debts and taking enough of the firm property to do so; he added other goods to the stock and mortgaged it to secure both the joint and individual debts. It was held that a creditor might apply payments made to the latter debt. *King v. Sutton*, 42 Kan. 600; *St. Louis T. F. Co. v. Wisdom*, 4 Lea, 695.

¹¹ *McBride v. Noble*, 40 Colo. 372, disapproving a dictum in *Adams v. Tucker*, 6 Colo. App. 393; *Van Rensselaer v. Roberts*, 5 Denio, 470; *Boyd v. Webster*, 59 N. H. 89.

¹² *Stanwood v. Owen*, 14 Gray, 195; *Morgan v. Tarbell*, 28 Vt. 498.

In *Fairchild v. Hoolly*, 10 Conn. 475, an account against a partnership, upon which sundry payments had been made, was entire and unbalanced; before any payments had been made, a secret partner had withdrawn from the concern, and

the payments were made by one of the partners who remained. Held, that the money with which payment was made could not be presumed to have accrued out of the funds of the new firm, and to be applied, therefore, to the benefit of the fund from which it had been taken; that it could not be applied to the portion of the account accruing after the withdrawal, on the principle that it should be applied to the debt for which there was the least security, because it did not appear but that the company was as solvent after the withdrawal as before; but that the money so paid should be applied to the oldest items of the account.

¹³ *Colby v. Copp*, 35 N. H. 434.

¹⁴ *Id.*; *Favenc v. Bennett*, 11 East, 36; *Barrett v. Lewis*, 2 Pick. 123; *Scott v. Ray*, 18 id. 360; *Cole v. Trull*, 9 id. 325.

¹⁵ *Farris v. Morrison*, 66 Ark. 318.

§ 240. *Same subject.* A creditor cannot apply a payment made generally on account of existing debts to a new debt subsequently contracted,¹⁶ nor to an instalment of the same debt becoming due subsequent to the payment.¹⁷ It has been held that the creditor's application is not complete and absolute until the debtor has been notified of it.¹⁸ When such notice has been given the money is appropriated.¹⁹ An objection to the application made by the debtor ten days after he has been informed of it is too late.²⁰

If the holder for collection of several notes against one debtor, which are owned by various persons, receives from him a sum less than the amount of all the notes, and the debtor makes no application of the payment, it is competent for the creditors owning the notes to direct the application to any of them. In an action after such payment upon one of such notes, in the absence of any application up to the time of the trial, no part will be applied to the note in suit if it appears that the plaintiff has not received part of the money.²¹ An attorney holding several notes for collection, belonging to different persons, and receiving a payment on account of them not appropriated by the debtor, may himself appropriate it.²² But if an agent, having a demand himself against the debtor,

¹⁶ *Miles v. Ogden*, 54 Wis. 573; *Law v. Sutherland*, 5 Gratt. 357; *Baker v. Stackpoole*, 9 Cow. 420, 18 Am. Dec. 508.

A. owed a debt to B. payable on demand, for which C. was surety. A. assigned debts of others to B. as a means of payment in part. After such assignment, but before the assigned debts were collected, A. contracted another debt to B. for which there was no security. Held, that B. could not, after collection of the assigned debts, apply the same to pay the debt contracted after the assignment, and recover the first debt from C., the surety for it. *Donally v. Wilson*, 5 Leigh, 329.

¹⁷ *Gates v. Burkett*, 44 Ark. 90; *Heard v. Pulaski*, 80 Ala. 502;

Kline v. Ragland, 47 Ark. 111; *Seymour v. Sexton*, 10 Watts, 255.

¹⁸ *Ryan v. O'Neil*, 49 Mich. 281; *Lane v. Jones*, 79 Ala. 156; *Simson v. Ingham*, 2 B. & C. 65; *Allen v. Culver*, 3 Denio, 284; *Van Rensselaer v. Roberts*, 5 id. 470.

¹⁹ *Id.*; *The Asiatic Prince*, 47 C. C. A. 325, 108 Fed. 287; *Bopp v. Wittich*, 88 Mo. App. 129; *Mosiman v. Occidental Mt. B. Ass'n*, 82 Kan. 670; *Krebs v. Blatz*, 134 Ky. 505.

²⁰ *Risher v. Risher*, 194 Pa. 164.

No change of the application can be made after the creditor has given the debtor credit by entering it. *Burnett v. Sledge*, 129 N. C. 114.

²¹ *Taylor v. Jones*, 1 Ind. 17.

²² *Carpenter v. Goin*, 19 N. H. 479.

and also acting for a principal who has a demand against the same debtor, receives an unappropriated payment from such debtor he must apply it ratably to both.²³

The right of appropriation is confined to the parties; no third person can insist on any application which neither of them has made.²⁴ Thus the grantee of a mortgagor cannot insist that money of the mortgagor in the mortgagee's hands shall be used to pay off the mortgage unless this was clearly contemplated by the parties, and the grantee made his purchase upon that understanding.²⁵ Strangers can demand nothing in this regard which the parties have not required.²⁶ Where creditors claim equities through their debtors they are usually estopped by what the debtors do; but fraud never estops creditors. This doctrine relative to the application of payments applies only where the creditor has two or more honest claims against the debtor; it does not apply so as to conclude creditors where there is only one such. Therefore a subsequent mortgagee may object to the application by the holder of an earlier mortgage of partial payments to usurious interest for the purpose of keeping alive that part which is valid.²⁷ As has been stated, a surety of a debtor who makes an indefinite payment cannot interfere with the election of the creditor; nor will an intention of the debtor be presumed to apply it in favor of the surety so as to exclude the right of the creditor to make the application.²⁸ But where, at the inception of the contract of

²³ Barrett v. Lewis, 2 Pick. 123; Cole v. Trull, 9 Pick. 325.

²⁴ Wannamaker v. Powers, 102 App. Div. (N. Y.) 485; Harding v. Tift, 75 N. Y. 461; Feldman v. Beier, 78 id. 293; Coles v. Withers, 33 Gratt. 186; Mack v. Adler, 22 Fed. 570; Jefferson v. Church of St. Matthew, 41 Minn. 392; Thorn & H.'s L. & C. Co. v. Citizens' Bank, 158 Mo. 272.

²⁵ Gordon v. Hobart, 2 Story, 243; Backhouse v. Patton, 5 Pet. 160, 8 L. ed. 82.

²⁶ Spring Garden Ass'n v. Tradesmen's L. Ass'n, 46 Pa. 493. See

Parker v. Green, 8 Mete. (Mass.) 137.

²⁷ Greene v. Tyler, 39 Pa. 361. See Chester v. Wheelwright, 15 Conn. 562.

²⁸ Hanson v. Manley, 72 Iowa, 48; Wilson v. Allen, 11 Ore. 154.

Payments made generally to the creditors on account of a person for whom a guaranty is given may be applied by them in liquidation of a balance existing against him before it was given, and the guarantor cannot insist on the payments being applied in exoneration of his liability, although at the time of his as-

suretyship, a mode of payment was agreed upon and a particular fund identified for that purpose, the surety may insist on the application of that fund when it is realized.²⁹ Thus, a factor who has accepted a bill drawn by his principal, as against an accommodation drawer who becomes such on the faith of a consignment of cotton made to meet it at maturity, cannot apply the proceeds of the consignment to another debt, and no factor's lien for such other debt will be permitted to intervene.³⁰ When the party having a right to appropriate a payment has done so, the appropriation is final, and he cannot change it.³¹ An appropriation made by mutual agreement may not be changed so as to affect the rights of a third party.³²

suming it the creditors did not give him notice that any such balance was then existing. *Kirby v. Marlborough*, 2 M. & S. 18. See *Merrimack Co. v. Brown*, 12 N. H. 320.

It is held in *Gore v. Townsend*, 105 N. C. 228, 8 L.R.A. 443, that a mortgagee who holds two mortgages, the older of which was executed by a husband and his wife to secure the former's debt, and the latter of which was executed by him alone on the same property to secure a subsequent note, cannot appropriate the proceeds of personal property to the payment of the second mortgage; it must go to the payment of the first in exoneration of the wife's dower right, she being a surety for her husband.

²⁹ *Barnes v. Century Sav. Bank*, 149 Iowa, 367.

³⁰ *Brander v. Phillips*, 16 Pet. 121, 10 L. ed. 209. See *Marryatts v. White*, 2 Stark. 101, in which security having been given by a surety for goods to be supplied and in respect of a pre-existing debt, the goods were supplied, and payments made from time to time by the principal, in respect of some of which discount was allowed for

prompt payment; held, that it must be inferred in favor of the surety that all these payments were intended to be in liquidation of the latter account; also *Shaw v. Pieton*, 7 D. & R. 201, 4 B. & C. 715, where the same agent had a bill of account with the grantor of several annuities, for the payment of which A. became surety and in consequence of a letter written by an attorney in the names of the grantees, at the instance of the agents, demanding payment of the arrears of the annuities from the grantor and his surety, a sum of money was paid under circumstances from which it was to be collected that the money was intended to be specifically appropriated to the annuity account, and the agents applied it to the bill account; held, that this was a misapplication, and that the money ought to be appropriated *pro rata* among the annuitants in relief of the surety.

³¹ *Liehenstein v. Lyons*, 115 Ia. 1051; *People v. Grant*, 139 Mich. 26; *Wright v. Wright*, 72 N. Y. 149.

³² *Pinney v. French*, 67 Kan. 473; *Mitchell v. Wheeler*, 122 Iowa 368, 131 Iowa 434.

§ 241. **Appropriation by the court.** Where the parties have not made a specific appropriation of moneys paid and there are several debts or demands for which the party paying the money is liable to the party receiving it, the fundamental rule or principle is that the law will appropriate it according to the justice and equity of the case.³³ It has been said that in law that application is made which is most favorable to the creditor; in equity, the payment is applied first to the debt for which the security is most precarious.³⁴ In applying the cardinal principle various subsidiary rules have been recognized, in respect to which and in the reasons assigned therefor the decisions are not entirely in accord. Many cases proceed upon the assumption that the intention of one or both of the parties is to be effectuated, or that the interest of one party in preference to that of the other is entitled to be subserved.³⁵ But

³³ *Arkansas Nat. Bank of Hot Springs v. Martin*, 110 Ark. 578; *Van Seeiver v. King*, 176 Mich. 605; *Marshall v. G. A. Stowers Furniture Co.*, — Tex. Civ. App. —, 167 S. W. 230; *Indiana T. Co. v. International B. & L. Ass'n*, 36 Ind. App. 685; *State v. McDermitt*, 72 W. Va. 291; *Martin v. Ede*, 103 Cal. 157; *McCartney v. Buck*, 8 Houst. 34; *Field v. Holland*, 6 Cranch 8; 3 L. ed. 136; *Souder v. Schechterly*, 91 Pa. 83; *Spiller v. Creditors*, 16 La. Ann. 292; *Stone v. Seymour*, 15 Wend. 19; *Parker v. Green*, 8 Mete. (Mass.) 144; *Norris v. Beaty*, 6 W. Va. 477; *Robinson v. Doolittle*, 12 Vt. 246; *Randall v. Parramore*, 1 Fla. 409; *Chester v. Wheelwright*, 15 Conn. 562; *Calvert v. Carter*, 18 Md. 73; *Neidig v. Whiteford*, 29 Md. 178; *Haden v. Phillips*, 21 La. Ann. 517; *Upham v. Lefavour*, 11 Mete. (Mass.) 174; *Seymour v. Van Slyck*, 8 Wend. 403; *Hargroves v. Cooke*, 15 Ga. 321; *Leef v. Goodwin*, Taney, 460; *Callahan v. Boazman*, 21 Ala. 246; *Bayley v. Wynkoop*, 10 Ill. 449; *Benny*

v. Rhodes, 18 Mo. 147, 59 Am. Dec. 293; *Proctor v. Marshall*, 18 Tex. 63; *Oliver v. Phelps*, 20 N. J. L. 180; *McFarland v. Lewis*, 3 Ill. 344; *White v. Trumbull*, 15 N. J. L. 314, 29 Am. Dec. 687; *Carson v. Hill*, 1 McMill. (S. C.) 76; *Selleck v. Sugar Hollow T. Co.*, 13 Conn. 453; *Rosseau v. Cull*, 14 Vt. 83; *Starrett v. Barber*, 20 Me. 457.

³⁴ *Barbee v. Morris*, 221 Ill. 382; *Chicago T. & T. Co. v. McGlew*, 90 Ill. App. 58.

³⁵ *Conduitt v. Ryan*, 3 Ind. App. 1; *McDaniel v. Barnes*, 5 Bush, 183; *Allen v. Culver*, 3 Denio, 284; *Byrne v. Grayson*, 15 La. Ann. 457; *Spiller v. Creditors*, 16 id. 292; *Calvert v. Carter*, 18 Md. 73; *Pierce v. Sweet*, 33 Pa. 151; *Poindexter v. La Roche*, 7 Sm. & M. 699; *Bussey v. Gant*, 10 Humph. 238; *Pattison v. Hull*, 9 Cow. 747; *Dows v. Morewood*, 10 Barb. 183; *Johnson's App.*, 37 Pa. 268; *Seymour v. Sexton*, 10 Watts, 255.

In *Johnson's App.*, *supra*, *Strong, J.*, said: "The fact of actual appropriation to the earliest items of the

it is believed that there is no presumption of intention which

account not being established, the next question is whether the law requires that the credits should be thus applied. In the absence of direction by the debtor, and of actual application by the creditor, the law will make an equitable application, and in making it will regard the circumstances of the case. In the present case it should make no difference to Duncan whether his credits were applied to the earlier or to the later items of the account. He was equally a debtor for both and both carried interest. It is true that when payments are made upon a running account it is one of the principles of legal application that they shall be treated as extinguishing the earliest charges in the account. But this is not a paramount principle. Another of equal force is that the payments are to be applied to that debt which is least secured. Both these rules look to the interest of the creditor, it being presumed that the debtor by neglecting to give any direction consented to such an application as would be most beneficial to the creditor. But to apply Duncan's credits to the first items of the account * * * against him and thus extinguish the mortgage in the first instance would be an application not beneficial to the debtor, and most hurtful to the creditor. It would be paying first the debt which was best secured, and leaving the later advances without the protection of a factor's lien and without any security at all as against judgments entered before they were made. It would be reversing the fundamental rule of appropriations." The equitable circumstances stated abundantly justify the application which was

made without the presumption that "the debtor by neglecting to give any direction consented to such an application as would be most beneficial to the creditor." There would seem to be no more ground for such a presumption than that the creditor by neglecting to make an actual application of the credits consented to such an application as would be most beneficial to the debtor.

That there is no such presumption that the debtor consents to an application most beneficial to the creditor is evident from the cases that consult the interest of the debtor where there are no countervailing equities. Thus, in accordance with the general course of authority, the law applies a payment to a debt bearing interest in preference to one not bearing interest. *Seymour v. Sexton*, *supra*. *Crompton v. Prall*, 105 Mass. 255, proceeds on the same principle. *Dows v. Morehead*, 10 Barb. 183, holds that the law will apply payments to that debt, a relief from which will be most beneficial to the debtor; as, for example, acceptances for which an instrument in the shape of a mortgage or pledge of personal property is given. *Poindexter v. La Roche*, 7 Sm. & M. 699, and *Pattison v. Hull*, 9 Cow. 747, are to the same effect. But a more satisfactory statement of the principle is to be found in *Field v. Holland*, 6 Cranch, 8, 3 L. ed. 136, where Marshall, C. J., says: "When a debtor fails to avail himself of the power he possesses, in consequence of which that power devolves on the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his

controls where the law makes the application.³⁶ If there is evidence of intention it governs, of course,³⁷ but the application then is not made by the law, but by the party whose intention controls. And when the interest of one party is subserved it is not upon any invidious preference, but upon some special ground of equity which appeals to the conscience of the court in his behalf.³⁸ Such considerations sometimes require a *pro rata* distribution of the payment to all of several debts; sometimes its appropriation to one for being the oldest or least secured, to relieve the debtor from some special hazard or hardship, or to absolve a surety.³⁹

Where a bank is protected against loss on future overdrafts

power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious." See *Langdon v. Bowen*, 46 Vt. 512; *Truscott v. King*, 6 N. Y. 147; *Worthley v. Emerson*, 116 Mass. 374; *The A. R. Dunlap*, 1 Low. 350; *Robie v. Briggs*, 59 Vt. 443, 59 Am. Rep. 737.

In the last case the debtor owed an individual and joint account; his payments amounted to more than the former; in ignorance of the exact state of the account the creditor entered the whole sum paid to the credit of the individual account. The court applied the surplus to the other.

³⁶ *Moore v. Gray*, 22 La. Ann. 289.

It has been presumed that a payment made by a tenant in common was made in fulfillment of his promise rather than to relieve the burden of a lien against the estate of joint tenants, the effect of that application being to toll the statute of limitations against the other ten-

ant. *Weidenhammer v. McAdams*, 52 Ind. App. 98 citing *Stubblefield v. McAuliff*, 20 Wash. 442.

³⁷ *Becker v. Hopper*, 22 Wyo. 237; *McMillan v. Grayston*, 83 Mo. App. 425; *Paragould & M. R. Co. v. Smith*, 93 Ark. 224; *Bower v. Walker*, 220 Pa. 294. See *Kissick v. Bolton*, 134 Iowa 650.

"In case an expressed intention cannot be found, one may be implied from the circumstances of the case. Every presumption and rule which the courts have adopted in furtherance of their purpose to discover the 'justice of each case' are [is] subordinate to this rule of intention." *American W. Co. v. Maaget*, 86 Conn. 234.

If the debtor pays with one intent and the creditor receives with another the former's intent will be given effect. *Roakes v. Bailey*, 55 Vt. 542.

³⁸ *Pierce v. Knight*, 31 Vt. 701; *Smith v. Loyd*, 11 Leigh, 512, 37 Am. Dec. 621; 2 Greenlf. Ev., § 533.

³⁹ *Marion W. Co. v. Marion*, 121 Iowa 306; *State v. United F. G. Co.*, 81 Kan. 660, 26 L.R.A.(N.S.) 865; *Columbia Digger Co. v. Rector*, 215 Fed. 618.

by a principal his sureties are entitled to have payments made applied to the account which they have guaranteed.⁴⁰ If the money paid arises from some property or fund it will be applied to the discharge or reduction of the demand against the same.⁴¹ If several chattels are bought at the same time under a single contract, the promise to pay being single, the court will not apply payments made on the contract to the different articles in the order in which they are specified therein; but will apply them to the contract generally.⁴² Partial payments made on a note infected with usury will be applied to the extinguishment of lawful interests, and then to the principal,⁴³ and to earlier rather than later accounts, though sureties are concerned.⁴⁴ If an incumbrance is void in part only, payments will be applied first to the discharge of so much as is valid.⁴⁵ The law of the state in which the sales constituting the account in question were made governs the application of payments.⁴⁶

§ 242. **When payments applied pro rata.** If an indefinite payment is made where there are several debts of the same nature and all things equal, it is applied proportionally.⁴⁷ Moneys collected by judicial proceedings founded on several claims cannot be applied by either party; the law will apply

⁴⁰ *Ida County Sav. Bank v. Seidenstieker*, 128 Iowa 54, 111 Am. St. 189; *Drake v. Sherman*, 179 Ill. 362.

⁴¹ *Day v. Ewen*, 140 Ky. 498; *Brinekerhoff v. Greenan*, 85 Ill. App. 253.

⁴² *Hill v. McLaughlin*, 158 Mass. 307.

⁴³ *Cotton v. Beatty*, — Tex. Civ. App. —, 162 S. W. 1007; *Haskins v. Bank*, 100 Ga. 216; *Citizens' Nat. Bank v. Donnell*, 172 Mo. 384; *Miller v. Monumental S. & L. Ass'n*, 57 W. Va. 437; *Lorentz v. Pinnell*, 55 W. Va. 114 (to the principal in both cases). See §§ 378, 379.

⁴⁴ *Fremont County v. Fremont County Bank*, 138 Iowa 167.

⁴⁵ *Wingate v. Peoples' B. & L. Sav. Ass'n*, 15 Tex. Civ. App. 416.

Payments made after a change in the membership of a firm will not be applied to debts incurred prior thereto. *Rodgers-W. F. Co. v. Wynn* (Tex. Civ. App.), 156 S. W. 340.

⁴⁶ *American W. Co. v. Maaget*, 86 Conn. 234.

⁴⁷ *Spiller v. Creditors*, 16 La. Ann. 292; *Jones v. Kilgore*, 2 Rich. Eq. 63; *Baine v. Williams*, 10 Sm. & M. 113; *Pointer v. Smith*, 7 Heisk. 137.

Matured notes given for the same consideration and in the hands of a single person constitute but one debt; and payments made after their maturity are applicable to them all. *Egle v. Roman C. Church*, 36 La. Ann. 310.

them *pro rata*.⁴⁸ If an insolvent debtor assigns for the benefit of those creditors who become parties to the assignment and thereby release their claims, and a dividend is received by one of them, it must be appropriated ratably to all his claims against the debtor, as well to those upon which other parties are liable, or which are otherwise secured, as to those which are not secured.⁴⁹ A general payment made by the principal debtor, pursuant to a compromise of several debts in one lump, will be applied *pro rata* to all the claims against him in an action against an indorser for part.⁵⁰ And doubtless the same rule of application would be applied between the debtor and creditor where there has been a general judgment pursuant to a compromise founded upon and embracing several demands.⁵¹

A *pro rata* distribution of a payment is made on the equitable maxim that equality is equity. Other considerations may concur and lead to the same result. If a debtor creates a trust or security for the payment of several demands, without preference, money realized from that source is deemed appropriated by him to the demands so provided for, and to be proportionately distributed thereto; and either party may insist on such application.⁵² If a general payment is made to a person having two accounts against the party paying, one due to himself and the other to a third party, for whom he was acting as agent, and no appropriation is made by either it will be applied ratably

⁴⁸ *Olds W. Works v. Bank*, 10 Ky. L. Rep. 253; *Orleans County Nat. Bank v. Moore*, 112 N. Y. 543, 8 Am. St. 775, 3 L.R.A. 302; *Bostick v. Jacobs*, 133 Ala. 344; *Standifer v. Codrington*, 35 La. Ann. 896; *Cowperthwaite v. Sheffield*, 1 Sandf. 416, 3 N. Y. 243; *Bridenbecker v. Lowell*, 32 Barb. 9. See *Thompson v. Hudson*, L. R. 6 Ch. 320; *Merri-mack County Bank v. Brown*, 12 N. H. 320.

Where a fund is insufficient to satisfy several judgments entered the same day they should be paid *pro rata*, though one was entered a

few hours later than the others. *Tucker v. Brackett*, 25 Tex. (Supp.) 199; *Ordinary v. McCollum*, 3 Strobb. 494; *Van Aken v. Gleason*, 34 Mich. 477; *Stamps v. Brown*, Walker (Miss.), 526. See *Mahone v. Williams*, 39 Ala. 202; *Jones v. Kilgore*, 2 Rich. Eq. 63; *Baine v. Williams*, 10 Sm. & M. 113.

⁴⁹ *Commercial Bank v. Cunningham*, 24 Pick. 270, 35 Am. Dec. 322.

⁵⁰ *Butchers' & D.'s Bank v. Brown*, 1 N. Y. Leg. Obs. 149.

⁵¹ *Thompson v. Hudson*, L. R. 6 Ch. 320.

⁵² *Id.*

to both accounts.⁵³ So where a debt is payable by instalments, or a mortgage is made to secure a series of notes payable at different times, and a payment is made after all the instalments or notes have become due, and neither party makes any special appropriation of it, according to the weight of authority it will be applied by the court *pro rata* to all the instalments or notes—and this whether they are held by the original creditor or a part have been transferred unless the assignee has specially acquired a preference by the agreement of transfer.⁵⁴

When a debt is payable in instalments and there are separate notes or other distinct evidences of debt payable at different times, all equally payable with or without interest, and a general payment made is not appropriated by either party, if it exceeds the interest and principal due at the time it was made it will be applied, of course, first to pay what is due of interest and principal, and the residue ratably on all and each of the instalments subsequently payable, with accrued interest on the part thus extinguished.⁵⁵

⁵³ *Wendt v. Ross*, 33 Cal. 650.

⁵⁴ *Cage v. Iler*, 5 Sm. & M. 410, 43 Am. Dec. 521; *Wooten v. Buchanan*, 49 Miss. 386; *Donley v. Hays*, 17 S. & R. 400; *Cooper v. Ullmann*, Walk. Ch. 251; *Mohlen's App.*, 5 Pa. 418, 47 Am. Dec. 413; *Henderson v. Herrod*, 10 Sm. & M. 631; *English v. Carney*, 25 Mich. 178; *McCurdy v. Clark*, 27 id. 445; *Youmans v. Heartt*, 34 id. 397; *Betz v. Heebner*, 1 P. & W. 280; *Smith v. Nettles*, 9 La. Ann. 455; *Bailey v. Bergen*, 2 Hun, 520; *Parker v. Mercer*, 6 How. (Miss.) 323; *Cremer v. Higginson*, 1 Mason, 323; *Perrie v. Roberts*, 2 Ch. Cas. 84. But see *State Bank v. Tweedy*, 8 Blackf. 447, 46 Am. Dec. 486; *Murdock v. Ford*, 17 Ind. 52; *Stanley v. Beatty*, 4 Ind. 134; *Cullum v. Erwin*, 4 Ala. 452; *Bank of United States v. Covert*, 13 Ohio, 240; *Turner v. Pierce*, 31 Wis. 342.

⁵⁵ *In Righter v. Stall*, 3 Sandf.

Ch. 608, a debtor owed a mortgage debt payable in ten instalments. About two-thirds of the debt was paid at a time when a small amount was due for interest, and before any part of the principal had fallen due. There was no direction given by the debtor nor actual application of the payment made by the creditor; it was held that the law must make the application, and that after discharging the interest due the balance must be applied ratably in exoneration of each and all of the instalments.

In *Jencks v. Alexander*, 11 Paige 619, the following rules are laid down: 1. Where the principal is not due, but the interest is due, the payment must first be applied to pay the interest then due; and the residue towards that part of the principal which will first become due and payable, so as to stop the interest, *pro tanto*, from the time of such

§ 243. General payment applied to oldest debt. If no other paramount rule of appropriation governs an indefinite pay-

payment. 2. When neither principal nor interest has become due at the time of the payment, the amount paid should be applied to the extinguishment of principal and interest ratably; so as to extinguish a part of the principal and the interest which has accrued on the part of the principal thus extinguished. The facts were that August 24, 1833, a mortgage was given for \$650, payable in five equal yearly payments, the first to become due on the first of January following, with interest annually. Five hundred dollars were paid and indorsed on the day the mortgage was given. On the 14th of the following September a further sum of \$3 was paid. On the 4th of November, 1835, proceedings to foreclose were commenced on a claim of \$20.98 of delinquent interest, and it was held that \$20.58 was then due. The chancellor said: "I think the counsel for the complainants is wrong in supposing that nothing had become due and payable upon the mortgage at the time the proceedings to foreclose were instituted. It is true a sum much larger than the two instalments of \$130 each, and all interest upon the residue, had been paid. But the proper application of the payments was to apply them towards the satisfaction of the principal of the debt at the time of such payments respectively, after deducting from such payments the interest which had then accrued. The payment of the \$500 on the day of the date of the mortgage, being applied in satisfaction of the three first instalments of principal and \$110 of the fourth instalment, left \$20 of the fourth and the whole

of the fifth instalments still due. And as by the terms of the bond and mortgage the interest on the whole \$650 was payable annually, the mortgagee would have been entitled to the annual interest on the \$150 which still remained due on the last two instalments, if there had been no subsequent payment. The payment of \$3 on the 14th of September, 1833, must be applied towards the fourth instalment of principal, after deducting therefrom the interest on the \$3 from the 24th of the preceding August. In other words, when the principal is not due, but interest is due (a different case), the payment must first be applied to the extinguishment of the interest then due and payable, and the residue to the extinguishment of that part of the principal which will first become due, so as to stop interest, *pro tanto*, from the time of such payment. But when neither principal nor interest has become due (the case in hand) at the time of the payment, such payment, in the absence of any agreement as to the application, is to be applied to the extinguishment of principal and interest ratably, according to the decision of the supreme court in the case of *Williams v. Houghtaling*, 3 Cow. 86."

In *Williams v. Houghtaling* the court say: "When, according to the terms of the bond payable by instalments, interest cannot be demanded until the principal is payable (as in this case), payments made on an instalment not due and payable should be applied to the extinguishment of principal and such proportion of interest as has accrued on the principal so extinguished. For

ment made to a person to whom a debtor paying the money owes several debts will be applied to that which first accrued.⁵⁶ This

instance, an instalment on a bond of \$500 is due on the 1st of January, 1825, with interest from 1st of January, 1824; on the first of July, 1824, the obligor pays \$207; the \$7 should be applied to pay the six months' interest accrued on \$200, and the \$200 extinguishes so much principal."

There is *dictum* in *Jencks v. Alexander* apparently in conflict with the text and in conflict with *Righter v. Stall*. The conclusion arrived at is not in conflict. If the payment of \$500 had been ratably applied to the five instalments, they would have been severally reduced to \$30, and interest on each annually payable would be the same, and due at the same time, as upon a like amount on the two past instalments. When the payment of \$3 was made no interest or principal was due. It being paid on the mortgage generally was applicable ratably towards paying the entire principal and interest.

In *Turner v. Pierce*, 31 Wis. 342, there was a land contract made October 22, 1863, upon which the purchase-money was \$5,600, due in six annual instalments, payable August 1, 1865, to 1870, with interest on the whole sum unpaid, payable at the time each instalment became due—the purchaser having the option to make the payments on or before the times mentioned, and then to pay interest only to the time of such payment. Before any of the principal became due the purchaser made a large payment, receipted to apply on the land contract. On the 5th of March, 1866, an action for strict foreclosure of the contract was begun on the ground that the

purchaser was in default. The title had failed to a part of the lands, and the court held that each instalment should be reduced in the proportion that the value of that part (\$1,832) bore to the whole value, and that the defendant was entitled to have the payment applied to the instalments first becoming due at such decreased rates, and that therefore nothing was due when the suit was commenced. See *Starr v. Richmond*, 30 Ill. 276.

⁵⁶ *Marshall v. G. A. Stowers Furniture Co.*, — Tex. Civ. App. —, 167 S. W. 230; *Larry v. Brown*, 153 Ala. 452; *Watson v. Appleton*, 183 Ala. 514; *Boynton v. Salinger*, 147 Iowa 537; *Brown v. Osborne*, 136 Ky. 456; *Sleet v. Sleet*, 109 La. 302; *Watson v. Parker*, 50 Tex. Civ. App. 616; *In re Hawks*, 204 Fed. 309; *Pond v. Harwood*, 139 N. Y. 111; *Atkins v. Atkins*, 71 Vt. 422; *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325; *Northwestern L. Co. v. American Exp. Co.*, 73 Wis. 656; *The Mary K. Campbell*, 40 Fed. 906; *Sanford v. Van Arsdall*, 53 Hun, 70; *Duncan v. Thomas*, 81 Cal. 56; *Jefferson v. Church of St. Matthew*, 41 Minn. 392; *Moses v. Noble*, 86 Ala. 407; *Ashby v. Washburn*, 23 Neb. 571; *Marks v. Robinson*, 82 Ala. 69; *State v. Chadwick*, 10 Ore. 423; *Mackey v. Fullerton*, 7 Colo. 556; *Bennett v. McGillan*, 28 Fed. 411; *McGillin v. Bennett*, 132 U. S. 445, 33 L. ed. 422; *Pardee v. Markle*, 111 Pa. 548, 56 Am. Rep. 299; *Kline v. Ragland*, 47 Ark. 111; *Brown v. Shirk*, 75 Ind. 266; *McCurdy v. Middleton*, 82 Ala. 131; *Hammett v. Dudley*, 62 Md. 154; *Hersey v. Bennett*, 28 Minn. 86, 41 Am. Rep. 281; *Helm*

rule is especially applicable to items of debit and credit in a general account current.⁵⁷ When both parties concur in the entry of the payments upon general account, without specific application, the law infers an intention on the part of both that they shall satisfy the charges therein in the order of their entry; and they will be so applied unless some controlling equity requires a different disposition.⁵⁸ It has been held that this rule should apply without reference to the fact that one item may be

v. Commonwealth, 79 Ky. 67; Bancroft v. Holton, 59 N. H. 141; Frost v. Mixsell, 38 N. J. Eq. 586; Wagner's App., 103 Pa. 185; Wiesenfeld v. Byrd, 17 S. C. 106; Milliken v. Tufts, 31 Me. 497; Fairchild v. Holly, 10 Conn. 475; Smith v. Loyd, 11 Leigh, 512, 37 Am. Dec. 621; Robinson v. Allison, 36 Ala. 526; Howard v. McCall, 21 Gratt. 205; Wendt v. Ross, 33 Cal. 650; Seymour v. Sexton, 10 Watts, 255; Shedd v. Wilson, 27 Vt. 478; St. Albans v. Failey, 46 Vt. 448; Langdon v. Bowen, 46 Vt. 512; Upham v. Lefavour, 11 Mete. (Mass.) 174; Dows v. Morewood, 10 Barb. 183; Allen v. Culver, 3 Denio 284; Webb v. Dickinson, 11 Wend. 62; Hollister v. Davis, 54 Pa. 508; Allen v. Brown, 39 Iowa 330; Livermore v. Rand, 26 N. H. 85; Parks v. Ingram, 22 N. H. 283; Thompson v. Phelan, 22 N. H. 339; Bacon v. Brown, 1 Bibb 334, 4 Am. Dec. 640; Sprague v. Hazenwinkle, 53 Ill. 419; Clayton's Case, 1 Meriv. 585; United States v. Kirkpatrick, 9 Wheat. 720, 6 L. ed. 199; Berrian v. Mayor, 4 Robert. 538; Horne v. Planters' Bank, 32 Ga. 1; Mills v. Fowkes, 5 Bing. N. C. 455; Pennell v. Doffell, 4 De G., McN. & G. 372; Harrison v. Johnston, 27 Ala. 445; Postmaster-General v. Furber, 4 Mason, 333; Hansen v. Roundsavell, 74 Ill. 238; Souder v. Schechterly, 91 Pa. 83; Perry v. Booth, 67 App. Div. (N.

Y.) 235; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 35. See Killorin v. Bacon, 57 Ga. 497.

In the case of mutual accounts the credits on one side are applied to the extinguishment of the debts on the other as payments intentionally made thereon, and not as the set-off of one independent debt against another. Sanford v. Clark, 29 Conn. 457. As to the application of this rule between *cestuis que trust*, see Wood v. Stenning, [1895] 2 Ch. 433; Mutton v. Peat, [1899] 2 Ch. 556.

⁵⁷ American W. Co. v. Maaget, 86 Conn. 234; Jamieson v. Alvarado C. & W. Co., 45 Tex. Civ. App. 363; Carey-L. L. Co. v. Hunt, 54 Ill. App. 314; Winnebago P. Mills v. Travis, 56 Minn. 480; Goetz v. Piel, 26 Mo. App. 634; Swett v. Boyce, 134 Mass. 381; Crompton v. Pratt, 105 id. 255.

⁵⁸ Id.; Jones v. United States, 7 How. 681, 12 L. ed. 870; Sanford v. Clark, 29 Conn. 457; Souder v. Schechterly, 91 Pa. 83; Lodge v. Ainscow, 1 Penne. 327; Conduitt v. Ryan, 3 Ind. App. 1; Grasser & B. B. Co. v. Rogers, 112 Mich. 112.

If a trustee pays trust money on his account at his banker's and mixes it with his own funds and draws checks against it in the usual manner for his personal use he will be presumed to have drawn his own and not the trust money. Knatchbull v. Hallett, 13 Ch. Div. 696, overruling earlier cases.

better secured than another, since the particular parts, being blended together in one common account, have no separate existence; the balance only is considered as due;⁵⁹ and a payment made on such account, without a more specific appropriation, is treated by a majority of the cases as applied to the earliest items, although for some of these the creditor has a lien or other security and has none for the others.⁶⁰ Where there is a single open account and a general payment is made by the debtor at full age, it is presumed to be in satisfaction of the earliest items although they accrued during his minority.⁶¹ Such a payment will not be judicially disturbed.⁶² The rule concerning the application of payments to the oldest item of the account applies to an open running account with a firm continued unchanged with a member of it who buys the interest of his copartner and continues the business.⁶³ As between a debt due and a contingent liability a payment will be applied to the former.⁶⁴

The rule applying an indefinite payment to the debts which first accrued applies not only to the first items of an account but to distinct debts contracted at different times.⁶⁵ The rule is not unjust or prejudicial to a debtor; it operates, however, more

⁵⁹ *Harrison v. Johnston*, 27 Ala. 445.

⁶⁰ *Polk P. Co. v. Smedley*, 155 Mich. 249; *Conduitt v. Ryan*, 3 Ind. App. 1; *Dunnington v. Kirk*, 57 Ark. 595; *Worthley v. Emerson*, 116 Mass. 374; *Truscott v. King*, 6 N. Y. 147; *The A. R. Dunlap*, 1 Low. 350; *Moore v. Gray*, 22 La. Ann. 289; *Cushing v. Wyman*, 44 Me. 121; *Hersey v. Bennett*, 28 Minn. 86, 41 Am. Rep. 271; *Miller v. Miller*, 23 Me. 22, 39 Am. Dec. 597. But see *Pierce v. Sweet*, 33 Pa. 151; *Thompson v. Davenport*, 1 Wash. (Va.) 125; *Schuelenberg v. Martin*, 2 Fed. 747. The last case is distinguishable because the payment was not a voluntary one a fact which the court failed to observe.

⁶¹ *ThurLOW v. Gilmore*, 40 Me. 378.

⁶² *Pond & Hasey Co. v. O'Connor*, 70 Minn. 266.

⁶³ *Schoonover v. Osborne*, 108 Iowa, 453; *Morgan v. Tarbell*, 28 Vt. 498.

⁶⁴ *Missouri Cent. L. Co. v. Stewart*, 78 Mo. App. 456; *Niagara Bank v. Roosevelt*, 9 Cow. 409.

⁶⁵ *Van Seeiver v. King*, 176 Mich. 605; *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153; *Thompson v. Phelan*, 22 N. H. 339; *McDaniel v. Barnes*, 5 Bush, 183; *Robinson v. Allison*, 36 Ala. 526; *Byrne v. Grayson*, 15 La. Ann. 457; *Upham v. LeFavour*, 11 Mete. (Mass.) 174; *Langdon v. Bowen*, 46 Vt. 512; *Smith v. Loyd*, 11 Leigh 512, 37 Am. Dec. 621; *Jones v. United States*, 7 How. 681; *McKinzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Allstan v. Contee*, 4 Har. & J. 351; *Driffen v. Boonville*, 8 Mo. 395; *Copland v. Toul-*

beneficially to the creditor; for it often saves a debt from the bar of the statute of limitations, and closes the door to the older transactions which it may be presumed are more difficult of proof. But the rule applies the payments in the natural and logical order of the transactions. It is not supported, however, by reasons so cogent but that it will yield when there is evidence of a contrary intention,⁶⁶ or where some superior equity requires a different application,⁶⁷ as where sureties are bound and a general account has been kept with the principal, in which case payments will be applied so that each set of sureties will receive the benefit of moneys paid during the time for which they were holden.⁶⁸ "Whenever the relation of the parties or the nature of the account or transaction between them shows that an appropriation of payments to the earliest items of the account would do injustice between them or fail to conform to their understanding or agreement, another application is made."⁶⁹ If property is exempt from execution the rule that partial payments shall be so appropriated as to protect the creditor does not apply so as to affect such property any more than such payments would revive a debt barred by time.⁷⁰

§ 244. General payment applied to a debt bearing interest, and first to interest. As between debts bearing and those not bearing interest the law directs an indefinite payment to be applied to the former.⁷¹ The reason generally assigned is that of relieving the debtor in respect to the debt which is most burden-

min, 7 Cl. & F. 349; *Simson v. Ing-ham*, 2 B. & C. 72; *Hooker v. Keay*, 1 Q. B. Div. 178.

This rule will not be applied to payments made by a reorganized partnership without the consent of its new members. *St. Louis T. F. Co. v. Wisdom*, 4 Lea 695; *Burland v. Nash*, 2 F. & F. 687; *Thompson v. Brown*, 1 Mood. & M. 406; *Roakes v. Bailey*, 55 Vt. 542.

⁶⁶ *City Discount Co. v. McLean*, L. R. 9 C. P. 692; *Langdon v. Bowen*, 46 Vt. 512.

⁶⁷ *Upham v. Lefavour*, 11 Mete. (Mass.) 174.

⁶⁸ *First Nat. Bank v. National S. Co.*, 130 Fed. 401, 64 C. C. A. 601, 66 L.R.A. 777.

⁶⁹ *Faisst v. Waldo*, 57 Ark. 270.

⁷⁰ *Sternberger v. Gowdy*, 93 Ky. 146; *Shaffer v. Chernyk*, 130 Iowa, 686.

⁷¹ *Heyward v. Lomax*, 1 Vern. 24; *Scott v. Fisher*, 4 T. B. Mon. 387; *Blanton v. Rice*, 5 id. 253; *Bacon v. Brown*, 1 Bibb, 334, 4 Am. Dec. 640; *Scott v. Cleveland*, 33 Miss. 447; *Bussey v. Gant*, 10 Humph. 238.

some, or the presumed choice of the debtor.⁷² This may be conceded to be sufficient for this application and some others, where a particular one is specially beneficial to a debtor without being attended with a corresponding loss to the creditor, which the law is equally solicitous to prevent. Interest due is first to be satisfied when a general payment is made, and if there be a surplus it is to be applied to the principal. If the payment falls short of the interest the balance of the interest is not to be added to the principal, but remains to be extinguished by the next payment, if it is sufficient.⁷³ This rule yields to that which requires that the debt least secured shall first be paid; hence if the claim for interest is better secured than the principal the application will be in favor of the latter;⁷⁴ and is not to be applied where the defendant in foreclosure appeals and gives a bond for the payment, if the judgment be affirmed, of such interest as might accrue and remain

⁷² Id. See *Neal v. Allison*, 50 Miss. 175.

⁷³ *Interstate Trust & Banking Co. v. Young*, 135 La. 465; *Wilson v. Ware*, — Tex. Civ. App. —, 166 S. W. 705; *Bidwell v. Douglas T. Co.*, 183 Fed. 93, 105 C. C. A. 385; *Cicero v. Green*, 211 Ill. 241; *Christie v. Scott*, 77 Kan. 257; *Colterd v. Tully*, 77 N. J. Eq. 439; *Bower v. Walker*, 220 Pa. 294, 14 Pa. Dist. 782; *Hinrichs v. Brady*, 23 S. D. 250; *Buck v. Mutual B. & L. Ass'n*, 49 Pa. Super. 128; *Equitable S. & L. Ass'n v. Bowes*, 70 Wash. 169; *Weide v. St. Paul*, 62 Minn. 67; *Monroe v. Fohl*, 72 Cal. 568; *Morgan v. Michigan A. L. R. Co.*, 57 Mich. 430; *Bradford Academy v. Grover*, 55 Vt. 462; *Case v. Fish*, 58 Wis. 56; *Hurst v. Hite*, 20 W. Va. 183; *Frazier v. Hyland*, 1 Har. & J. 98; *Gwinn v. Whitaker*, id. 754; *Bond v. Jones*, 8 Sm. & M. 368; *Spire v. Hamot*, 8 W. & S. 17; *Peebles v. Gee*, 1 Dev. 341; *Hampton v. Dean*, 4 Tex. 455; *Hearn v. Cutberth*, 10 id. 216; *Me-*

Fadden v. Fortier, 20 Ill. 509; *Hart v. Dorman*, 2 Fla. 445; *Lash v. Edgerton*, 13 Minn. 210; *Hammer v. Nevill, Wright*, 169; *Estebene v. Estebene*, 5 La. Ann. 738; *Union Bank v. Lobdell*, 10 id. 130; *Bird v. Lobdell*, id. 159; *Johnson v. Robbins*, 20 id. 569; *Moore v. Kiff*, 78 Pa. 96; *Williams v. Houghtaling*, 3 Cow. 86; *Righter v. Stall*, 3 Sandf. Ch. 608; *State v. Jackson*, 1 Johns. Ch. 13, 7 Am. Dec. 471; *People v. New York County*, 5 Cow. 331; *Jencks v. Alexander*, 11 Paige, 619; *Starr v. Richmond*, 30 Ill. 276, 83 Am. Dec. 189; *Johnson v. Johnson*, 5 Jones' Eq. 167; *De Bruhl v. Neuffer*, 1 Strobb. 426. See *Mercer v. Beale*, 4 Leigh, 189.

If part of the interest is barred by the statute an unappropriated payment will not be applied to its discharge because it is not wholly due. In *re Fitzmaurice's Minors*, 15 Irish Ch. 445.

⁷⁴ *Smythe v. New England L. & T. Co.*, 12 Wash. 424.

otherwise unpaid upon the decree from the date thereof. On affirmance of such judgment the proceeds of the sale will be applied to meet the fees, costs and principal before satisfying the interest on the decree; the deficiency, if any, will thereby be secured by the appeal bond. "It would not be in accordance with natural justice or with the rules which govern courts of equity to allow appellant to delay a sale by his appeal and render the security inadequate to pay the accruing interest, and then, upon a sale, discharge the interest from the proceeds of such security and free him from his obligation."⁷⁵

Where a debt bearing interest remains unpaid until interest is due on the interest, where that is permitted, general payments are to be applied, first, to such interest on interest; second, to interest on the principal; and third, to the principal.⁷⁶ And in applying payments on a sum secured by a penal bond, they will be applied to the interest in the first instance, although their sum exceeds the penalty.⁷⁷ A payment of usury will be applied in law to discharge the amount legally due.⁷⁸ Payments received on a debt bearing interest before either is due should be applied to pay the principal and the interest accrued on that part of the principal so extinguished.⁷⁹ The rule which applies

⁷⁵ *Monson v. Meyer*, 190 Ill. 105, aff'g 92 Ill. App. 127.

⁷⁶ *Anketel v. Converse*, 17 Ohio St. 11; *Dickson v. Stewart*, 71 Neb. 424, 115 Am. St. 596. See *In re Ewing's Est.*, 103 App. Div. (N. Y.) 500.

⁷⁷ *Smith v. Macon*, 1 Hill Ch. (S. C.) 339.

⁷⁸ *Atlanta Sav. Bank v. Spencer*, 107 Ga. 629; *Burrows v. Cook*, 17 Iowa, 436; *Parchman v. McKinney*, 12 Sm. & M. 631; *Stanley v. Westrop*, 16 Tex. 200; *Bartholomew v. Yaw*, 9 Paige, 165; *Gage v. Smyth* M. Co., 160 Fed. 425, 87 C. C. A. 377; *Western Bank & T. Co. v. Ogden*, 42 Tex. Civ. App. 465. See *Bramblett v. Deposit Bank*, 122 Ky. 324, 6 L.R.A.(N.S.) 612; § 236.

In a suit under the national bank

act to recover usurious interest and the forfeiture provided for, if occasional settlements have been made by the parties, payments deducted from the principal and interest then due and new notes given for the balances, the payments will be applied *pro rata* to the principal and interest due at the time. *Kinser v. Farmers' Nat. Bank*, 58 Iowa 728.

⁷⁹ *Righter v. Stall*, 3 Sandf. Ch. 608; *Jencks v. Alexander*, 11 Paige, 619; *Williams v. Houghtaling*, 3 Cow. 86; *Miami E. Co. v. United States Bank*, 5 Ohio, 260.

In *Starr v. Richmond*, 30 Ill. 276, 83 Am. Dec. 189, Walker, J., said: "It appears to be more equitable and just that when the holder receives money before it is due, on a demand drawing interest, it should

a general payment first to interest due, rather than principal, is directly opposite to that which applies a payment on an interest-bearing debt in preference to one not bearing interest; it does not favor the debtor, but the creditor; for the law in some states allowing interest due to bear interest is exceptional.

§ 245. General payments applied to the debt least secured; comments on conflicting views of the general subject. If one debt be secured and another not and a general payment is made, the prevailing rule is that the court will apply it to the debt which is not secured, or that for which the security is most precarious.⁸⁰ The rule has been applied to money recov-

be applied, in the absence of an agreement to the contrary, to the principal. Otherwise, by loaning the sum thus received, he would, in effect, compound the interest, or have placed at interest before its maturity a larger sum than his original claim. In other words, he would receive interest on the maker's money as well as his own. After the principal and interest both become due it would be otherwise. The court below, we think, erred in applying any portion of the payment made before the maturity of the note to the extinguishment of interest, but should have appropriated the whole of the payment to the principal." *McElrath v. Dupuy*, 2 La. Ann. 520; *Fay v. Lovejoy*, 20 Wis. 407.

⁸⁰ *Schmeling v. Rockford A. Co.*, 154 Ill. App. 308; *Coles County v. Haynes*, 134 id. 320; *Sawyer v. Stilson*, 146 Iowa 707; *Sipe v. Taylor*, 106 Va. 231; *Sternberger v. Gowdy*, 93 Ky. 146; *Chicago T. & T. Co. v. McGlew*, 90 Ill. App. 58; *Monson v. Meyer*, 93 Ill. App. 94, aff'd 190 Ill. 105; *Gardner v. Leek*, 52 Minn. 522; *Price v. Merritt*, 55 Mo. App. 640; *McMillan v. Grayston*, 83 id. 425; *Smith v. Lewiston S. Mill*, 66 N. H. 613;

Pond v. Harwood, 139 N. Y. 111; *Pope v. Transparent I. Co.*, 91 Va. 79; *Poling v. Flanagan*, 41 W. Va. 191; *The Katie O'Neil*, 65 Fed. 111; *Garrett's App.*, 100 Pa. 597; *Goetz v. Piel*, 26 Mo. App. 634, 643; *Nicholas v. Knowles*, 3 McCrary, 477, 17 Fed. 494; *Sanborn v. Stark*, 31 Fed. 18; *McCurdy v. Middleton*, 82 Ala. 131; *Poulson v. Collier*, 18 Mo. App. 583; *The D. B. Steelman*, 5 Hughes 210; *Hare v. Stegall*, 60 Ill. 380; *Wilhelm v. Schmidt*, 84 id. 183; *Plain v. Roth*, 107 id. 588; *Frazier v. Lanahan*, 71 Md. 131, 17 Am. St. 516; *Lester v. Houston*, 101 N. C. 605; *North v. La Flesh*, 73 Wis. 520; *McDaniel v. Barnes*, 5 Bush 183; *Thomas v. Kelsey*, 30 Barb. 268; *Blanton v. Rice*, 5 T. B. Mon. 253; *Field v. Holland*, 6 Cranch, 8, 3 L. ed. 136; *Burks v. Albert*, 4 J. J. Marsh. 97, 20 Am. Dec. 209; *Foster v. McGraw*, 64 Pa. 464; *Pattison v. Hull*, 9 Cow. 747; *Dows v. Morewood*, 10 Barb. 183; *Johnson's App.*, 37 Pa. 268; *Langdon v. Bowen*, 46 Vt. 512; *Wilcox v. Fairhaven Bank*, 7 Allen, 270; *Hempfield R. Co. v. Thornburg*, 1 W. Va. 261; *Gaston v. Barney*, 11 Ohio St. 510; *Moss v. Adams*, 4 Ired. Eq. 42; *Ransour v. Thomas*, 10 Ired. 164; *State v.*

ered from a defaulting officer by his sureties and paid over by them to the government, his defalcation being in excess of their liability.⁸¹ If, however, the security of one of the debts is by a surety, a general payment will be applied to the debt for which he is liable that he may be relieved.⁸² No one except a surety will be heard to contend for a different application. The court cannot go outside the case to see whether or not equity requires that other than the parties to the record shall be protected; and, it seems, that in the absence of fraud or imposition on the surety he has no equity to control the application of a payment for which he is bound.⁸³ One liable as guarantor for the prompt payment of interest on a mortgage cannot, in an action upon the guaranty, after a foreclosure sale which failed to bring the amount due on principal and interest, assert the right to have the money applied to the interest.⁸⁴ In some states the courts, carrying the rule first stated in this section to greater length, hold that the application will be made to the debt which bears heaviest upon the debtor and apply a general payment so as to discharge a debt for which he has

Thomas, 11 id. 251; *Jenkins v. Beal*, 70 N. C. 440; *Sprinkle v. Martin*, 72 id. 92; *Chester v. Wheelwright*, 15 Conn. 562; *Bosley v. Porter*, 4 J. J. Marsh. 621; *Gordon v. Hobart*, 2 Story, 243; *Taylor v. Talbot*, 2 J. J. Marsh. 49; *Sager v. Warley*, Rice Ch. (S. C.) 26; *Heilbron v. Bissell*, 1 Bailey Eq. 430; *Gregory v. Forrester*, 1 McCord Ch. 318; *Smith v. Wood*, 1 N. J. Eq. 74; *Jones v. Kilgore*, 2 Rich. Eq. 63; *Baine v. Williams*, 10 Sm. & M. 113; *McQuaide v. Stewart*, 48 Pa. 198; *Smith v. Brooke*, 49 id. 147; *Planters' Bank v. Stockman*, 1 Freeman's Ch. 502.

⁸¹ *Alexander v. United States*, 6 C. C. A. 602, 57 Fed. 828.

⁸² *Pritchard v. Comer*, 71 Ga. 18; *Pearl v. Deacon*, 1 De G. & J. 461; *Kinnaird v. Webster*, 10 Ch. Div. 139; *Berghaus v. Alter*, 9 Watts 386; *Ross v. McLauchlan*, 7 Gratt.

86; *Marryatts v. White*, 2 Stark. 101; *Gard v. Stevens*, 12 Mich. 292, 86 Am. Dec. 52; *Bridenbecker v. Lowell*, 32 Barb. 9.

Where one of several accommodation makers of a note has notified the payee and holder of his desire to terminate his liability he cannot claim in diminution thereof on account of outstanding advances money paid to the holder by the accommodation payee after such revocation, such money being the proceeds of the business of the payee conducted on money advanced on the credit of the other accommodation makers. *Patterson v. Bank*, 26 Ore. 509.

⁸³ *Richards' Est.*, 185 Pa. 155; *Stamford Bank v. Benedict*, 15 Conn. 444.

⁸⁴ *Smythe v. New England L. & T. Co.*, 12 Wash. 424.

given security in preference to an unsecured demand in order to release the collateral.⁸⁵

There is a marked conflict of decision upon this point relating to the application by the court of indefinite payments arising, as before intimated, from the diverse judicial assumptions on the one hand, that such payments are as a general rule to be applied in the manner most beneficial to the debtor, and on the other, that they are to be applied most beneficially to the creditor.⁸⁶ No court, however, has so far relied upon either assumption as to resolve all questions by it. As before stated, neither assumption, apart from some special ground, is founded in reason or principle. Neither party, by reason merely of being debtor or creditor, has any claim to be preferred; each as a general rule has had an election to appropriate the payment, and each having waived it has an equal claim to a just application by the court. The rule that the debt which is least secured should be first paid, where there are no special circumstances, stands on very slight preponderance of equity. The most that can be said for it was said by Marshall, C. J.: "It being equitable that the whole debt should be paid it cannot be inequitable to extinguish first those debts for which the se-

⁸⁵ *Compound L. Co. v. Murphy*, 169 Ill. 343; *Frazier v. Lanahan*, 71 Md. 131, 17 Am. St. 516; *Griswold v. Onondaga County Sav. Bank*, 93 N. Y. 301; *Pattison v. Hull*, 9 Cow. 747; *Dows v. Morewood*, 10 Barb. 183; *Poindexter v. La Roche*, 7 Sm. & M. 699; *Dorsey v. Gassaway*, 2 Har. & J. 402, 3 Am. Dec. 557; *McTavish v. Carroll*, 1 Md. Ch. 160 (but see *Gwinn v. Whitaker*, 1 Har. & J. 754); *The Antarctic*, 1 Sprague, 206; *Neal v. Allison*, 50 Miss. 175. See *Thatcher v. Massey*, 20 S. C. 542.

Payments will be so applied as to save a debtor's homestead. *First Nat. Bank v. Hollinsworth*, 78 Iowa 575, 6 L.R.A. 92.

⁸⁶ So much has this assumption of favoring one party or the other

as a rule entered into the judgment of the courts that it has been a convenient resort for determining incidental questions. Thus where it was proved that a payment was made in a certain year, but the day and month could not be shown, the court directed the credit to be given as of the last day of the year, a day most favorable to the creditor. *Byers v. Fowler*, 14 Ark. 86. See *Anderson v. Mason*, 6 Dana 217; *Bank v. Brown*, 22 Me. 295.

If the course of dealing between the parties indicates an understanding that payments are to be applied in the way most beneficial to the creditor the court will give effect to it. *Gwin v. McLean*, 62 Miss. 121.

curity is most precarious;”⁸⁷ and it is not surprising that the humane consideration of relieving the debtor of the more burdensome debt should determine the application the other way. But the rule to pay first the debt least secured seems to be supported by a decided weight of authority.

There is also considerable contrariety of decision upon other points relative to the application of payments by the court. The cases agree that an indefinite payment is to be applied to the oldest debt, where no other rule of appropriation conflicts; but it often occurs that another and sometimes several rules do conflict. Then the relative force of the conflicting rules and the particular circumstances must control the application. That rule is often met by the rule that the least secured debt shall be first paid. Both may be said to operate in favor of the creditor, but they do not always conduce to the same application. The latter is paramount when no circumstances exist to increase the force of the other. Where the secured and unsecured debts are by mutual consent items in a general account current, and especially if, by like consent, the payment is also credited in the account, the rule for applying the credit to the oldest items prevails, notwithstanding the partial security⁸⁸ but not without dissent. Where the creditor's security consisted in retaining title to the property sold, and the purchase price of the articles so conditionally sold constituted the earliest items in the account, and the payments were by mutual consent entered as credits therein, the interest of the purchaser to perfect his title to the property was deemed to preponderate against the interest of the creditor to obtain payment of his unsecured, rather than his secured, claims; and the concurrence of the parties in making the transaction a matter of account evinced their intention that the payments should satisfy the charges in the order of their entry.⁸⁹

⁸⁷ *Field v. Holland*, 6 Cranch 8, 3 L. ed. 136.

⁸⁸ § 243.

⁸⁹ *Crompton v. Pratt*, 105 Mass. 255.

In *Pointer v. Smith*, 7 Heisk. 137, A., a Tennessean, as agent, hired out

in Alabama the slaves of several Tennesseans, and afterwards received in Alabama a part of the hire, without any appropriation at the time by either agent receiving or the debtor paying. Held, that the law of Alabama would govern

SECTION 3.

ACCORD AND SATISFACTION.

§ 246. **Definition.** A claim or demand may be satisfied by the party liable delivering, paying or doing, and the claimant accepting, something different from that which was owing or claimed, if they so agree.⁹⁰ It is a substituted payment. When

as to the subsequent appropriation of the payment; but in the absence of any proof as to the law thereof, applicable to the circumstances, the debtor could not make a subsequent appropriation, and it should be distributed *pro rata*.

In *Smith v. Union Bank*, 5 Pet. 518, 8 L. ed. 212, it was held that the right of priority of payment among creditors of an intestate depends on the law of the place where the assets are administered, and not on the law of the place of the contract, or of the domicile of the deceased; and, therefore, where administration was taken under the laws of Maryland of assets there, where all debts are of equal dignity, and the intestate was domiciled and owed a bond debt in Virginia, where bond debts have a preference, the latter debt had no prior right of payment out of the assets in Maryland.

⁹⁰ *Fuller v. Smith*, 107 Me. 161; *Ikard v. Armstrong*, 10 Ala. App. 657.

The amount tendered must be unconditionally accepted in full settlement. *Grossman Bros. & Rosenbaum v. Phillips*, 83 Misc. (N. Y.) 453; *Alabama City, G. & A. Ry. Co. v. Gadsden*, 185 Ala. 263.

The intention of the parties controls. *Jacobs v. Jacobs*, 130 Iowa 10.

If the amount due is unliquidated and the party owing it makes an

offer of a less sum in settlement and attaches thereto the condition that if the sum is taken at all it must be received in full or in satisfaction, and the other party receives it with knowledge of the condition, he takes it subject thereto, and it operates as a full accord and satisfaction notwithstanding the payee, at the time of receiving it, declares that he takes it in satisfaction *pro tanto* only. *McDaniels v. Bank*, 29 Vt. 230, 70 Am. Dec. 406; *Preston v. Grant*, 34 Vt. 201; *Berdell v. Bissell*, 6 Colo. 162; *Vermont State Baptist Convention v. Ladd*, 58 Vt. 95; *Bull v. Bull*, 34 Conn. 455; *Patton v. Douglass*, 44 id. 541; *Donaldson v. Norman*, 14 Ga. App. 146; *Redmond & Co. v. Atlanta & B. Air-Line Ry. Co.*, 129 Ga. 133; *Elrod v. M. C. Kiser & Co.*, 13 Ga. App. 471.

If a party injured, with knowledge of all the facts, demands and receives from the wrongdoer a sum of money on account of the injury, either in whole or in part, it is presumed that it was intended as a full recompense, and it is an accord and satisfaction. *Hinkle v. Minneapolis, etc. R. Co.*, 31 Minn. 434. But it is otherwise if the party in fault pays money voluntarily, and not in response to a claim made by the other, or if any fact gives the payment the character of a gratuity. *Sobieski v. St. Paul & D. R. Co.*, 41 Minn. 169, 16 Am. Neg. Cas. 319.

such agreement is executed—carried fully into effect⁹¹—the original demand is canceled, satisfied, extinguished. It is thus discharged by what the law denominates *accord and satisfaction*. It is a discharge of the former obligation or liability by the receipt of a new consideration mutually agreed upon.⁹² The rule requiring that an accord be executed is satisfied if the creditor accepts the promise of the debtor to perform some act in future in satisfaction of the debt, and where that is the case the debt is extinguished without performance.⁹³ But there is an obvious distinction between an engagement to accept a promise in satisfaction and an agreement requiring performance of the promise. In the latter case a tender of performance, although made promptly and in good faith, is not satisfaction.⁹⁴

§ 247. **Consideration.** For the purpose of supporting such an agreement and giving it effect the law treats all considerations which have value, without regard to the extent of that

⁹¹ *Lamberton v. Harris*, 112 Ark. 503; *B. & W. Engineering Co. v. Beam*, 23 Cal. App. 164; *North State F. Ins. Co. v. Dillard*, 88 Ark. 473 (service of garnishment process does not excuse nonperformance); *Dreyfus v. Roberts*, 75 Ark. 354, 69 L.R.A. 823, 112 Am. St. 67; *Mayo v. Leighton*, 101 Me. 63; *Goodloe v. Empson P. Co.*, 145 Mo. App. 574; *Swofford D. G. Co. v. Goss*, 65 Mo. App. 55; *Wenz v. Meyersohn*, 59 App. Div. (N. Y.) 130; *First Nat. Bank v. Leech*, 36 C. C. A. 262, 94 Fed. 310; *Crow v. Kimball L. Co.*, 16 C. C. A. 127, 69 Fed. 127; *Hosler v. Hursh*, 151 Pa. 415; *Omaha F. Ins. Co. v. Thompson*, 50 Neb. 580; *Carpenter v. Chicago*, etc. R. Co., 7 S. D. 584; *Rogers v. Spokane*, 9 Wash. 168.

An accord and satisfaction is binding on a party who after knowledge of misrepresentations in the making thereof retains the benefits,

Beebe v. Worth, 146 N. Y. Supp. 146.

⁹² *Jackson v. Security Mut. L. Ins. Co.*, 233 Ill. 161; *Fredonia G. Co. v. Elwood S. Co.*, 71 Kan. 464; *Neely v. Thompson*, 68 Kan. 193; *Richardson v. Taylor*, 100 Me. 175; *First Nat. Bank v. Latham*, 37 Okla. 286; *Vanbebbler v. Plunkett*, 26 Ore. 562, 569, 27 L.R.A. 811, quoting the text; *Bush v. Abraham*, 25 Ore. 336, 345, quoting the text.

The sum tendered must be offered as full satisfaction and it must be so expressed. *Harrison v. Henderson*, 67 Kan. 194, 62 L.R.A. 760; *Asher v. Greenleaf*, 68 Kan. 29.

⁹³ *Smith v. Elrod*, 122 Ala. 269; *Knowles v. Knowles*, 128 Ill. 110; *Potts v. Polk County*, 80 Iowa 401; *Averill v. Wood*, 78 Mich. 342; *Oregon Pac. R. Co. v. Forrest*, 128 N. Y. 83; *Babcock v. Hawkins*, 23 Vt. 561; *Sharp v. Mauston*, 92 Wis. 629. See § 252.

⁹⁴ *Hosler v. Hursh*, 151 Pa. 415.

value, as sufficient, as it does in all other cases of contract;— inadequacy is not a valid objection; a court will not consider the disparity, if there is any, between the value of the liability discharged and the thing done or promised which forms the consideration, if the latter is of some value.⁹⁵ The receipt of money paid into court by the defendant does not deprive the plaintiff of his right to collect the balance due unless the payment was accompanied by a condition that the sum must be accepted in full satisfaction.⁹⁶

§ 248. Payment of part of a debt will not support agreement to discharge the whole. Where there is an overdue money demand, liquidated and not disputed, and a part only of it is paid, though this is accepted as full satisfaction, there is only a part performance of the obligation in kind; the agreement to discharge the residue is void, for want of consideration. All claims for damages, for torts committed, or for contracts broken, are payable in money. When a demand therefor is certain, or rendered certain by agreement or adjudication, and is no longer disputed, it cannot be satisfied with any less amount than the precise sum owing. If a part is paid there is a partial performance of the obligation of the party liable, and no more. This payment is only a discharge *pro tanto*. This part payment may have been induced solely by the assurance that it would be accepted as full satisfaction, and it may have been impossible to compel payment; still, the party paying has done in kind only what he was under a legal obligation to do in respect to the amount paid, and the corresponding amount of the obligation is thereby satisfied, but no more; therefore the agreement of the creditor to

⁹⁵ Fuller v. Smith, 107 Me. 161; Valley v. Boston & M. R. Co., 103 Me. 106; Savage v. Everman, 70 Pa. 315, 10 Am. Rep. 676; Hartman v. Danner, 74 Pa. 33; Very v. Levy, 13 How. 345, 14 L. ed. 173; Hardman v. Bellhouse, 9 M. & W. 596; Sibree v. Tripp, 15 id. 23; Booth v. Smith, 3 Wend. 66; Kellogg v. Richards, 14 id. 116; Steinman v. Magnus, 11 East, 390; Lewis v. Jones, 4 B. & C. 506; Blinn v. Chester, 5 Day,

360; Webster v. Wyser, 1 Stew. 184; Davis v. Noaks, 3 J. J. Marsh. 497; Wood v. Roberts, 2 Stark. 417; Boothby v. Sowden, 3 Camp. 175; Bradley v. Gregory, 2 id. 383; Bush v. Abraham, 25 Ore. 336; Griffith v. Creighton, 61 Mo. App. 1; Howard v. Morton, 65 Barb. 161. See § 249.

⁹⁶ Cooley v. Kinney, 119 Mich. 377

discharge the residue is, in a legal sense, gratuitous and not binding⁹⁷ as between the parties, although it may be binding as to

- ⁹⁷ *Louisiana Lumber Co. v. J. W. Farrior Lumber Co.*, 9 Ala. App. 383; *Abererombie v. Goode*, 187 Ala. 310; *Baccaria v. Landers*, 84 Misc. (N. Y.) 396; *National Art Co. v. Ellery* — Misc. (N. Y.) —, 145 N. Y. Supp. 277; *Schumacher v. Moffitt*, 71 Ore. 79; *Johnson v. Hoover & Lyons*, — Tex. Civ. App. —, 165 S. W. 900; *Scott v. Rawls*, 159 Ala. 399; *Schlessinger v. Schlessinger*, 39 Colo. 44, 8 L.R.A.(N.S.) 863; *Phinizy v. Bush*, 129 Ga. 479; *Stewart v. Stephens*, 7 Ga. App. 453; *Farmers & M's. L. Ass'n v. Caine*, 224 Ill. 599; *Cartan v. Tackaberry*, 139 Iowa 586; *New York L. Ins. Co. v. Van Meter*, 137 Ky. 4, 136 Am. St. 282; *Commercial & F's. Nat. Bank v. McCormick*, 97 Md. 703; *Gilman v. Cary*, 198 Mass. 318; *Proctor v. Cable Co.*, 145 Mich. 503; *Goldsmith v. Lichtenberg*, 139 Mich. 163; *Wherley v. Rowe*, 106 Minn. 494; *Demeules v. Jewel T. Co.*, 103 Minn. 150, 123 Am. St. 315, 14 L.R.A.(N.S.) 954; *Hoidale v. Wood*, 93 Minn. 190; *Debuhr v. Thompson*, 134 Mo. App. 21; *Crilly v. Rule*, 87 Neb. 367; *Crawford v. Darrow*, 87 Neb. 494; *Castelli v. Jereissati*, 80 N. J. L. 295; *Eckert v. Wallace*, 75 N. J. L. 171, citing local cases; *Schuller v. Robison*, 139 App. Div. (N. Y.) 97; *Parker v. Mayes*, 85 S. C. 419; *Hagen v. Townsend*, 27 S. D. 457; *Siegele v. Des Moines Mut. Hail Ins. Ass'n*, 28 S. D. 142; *Nixon v. Kiddy*, 66 W. Va. 355; *Borden v. Vinegar Bend L. Co.*, 2 Ala. App. 354; *Same v. Same*, 7 Ala. App. 335; *Rogers v. Union I. & F. Co.*, 167 Mo. App. 228; *Wolf v. Humboldt County*, 36 Nev. 26, 45 L.R.A.(N.S.) 762; *Bergman P. Co. v. Brown* (Tex. Civ. App.), 156 S. W. 1102; *Smoot v. Checketts*, 41 Utah 211; *Swofford D. G. Co. v. Goss*, 65 Mo. App. 55; *Morrill v. Baggott*, 157 Ill. 240; *Hart v. Strong*, 183 Ill. 348; *Pottlitzer v. Wesson*, 8 Ind. App. 472; *Jennings v. Durlinger*, 23 Ind. App. 673; *Stengel v. Preston*, 11 Ky. L. Rep. 976; *Leeson v. Anderson*, 99 Mich. 247; *Wetmore v. Crouch*, 150 Mo. 671; *Griffith v. Creighton*, 61 Mo. App. 1; *Howe v. Robinson*, 13 N. Y. Misc. 256; *Jones v. Rice*, 19 N. Y. Misc. 357; *Toledo v. Sanwald*, 13 Ohio C. C. 496 (applying the rule to a judgment); *Mt. Holly W. Co. v. Mt. Holly Springs*, 10 Pa. Super. Ct. 162; *Commonwealth v. Cummins*, 155 Pa. 30; *Chicago, etc. R. Co. v. Clark*, 35 C. C. A. 120, 92 Fed. 968 (the opinion of Lacombe, C. J., reviews many cases); *Hodges v. Truax*, 19 Ind. App. 651; *Rued v. Cooper*, 119 Cal. 463; *Gurley v. Hiteshue*, 5 Gill, 217; *Markel v. Spitler*, 28 Ind. 488; *Dederick v. Leman*, 9 Johns. 333; *Harris v. Close*, 2 id. 448, 3 Am. Dec. 244; *Seymour v. Minturn*, 17 Johns. 169, 8 Am. Dec. 380; *White v. Jordan*, 27 Me. 370; *Latapee v. Pecholier*, 2 Wash. C. C. 180; *Warren v. Skinner*, 20 Conn. 559; *Campbell v. Booth*, 8 Md. 107; *Curtiss v. Martin*, 20 Ill. 575; *Donohue v. Woodbury*, 6 Cush. 150; *Bryant v. Proctor*, 14 B. Mon. 451; *Williams v. Langford*, 15 id. 566; *Conkling v. King*, 10 Barb. 372, 10 N. Y. 440; *Keeler v. Salisbury*, 33 N. Y. 648; *Fellows v. Stevens*, 24 Wend. 299; *Harper v. Graham*, 20 Ohio, 105; *Fell v. McHenry*, 42 Pa. 41; *Piereson v. McCahill*, 21 Cal. 122; *Irvine v. Millbank*, 56 N. Y. 635; *Hinckley*

third persons.⁹⁸ The actual value of a debt or demand depends on the probability of voluntary payment, or the possibility of collection by legal process. Where a debt is doubtful a creditor may obtain a part of the nominal amount by discharging the residue and thus realize all that it is actually worth, and perhaps more. For this reason the rule stated has been regarded by the courts as only a technical one; and they have satisfied it on nice distinctions;⁹⁹ or, as has been judicially said, "they have seemed

v. Arey, 27 Me. 362; *Riley v. Ker-shan*, 52 Mo. 224; *Peterson v. Wheeler*, 45 id. 369; *Rose v. Hall*, 26 Conn. 392, 68 Am. Dec. 402; *Bailey v. Day*, 26 Me. 88; *Redfield v. Holland P. Ins. Co.*, 56 N. Y. 354, 15 Am. Rep. 424; *Lewis v. Jones*, 6 D. & R. 567, 4 B. & C. 513; *Ogborn v. Hoffman*, 52 Ind. 439; *Keen v. Vaughan*, 48 Pa. 477; *Carrington v. Crocker*, 37 N. Y. 336; *Cumber v. Wane*, 1 Str. 426; *Sibree v. Tripp*, 15 M. & W. 23; *Fitch v. Sutton*, 5 East, 230; *Pinnell's Case*, 5 Rep. 117; *Lynn v. Bruce*, 2 H. Bl. 317; *Thomas v. Heathorn*, 2 B. & C. 477; *Mitchell v. Cragg*, 10 M. & W. 367; *Skaife v. Jackson*, 3 B. & C. 421; *Graves v. Key*, 3 B. & Ad. 313; *Straton v. Rastall*, 2 T. R. 366; *Churchill v. Bowman*, 39 Vt. 518; *Hardey v. Coe*, 5 Gill 189; *Smith v. Bartholomew*, 1 Mete. (Mass.) 276, 35 Am. Dec. 365; *Arnold v. Park*, 8 Bush 3; *Tyler v. Odd Fellows' Mut. Relief Ass'n*, 145 Mass. 134; *Smith v. Chilton*, 84 Va. 840; *Martin v. Frantz*, 127 Pa. 389, 14 Am. St. 859; *Hayes v. Massachusetts Mut. L. Ins. Co.*, 125 Ill. 626, 1 L.R.A. 303; *Sheibley v. Dixon County*, 61 Neb. 409; *Helling v. United Order of Honor*, 29 Mo. App. 309; *Emmittsburg R. Co. v. Donoghue*, 67 Md. 383, 1 Am. St. 396; *St. Louis, etc. R. Co. v. Davis*, 35 Kan. 464;

Foakes v. Beer, 9 App. Cas. 605, 11 Q. B. Div. 221; *Eldred v. Peterson*, 80 Iowa, 264, 20 Am. St. 416.

In *Gordon v. Moore*, 44 Ark. 349, 355, 51 Am. Rep. 606, it is held "that an agreement by a creditor to accept a smaller sum in satisfaction of a debt, carried into effect by the receipt of the money, and the execution of a formal and positive release, with all other acts essential to an absolute relinquishment of his right, is a valid and irrevocable act."

⁹⁸ *Ebert v. Johns*, 206 Pa. 395.

⁹⁹ *Knowlton v. Black*, 102 Me. 503; *Kellogg v. Richards*, 14 Wend. 116; *Smith v. Ballou*, 1 R. I. 496; *Harper v. Graham*, 20 Ohio 105; *Brooks v. White*, 2 Mete. (Mass.) 283, 37 Am. Dec. 95; *McDaniels v. Lapham*, 21 Vt. 222. See *Weymouth v. Babcock*, 42 Me. 44; *Milliken v. Brown*, 1 Rawle 391; *Lamb v. Goodwin*, 10 Ired. 320; *McDaniels v. Bank*, 29 Vt. 230; *Mathis v. Bryson*, 4 Jones 509; *Brink v. Garland*, 58 Mo. App. 356.

In *Woolfolk v. McDowell*, 9 Dana, 268, a creditor accepted his own note outstanding in the hands of a third person, in satisfaction of a larger amount against his debtor, but worth less because the debtor was unable to pay it. Judge Marshall said: "We think his acceptance is sufficient to establish the

to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or, in other words, to extract if possible from the circumstances of each case a consideration for the new agreement in place of the old, and thus to form a defense to the action brought upon the old agreement.”¹

§ 248a. **Same subject.** In a recent case the Mississippi court refused to recognize the rule stated in the last section, notwithstanding it had been applied there. In a strong opinion Woods, C. J., argues that the case in Coke² which is relied upon as the foundation of the rule decided no such question. “An examination of that mischievous and misleading reported case will make it appear at once that the question before us was not in any way involved. Pinnel’s plea was that, before the maturity of his bond for the larger sum, plaintiff had accepted a lesser sum agreed upon between the parties, in full satisfaction of the original debt. Now, all the authorities, American and English, including Coke himself, agree that this was a good defense, and that the plaintiff was bound by it, if defendant should properly plead it to a suit for the entire original debt. But the hapless Pinnel, in that remote period when courts were almost as zealous for the observance of technical rules of special pleading as for the execution of justice according to right, was adjudged to pay the whole debt, the plaintiff having judgment against him because of his ‘insufficient pleading, for,’ says Coke, ‘he did not plead that he had paid the 5*l.* 2*s.* 2*d.* in full satisfaction (as by law he ought), but pleaded the payment of part generally, and that the plaintiff accepted it in full satisfac-

adequacy of the satisfaction. It cannot be said that there was no consideration for giving up any part of the debt of the defendant, because although the value of the entire consideration given can be measured, there is no measure of the value of the debt which the defendant could not pay.”

¹ Jaffray v. Davis, 124 N. Y. 164, 11 L.R.A. 710.

“While the rule that where a

liquidated sum is due, the payment of part only, although accepted in satisfaction, is not, for want of consideration, a discharge of the entire indebtedness, is not looked upon with favor, and is confined strictly to cases falling within it.” *Baccaria v. Landers*, 84 Misc. (N. Y.) 396; *Jackson v. Volkening*, 81 App. Div. (N. Y.) 36, aff’d 178 N. Y. 562.

² Pinnel’s Case, 5 Co. Rep. 117.

tion.' ” After showing that the courts of this country generally adopted the rule supposed to be so laid down, the writer comes to the question of consideration, the absence of which is usually given as the reason for the rule: “The absurdity and unreasonableness of the rule seem to be generally conceded, but there also seems to remain a wavering, shadowy belief in the fact, falsely so called, that the agreement to accept, and the actual acceptance of, a lesser sum in the full satisfaction of a larger sum, is without any consideration to support it—that is, that the new agreement confers no benefit upon the creditor. However it may have seemed three hundred years ago in England, when trade and commerce had not yet burst their swaddling bands, at this day and in this country, where almost every man is in some way or other engaged in trade or commerce, it is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost, and delay, or the hazards of litigation in an effort to collect all, is not often—nay, generally—greatly to the benefit of the creditor. Why shall not money—the thing sought to be secured by new notes of third parties, notes whose payment in money is designed to be secured by mortgage, and even negotiable notes of the debtor himself—why shall not the actual payment of money, cash in hand, be held to be as good consideration for a new agreement, as beneficial to the creditor, as any mere promises to pay the same amount, by whomsoever made and howsoever secured? And why may not men make and substitute a new contract and agreement for an old one, even if the old contract calls for a money payment? And why may one accept a horse worth one hundred dollars in full satisfaction of a promissory note for one thousand dollars, and be bound thereby, and yet not be legally bound by his agreement to accept nine hundred and ninety-nine dollars, and his actual acceptance of it, in full satisfaction of the one thousand dollar note? No reason can be assigned, except that just adverted to, and this rests upon a mistake in fact. And a rule of law which declares that under no circumstances, however favorable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a less sum of

money at the time and place stipulated in the original obligation, or afterwards, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to satisfaction of the original debt, is absurd, irrational, unsupported by reason and not founded in authority, as has been declared by courts of the highest respectability, and of last resort, even when yielding reluctant assent to it."³

§ 249. **Any other act or promise which is a new consideration will suffice.** If there be any benefit or even legal possibility of benefit⁴ to the creditor thrown in the additional weight will turn the scale and render the consideration sufficient to support the agreement.⁵ Payment at a different place⁶ or before the original debt is due⁷ is sufficient. So if, instead of offering payment of a less sum, the debtor procures a third person to

³ Clayton v. Clark, 74 Miss. 499, 60 Am. St. 521, 37 L.R.A. 771, modifying or overruling Jones v. Perkins, 29 Miss. 139; Pulliam v. Taylor, 50 id. 251, and Burrus v. Gordon, 57 id. 93. To much the same effect as the principal case are Harper v. Graham, 20 Ohio, 105, and Frye v. Hubbell, 74 N. H. 358, 7 L.R.A.(N.S.) 1197 (a full discussion). See Dreyfus v. Roberts, 75 Ark. 354, 112 Am. St. 67, 69 L.R.A. 823; Shelton v. Jackson, 20 Tex. Civ. App. 443.

⁴ "What is called 'any benefit, or even any legal possibility of benefit,' is not that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal." Foakes v. Beer, 9 App. Cas. 605 (1884), 11 Q. B. Div. 221. Compare the preceding section.

⁵ Grayson's App., 108 Pa. 581; Hendrick v. Thomas, 106 Pa. 327; Tyson v. Woodruff, 108 Ga. 368; 1 Smith, Lead. Cas. 600; Steinman v. Magnus, 2 Camp. 124; Bradley v. Gregory, id. 383; Wood v. Roberts, 2 Stark. 417; Boothby v. Snowden, 3 Camp. 175; Sibree v. Tripp, 15 M. & W. 23; Bidder v. Bridges, 37 Ch. Div. 406.

⁶ Smith v. Brown, 3 Hawks, 580; Harper v. Graham, 20 Ohio 105; Austin v. Dorwin, 21 Vt. 39; Spann v. Baltzell, 1 Fla. 302, 46 Am. Dec. 346; Arnold v. Park, 8 Bush, 3; Milliken v. Brown, 1 Rawle, 391.

⁷ Singer S. M. Co. v. Lee, 105 Md. 663; Weiss v. Marks, 206 Pa. 513; Baldwin v. Daly, 41 Wash. 416; Russell v. Stevenson, 34 Wash. 166; Sonnenberg v. Riedel, 16 Minn. 83; Goodnow v. Smith, 18 Pick. 414, 29 Am. Dec. 200; Brooks v. White, 2 Mete. (Mass.) 283, 37 Am. Dec. 95; Levy v. Very, 12 Ark. 148; Boyd v. Moats, 75 Iowa 151; Schweider v. Lang, 29 Minn. 254; Ricketts v. Hall, 2 Bush 249, 43 Am. Rep. 302; Smith v. Brown, 3 Hawks, 580.

become security either by engaging his personal credit or pledging his property for the payment of a smaller sum;⁸ or the payment of such sum by a third person;⁹ or if the debtor alone gives negotiable paper for a smaller sum to satisfy a larger debt not in negotiable form;¹⁰ or if one of several joint debtors, whether in partnership or not, does so, and the note or bill, and not the payment of it, is accepted as satisfaction, it is valid; giving such security is a new consideration, for it may be more advantageous than the debt in its previous form.¹¹ Giving notes for smaller sums than the amount of the indebtedness which was represented by a single note, so that the creditor may sue on

⁸ Lincoln Sav. Bank & S. D. Co. v. Allen, 27 C. C. A. 87, 82 Fed. 148; Keeler v. Salisbury, 33 N. Y. 648; Brooks v. White, *supra*; Babcock v. Dill, 43 Barb. 577; Le Page v. McCrea, 1 Wend. 164, 19 Am. Dec. 469; Harrison v. Close, 2 Johns. 448, 3 Am. Dec. 444; Seymour v. Minturn, 17 Johns. 169, 8 Am. Dec. 380; Conkling v. King, 10 N. Y. 440; Welby v. Drake, 1 C. & P. 557; Belshaw v. Bush, 11 C. B. 191; James v. Isaacs, 12 id. 791; Steinman v. Magnus, 11 East, 390; Henderson v. Stobart, 5 Ex. 99; Dias v. Wanmaker, 1 Sandf. 469; Seymour v. Goodrich, 80 Va. 303; Bidder v. Bridges, 37 Ch. Div. 406; Roberts v. Brandies, 44 Hun 468; Varney v. Conery, 77 Me. 527; Laboyteaux v. Swigart, 103 Ind. 596. See Warburg v. Wilcox, 7 Abb. Pr. 336.

⁹ Cunningham v. Irwin, 182 Mich. 629; Gilson v. Nesson, 198 Mass. 598, 17 L.R.A.(N.S.) 1208; Parttridge v. Moynihan, 59 N. Y. Misc. 234; Hirachand Punanchand v. Temple, [1911] 2 K. B. 330; Fowler v. Smith, 153 Pa. 639; Clark v. Abbott, 53 Minn. 88, 39 Am. St. 577; Laboyteaux v. Swigart, 103 Ind. 596; Varney v. Conery, 77 Me. 527; Welby v. Drake, 1 C. & P. Suth. Dam. Vol. I.—48.

557; Gordon v. Moore, 44 Ark. 349, 51 Am. Rep. 606; Pettigrew Mach. Co. v. Harmon, 45 Ark. 290.

¹⁰ Jaffray v. Davis, 124 N. Y. 164, 11 L.R.A. 710, distinguishing or disapproving Keeler v. Salisbury, 73 N. Y. 653, and Platts v. Walrath, Lalor's Supp. 59; Mechanics' Bank v. Houston, 11 W. N. C. 388 (Pa. Sup. Ct.); Curlew v. Clark, 3 Ex. 375; Cooper v. Parker, 15 C. B. 825; Sibree v. Tripp, 15 M. & W. 23; Goddard v. O'Brien, 9 Q. B. Div. 37; American Seeding Mach. Co. v. Baker, 55 Ind. App. 625.

¹¹ Smith v. Pitts, 167 Ala. 461; Thompson v. Percival, 5 B. & Ad. 925; Sheehy v. Mandeville, 6 Cranch. 253, 3 L. ed. 215; Mason v. Wickersham, 4 W. & S. 100; Cole v. Sackett, 1 Hill 516; Waydell v. Luer, 5 id. 448, 3 Denio 410; Arnold v. Camp, 12 Johns. 409, 7 Am. Dec. 328; Lodge v. Dicus, 3 B. & Ald. 611; Pearson v. Thomason, 15 Ala. 700, 50 Am. Dec. 159; Russell v. Lytle, 6 Wend. 390, 22 Am. Dec. 537; Barron v. Vandvert, 13 Ala. 232; Webb v. Goldsmith, 2 Duer, 413; Cartwright v. Cooke, 3 B. & Ad. 701; Evans v. Powis, 1 Ex. 601; Kinsler v. Pope, 5 Strobl. 126; Evans v. Drummond, 4 Esp. 89; Reed v. White, 5 id. 122; Lyth

them in justice's court, is a sufficient consideration.¹² An accord and satisfaction moving from a stranger or a person having no pecuniary interest in the subject-matter, if accepted in discharge of the debt, constitutes a good defense to an action to enforce the liability against the debtor.¹³ He sufficiently adopts it by taking advantage of it by plea.¹⁴ There must be something received to which the creditor was not before entitled.¹⁵ And it must possess some value or by legal possibility be of benefit to him.¹⁶ The extent of the value is not material.¹⁷ Part of a claim may be satisfied by withdrawal of the defense of infancy to the residue.¹⁸ Suspension or abandonment of a suit is a sufficient consideration.¹⁹ If there is a new consideration of

v. Ault, 7 Ex. 669; Bedford v. Deakin, 2 Stark. 178. See Ricketts v. Hall, 2 Bush, 249; Keeler v. Salisbury, 27 Barb. 485, 33 N. Y. 648; Conkling v. King, 10 Barb. 372.

In Bowker v. Harris, 30 Vt. 425, a wife's note was held sufficient consideration, she having paid it, though it was void when made. See also, Kirwan v. Kirwan, 4 Tyrwh. 491; Hart v. Alexander, 2 M. & W. 484; Powles v. Page, 3 C. B. 16.

¹² In re Dixon, 2 McCrary, 556.

¹³ Jones v. Broadhurst, 9 C. B. 173; Leavitt v. Morrow, 6 Ohio St. 71, 67 Am. Dec. 334; Harrison v. Hicks, 1 Port. 423, 27 Am. Dec. 638; Daniel v. Hallenbeck, 19 Wend. 408; Clow v. Borst, 6 Johns. 37; Stark v. Thompson, 3 Mon. 296; Woolfolk v. McDowell, 9 Dana, 268; Belshaw v. Bush, 11 C. B. 191; Jackson v. Pennsylvania R. Co. 66 N. J. L. 319; Armstrong v. School Dist., 28 Mo. App. 169; Beebe v. Worth (Misc.), 146 N. Y. Supp. 146.

¹⁴ Chicago, etc. R. Co. v. Brown, 70 Neb. 696; Belshaw v. Bush, *supra*; Snyder v. Pharo, 25 Fed. 398; Bennett v. Hill, 14 R. I. 322.

¹⁵ Thurber v. Sprague, 17 R. I. 634; Bryant v. Proctor, 14 B. Mon. 451; Hethcoate v. Crookshanks, 2 T. R. 24; Harper v. Graham, 20 Ohio, 105; Good v. Cheesman, 2 B. & Ad. 328; Fitch v. Sutton, 5 East, 230; Acker v. Phoenix, 4 Paige, 305; Commonwealth v. Miller, 5 Mon. 205; Riley v. Kershan, 52 Mo. 224; Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402; Bartlett v. Rogers, 3 Sawyer, 62; Brooklyn Heights R. Co. v. Brooklyn City R. Co., 151 App. Div. (N. Y.) 465.

¹⁶ Blinn v. Chester, 5 Day, 360; Booth v. Smith, 3 Wend. 66; Webster v. Wyser, 1 Stew. 184; Keeler v. Neal, 2 Watts, 424; Davis v. Noaks, 3 J. J. Marsh. 494. See § 247; Foster v. Dawber, 6 Ex. 839.

¹⁷ *Id.*; Pinnel's Case, 5 Co. Rep. 117; Andrew v. Boughney, 1 Dyer 75a.

¹⁸ Cooper v. Parker, 15 C. B. 822.

¹⁹ Daly v. Busk Tunnel R. Co., 129 Fed. 513, 64 C. C. A. 87; Roberts v. Banse, 78 N. J. L. 57; Sutherland v. Bloomer, 50 Ore. 398; Snohomish River B. Co. v. Great Northern R. Co., 57 Wash. 693; Smith v. Monteith, 13 M. & W. 427; Lewis v. Donohue, 27 N. Y. Misc.

some value, it is enough, though it is of much less value than the debt discharged.²⁰ The voluntary acceptance by an injured railroad employee of the benefits provided for in his contract of membership in the relief department maintained by his employer, knowing the effect of such acceptance, bars a suit to recover for the injury sustained.²¹ It is otherwise if such benefits are accepted because of the unperformed promise of the employer.²² Where a debtor pays part of a debt for which the creditor holds a note, upon an agreement that such part payment shall be full satisfaction, and, in pursuance of such agreement, the note is surrendered or canceled, the transaction will amount to full accord and satisfaction.²³ The surrender is equivalent to a release.²⁴ If the principal and surety in a bond given to secure the performance of a contract which involves matters uncertain in their nature are insolvent, payment of less than the face of the bond is a good consideration for its discharge.²⁵ An agreement between grantor and grantee, subsequent to a conveyance, in pursuance of which the former places a sum of money in the hands of a third person to be forfeited to the grantee in full satisfaction of all damage he may sustain by reason of the breach of the former's covenant, is a good accord and satisfaction.²⁶

An accord and satisfaction by one of several jointly liable is a discharge of all.²⁷ At common law an accord and satisfaction to one of two obligees of a common money bond was good

514. But compare *Brush H. Mfg. Co. v. Abeles*, 45 Pa. Super. Ct. 243.

²⁰ 1 *Smith's Lead. Cas.* pt. 1, *445; *Kellogg v. Richards*, 14 Wend. 116; *Jones v. Bullitt*, 2 Litt. 49; *Brooks v. White*, 2 Mete. (Mass.) 283; *Harper v. Graham*, 20 Ohio 105; *Boyd v. Hitchcock*, 20 Johns. 76, 11 Am. Dec. 247; *Le Page v. McCrea*, 1 Wend. 164, 19 Am. Dec. 469; *Sanders v. Branch Bank*, 13 Ala. 353.

²¹ *Eckman v. Chicago, etc. R. Co.*, 169 Ill. 312, 38 L.R.A. 750, aff'g 64 Ill. App. 444. See § 6.

²² *Wacksmuth v. Atlantic C. L. R. Co.*, 157 N. C. 34.

²³ *Wheeler v. Baker*, 132 Mich. 507; *Ellsworth v. Fogg*, 35 Vt. 355; *Draper v. Hitt*, 43 Vt. 439, 5 Am. Rep. 292; *Beach v. Endress*, 51 Barb. 570; *Kent v. Reynolds*, 8 Hun, 559.

²⁴ *Id.*

²⁵ *Shelton v. Jackson*, 20 Tex. Civ. App. 443.

²⁶ *Reichel v. Jeffrey*, 9 Wash. 250.

²⁷ *Clabaugh v. Southern W. G. Ass'n*, 181 Fed. 706; *Chicago v. Babcock*, 143 Ill. 358; *Atwood v. Brown*, 72 Iowa 723; *Turner v. Hitchcock*, 20 Iowa 310; *Metz v. Soule*, 40 id. 236; *Long v. Long*, 57 id. 497; *Goss v. Ellison*, 136

because they were considered as having a joint interest in the debt, with its incident of survivorship, and the satisfaction to one of them of the full amount due to all put an end to the bond.²⁸ But in equity the general rule with regard to money lent by two persons to a third was that they were *prima facie* regarded as tenants in common, and not as joint tenants, both of the debt and of any security held for it. "Though they take a joint security, each means to lend his own money and to take back his own."²⁹ This is, however, but a presumption, and may be rebutted. The accord is good as to the obligee who received his share.³⁰

§ 250. **Composition with creditors.** There is no want of consideration in agreements for composition between a debtor and two or more of his creditors: the engagement of one is a sufficient consideration for that of the others.³¹ The fact that a creditor whose claim was disputed was not a party to the agreement does not invalidate it, no such contingency being provided for.³² When an unliquidated or disputed demand is the subject of accord and a certain sum is paid and accepted as full satisfaction, the consideration is manifest.

§ 251. **Compromise of disputed claim.** The settlement of compromise of a disputed or doubtful claim is a good consid-

Mass. 503; Coonley v. Wood, 36 Hun, 559.

The discharge of one not a wrongdoer will not affect the right of action against the other defendants. Wardell v. McConnell, 25 Neb. 558.

²⁸ Ely v. Ely, 70 N. J. L. 31; Wallace v. Kelsall, 7 M. & W. 264. See Leafgreen v. Telford, 169 Ill. App. 582.

²⁹ Morley v. Bird, 3 Ves. 631; Matson v. Dennis, 10 Jur. (N. S.) 461, 12 Week. Rep. 926.

³⁰ Steeds v. Steeds, 22 Q. B. Div. 537.

³¹ Pierson v. McCahill, 21 Cal. 122; Fellows v. Stevens, 24 Wend. 292; Steinman v. Magnus, 11 East, 390; Keeler v. Salisbury, 33 N. Y. 648; Way v. Langley, 15 Ohio St.

392; Ricketts v. Hall, 2 Bush, 249; Tuckerman v. Newhall, 17 Mass. 581; Diermeyer v. Hackman, 52 Mo. 282; Reay v. Whyte, 3 Tyrwh. 596; Boyd v. Hind, 1 H. & N. 938; Cutter v. Reynolds, 8 B. Mon. 596; Boothby v. Sowden, 3 Camp. 174; Bradley v. Gregory, 2 id. 383; Wood v. Roberts, 2 Stark. 417; Cockshott v. Bennett, 2 T. R. 765; Hale v. Holmes, 8 Mich. 37; Hartle v. Stahl, 27 Md. 157. See Case v. Gerrish, 15 Pick. 49.

³² Crawford v. Krueger, 201 Pa. 348. See Norton v. Clayton II. Ass'n, 149 Ala. 248.

An agreement or understanding among the creditors must exist to bind any of them. Smoot v. Checketts, 68 Utah, 211.

eration for a promise.³³ The claim must be a real one and the parties must regard their rights concerning it as in fact or in law doubtful, and the compromise must be made *bona fide*.³⁴ A mere statement that the amount of a claim was in dispute is

³³ Heath v. Potlatch L. Co., 18 Idaho, 42; Kiler v. Wohletz, 79 Kan. 716, L.R.A.1915B, 11; Bull v. Hepworth, 159 Mich. 662; Brookley v. Brookley, 122 Pa. 1; Schaben v. Brunning, 74 Iowa, 102; Zimmer v. Becker, 66 Wis. 527; Stewart v. Ahrenfeldt, 4 Denio, 189; Wehrum v. Kulm, 61 N. Y. 623; Hammond v. Christie, 5 Robert. 160; United States v. Clyde, 13 Wall. 35, 20 L. ed. 479; Same v. Child, 12 Wall. 232, 20 L. ed. 360; Same v. Justice, 14 Wall. 535, 20 L. ed. 753; Brett v. Universalist Soc. 63 Barb. 610.

But the payment of an amount concededly due and owing, even when made by a check stating that payment is thereby made in full settlement will not amount to an accord and satisfaction of another claim over which a dispute exists. Dunn v. Lippard-Stewart Motor Car Co., 144 N. Y. Supp. 349; and so in case of like payment of an undisputed part of a claim. Whittaker Chain Tread Co. v. Standard Auto Supply Co., 216 Mass. 204, 51 L.R.A. (N.S.) 315.

³⁴ B. & W. Engineering Co. v. Beam, 23 Cal. App. 164; Dana v. Gulf & S. I. R. Co., — Miss. —, 64 So. 214; Missouri, K. & T. Ry. Co. of Texas v. Morgan, — Tex. Civ. App. —, 163 S. W. 992; Robinson v. Leatherbee T. & L. Co., 120 Ga. 901; People v. Parker, 231 Ill. 478; Stein v. Automatic E. Co., 152 Ill. App. 392; Midereich v. Rank, 40 Ind. App. 393; Wherley v. Rowe, 106 Minn. 494; New Amsterdam Cas. Co. v. Mesker, 128 Mo. App. 183; Canadian F. Co. v. McShane,

80 Neb. 551, 14 L.R.A. (N.S.) 443, 127 Am. St. 791; Fremont F. & M. Co. v. Norton, 3 Neb. (Unof.) 804; Cornell v. Taylor, 137 App. Div. (N. Y.) 496; Silander v. Gronna, 15 N. D. 552, 125 Am. St. 616. See Laroe v. Sugar Loaf D. Co., 180 N. Y. 367; Biddlecom v. General Acc. Assur. Co. 167 Mo. App. 581; Smoot v. Cheeketts, 68 Utah 211; Thayer v. Harbican, 70 Wash. 278; Wahl v. Barnum, 116 N. Y. 87, 5 L.R.A. 623; Zoebisch v. Von Minden, 120 N. Y. 406; Moon v. Martin, 122 Ind. 211; Gilliam v. Alford, 69 Tex. 267; Grandin v. Grandin, 49 N. J. L. 508, 60 Am. Rep. 642; Cook v. Wright, 1 B. & S. 559; Callisher v. Bischoffsheim, L. R. 5 Q. B. 449; Ockford v. Barrelli, 20 Week. Rep. 116; Miles v. New Zealand Alford Est. Co., 32 Ch. Div. 266; Demars v. Musser-S. L. Co., 37 Minn. 418; Anthony v. Boyd, 15 R. I. 495; Headley v. Hackley, 50 Mich. 43.

In Miles v. New Zealand Alford Est. Co., *supra*, the court dissents from some observations made by Lord Esher, M. R., in Ex parte Banner, 17 Ch. Div. 480, 490, to the effect that it was not only necessary to the validity of a settlement that the plaintiff believed he had a good cause of action, but that the circumstances must in fact raise some doubt whether there was or was not a good cause of action.

The contention as to the claim must be known to the agent of the party to whom payment is made. Bergman P. Co. v. Brown (Tex. Civ. App.), 156 S. W. 1102.

The merit of the claim is not ma-

not enough to show that there was a consideration for accepting less than was due;³⁵ but it is sufficient if the controversy be real and the issue respecting it be considered by the parties as doubtful,³⁶ and there is a mutual yielding of claimants.³⁷ Whether the compromise amount be received or a promise to pay it, the original claim is extinguished if the parties so agree and there is a sufficient consideration.³⁸ Inequality

terial. *Gardner v. Ward*, 99 Ark. 588; *Kress v. Moscovetz*, 105 Ark. 638. Compare *Biddlecom v. Assur. Co.*, *supra*.

³⁵ *Weller v. Stevens*, 12 Cal. App. 779; *Kelley v. Hopkins*, 105 Minn. 155; *Emmitsburg R. Co. v. Donoghue*, 67 Md. 383, 1 Am. St. 396.

It was observed in *Edwards v. Baugh*, 11 M. & W. 641: "The declaration alleges that certain disputes and controversies were pending between the plaintiff and the defendant whether the defendant was indebted to the plaintiff in a certain sum of money. There is nothing in the use of the word 'controversy' to render this a good allegation of consideration. The controversy merely is that the plaintiff claims the debt and the other denies it."

³⁶ *San Juan v. St. John's G. Co.*, 195 U. S. 510, 49 L. ed. 299 (dispute as to medium of payment); *Gardner v. Ward*, 99 Ark. 588; *Satchfield v. Laconia Levee Dist.*, 74 Ark. 270; *Baugh v. Fist*, 84 Kan. 740; *Howard v. Straight Creek C. Co.*, 140 Ky. 700; *Galusha v. Sherman*, 105 Wis. 263, 47 L.R.A. 417.

As applied to the subject of accord and satisfaction a demand is not liquidated, even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of two specific sums is due, but there is a real difference as to which is the proper

amount, the demand is unliquidated. *Nassoiy v. Tomlinson*, 148 N. Y. 326, 51 Am. St. 695.

An account cannot be considered as liquidated so as to prevent the receipt of a less amount than is claimed from being a satisfaction if there is a controversy over a set-off and the amount of the balance. *Ostrander v. Scott*, 161 Ill. 339. See *Bingham v. Browning*, 197 Ill. 122, aff'g 97 Ill. App. 442.

³⁷ *Red Cypress L. Co. v. Beall*, 5 Ga. App. 202.

³⁸ *Wilder v. St. Johnsbury, etc. R. Co.*, 65 Vt. 43; *Grandin v. Grandin*, 49 N. J. L. 508, 60 Am. Rep. 642; *Korne v. Korne*, 30 W. Va. 1; *Tuttle v. Tuttle*, 12 Mete. (Mass.) 551, 46 Am. Dec. 701; *Peace v. Sten-net*, 4 J. J. Marsh. 449; *Jones v. Bullitt*, 2 Litt. 49; *Reid v. Hibbard*, 6 Wis. 175; *Pulling v. Supervisors*, 3 Wis. 337; *Calkins v. State*, 13 Wis. 389; *Metz v. Soule*, 40 Iowa, 236; *Ogborn v. Hoffman*, 52 Ind. 439; *Riley v. Kershan*, 52 Mo. 224; *Merry v. Allen*, 39 Iowa, 235; *Gates v. Shutts*, 7 Mich. 127; *Converse v. Blumrich*, 14 id. 109, 90 Am. Dec. 230; *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105; *Hooper v. Hooper*, 26 id. 435; *Bowen v. Lockwood*, id. 441; *Hull v. Swarthout*, 29 id. 249; *Campbell v. Skinner*, 30 id. 32; *Reithmaier v. Beckwith*, 35 id. 100; *Neary v. Bostwick*, 2 Illt. 514; *Wallner v. Chicago Con. T. Co.*, 245 Ill. 148; *South*

of consideration will not, of itself, avoid a settlement.³⁹ The adjustment of any unliquidated demand, whether in dispute or not, stands on a similar principle.⁴⁰ Stated accounts and settlements are treated with favor, and are conclusive unless there is proof of mistake or fraud.⁴¹ A definite sum paid or agreed to be paid, and adopted by the parties as an adjustment and compensation for either a doubtful and disputed demand, or one which is uncertain and unliquidated, constitutes a sufficient consideration for the discharge of such original demand. And upon such adjustment, by which a definite sum, paid or to be paid, is substituted for the claim as it formerly existed, the lat-

Side C. Co. v. Gross, 157 Ill. App. 218; Western & S. L. Ins. Co. v. Quinn, 130 Ky. 397; Hillestad v. Lee, 91 Minn. 335; Ogilvie v. Lee, 158 Mo. App. 493; Simons v. American Legion of Honor, 178 N. Y. 263; Du Moulin v. Board of Education — Misc. (N. Y.) —, 124 N. Y. Supp. 901; Ravenswood P. M. Co. v. Dix, 61 N. Y. Misc. 235; Segbel v. Metz, 120 App. Div. (N. Y.) 291; Aydlett v. Brown, 153 N. C. 334; Ramsey v. Browder, 136 N. C. 251; Philadelphia, etc. R. Co. v. Walker, 45 Pa. Super. 524; Gulf, etc. R. Co. v. Harriett, 80 Tex. 73; Laughman v. Sun P. L. Co., 52 Tex. Civ. App. 485; Cahaba C. Co. v. Hanby, 7 Ala. App. 282; Waterbury Co. v. Maryland C. Co. — Misc. (N. Y.) —, 134 N. Y. Supp. 564.

³⁹ Beebe v. Worth 146 N. Y. Misc. 146; Bunel v. O'Day, 125 Fed. 303; Minor v. Fike, 77 Kan. 806; Worcester L. Co. v. Heald, 78 N. J. L. 172; Bowers H. D. Co. v. Hess, 71 N. J. L. 327; Baines v. Coos Bay N. Co., 49 Ore. 192; Melroy v. Kemmerrer, 218 Pa. 381, 11 L.R.A. (N.S.) 1018, 120 Am. St. 888; Galusha v. Sherman, *supra*.

⁴⁰ Republic Iron & Steel Co. v.

Sturges & Burn Mfg. Co., 181 Ill. App. 304; Brady v. New Jersey Fidelity Ins. Co., 180 Mo. App. 214; Hand L. Co. v. Hall, 147 Ala. 561; Canton Union C. Co. v. Parlin, 215 Ill. 244; Kelly v. Homer C. Co., 110 La. 983; Weber v. Board of Com'rs, 93 Minn. 320; Missouri & I. C. Co. v. Consolidated C. Co., 127 Mo. App. 320; Noyes v. Young, 32 Mont. 226; Sanford v. Abrams, 24 Fla. 181; Donohue v. Woodbury, 6 Cush. 148, 52 Am. Dec. 777; Bateman v. Daniels, 5 Blackf. 71; Harris v. Story, 2 E. D. Smith, 363; Longridge v. Dorville, 5 B. & Ald. 117; Watters v. Smith, 2 B. & Ad. 889; Haigh v. Brooks, 10 A. & E. 309; Wilkinson v. Byers, 1 id. 106; Wright v. Acres, 6 id. 726; Atlee v. Backhouse, 3 M. & W. 633; Sibree v. Tripp, 15 id. 23; Llewellyn v. Llewellyn, 3 Dowl. & L. 318; Allis v. Billing, 2 Cush. 19; Durham v. Wadlington, 2 Strobb. Eq. 258; Abbott v. Wilmot, 22 Vt. 437; Ellis v. Bitzer, 2 Ohio. 295.

⁴¹ Id.; Wilde v. Jenkins, 4 Paige, 481; Lockwood v. Thorne, 11 N. Y. 170; Pulliam v. Booth, 21 Ark. 420. See Purteil v. Morehead, 2 Dev. & Bat. 239; Galusha v. Sherman, 105 Wis. 263, 47 L.R.A. 417.

ter is extinguished on the principle of accord and satisfaction.⁴² An unquestioned judgment may be satisfied by the payment of less than its face in the settlement of a disputed matter collateral to it.⁴³ An infant's action for damages is barred by the acceptance, in full satisfaction from the party liable therefor, of

⁴² *Neubacher v. Perry*, 57 Ind. App. 362; *Read Printing Co. v. J. J. Little & Ives Co.* (Misc. [N. Y.]), 146 N. Y. Supp. 194; *Beebe v. Worth*, 146 N. Y. Supp. 146; *Marx v. White Co.* (Misc.), 148 N. Y. Supp. 262; *Schumacher v. Mollitt*, 71 Ore. 79; *United States B. & S. Co. v. Thisell*, 137 Fed. 1, 69 C. C. A. 651; *Sims v. Three States L. Co.*, 135 Fed. 1019, 68 C. C. A. 413; *In re D. H. McBride*, 132 Fed. 285; *Daly v. Busk Tunnel R. Co.*, 129 Fed. 513, 64 C. C. A. 87; *Cunningham C. Co. v. Rauch-D. G. Co.*, 98 Ark. 269; *Willinham v. Jordan*, 75 Ark. 266; *Creighton v. Gregory*, 142 Cal. 34; *Harvey v. Denver, etc. R. Co.*, 44 Colo. 258, 130 Am. St. 120; *Redmond v. Atlanta & B. R. Co.*, 129 Ga. 133; *Snow v. Triesheimer*, 220 Ill. 106; *New York L. Ins. Co. v. Chittenden*, 134 Iowa 613, 11 L.R.A. (N.S.) 233, 120 Am. St. 444; *Beaver v. Porter*, 129 Iowa 41; *Howard v. Straight Creek C. Co.*, 140 Ky. 700; *Cunningham v. Standard C. Co.*, 134 Ky. 198; *Scheffenacker v. Hoopes*, 113 Md. 111, 29 L.R.A. (N.S.) 205; *Cooper v. Yazoo, etc. R. Co.*, 82 Miss. 634; *Knapp v. Pepsin S. Co.*, 137 Mo. App. 472; *Bahrenburg v. Schopp F. Co.*, 128 Mo. App. 526; *Rauh v. Wolf*, 59 N. Y. Misc. 419; *Le Page v. Lalence & G. Mfg. Co.*, 98 App. Div. (N. Y.) 179; *Laroe v. Sugar Loaf D. Co.*, 85 App. Div. (N. Y.) 585; *Seeds G. & H. Co. v. Conger*, 83 Ohio 169, 32 L.R.A. (N.S.) 380; *Laughead v. Frick C. Co.*, 209 Pa. 368, 103 Am. St. 1014; *Powers v. Harris*, 42 Tex. Civ. App. 250; *Bor-*

den v. Vinegar Bend L. Co., 2 Ala. App. 354; *Olson v. Burton* (Tex. Civ. App.), 141 S. W. 549; *Storch v. Dewey*, 57 Kan. 370; *Maack v. Schneider*, 51 Mo. App. 92; *Lapp v. Smith*, 183 Ill. 179; *Home F. Ins. Co. v. Bredehoft*, 49 Neb. 152; *Bingham v. Browning*, 197 Ill. 122; *Housatonic Nat. Bank v. Foster*, 85 Hun, 376; *Bennett v. Hudson*, 174 Ill. App. 229; *Lafrentz v. Cavanagh*, 166 Ill. App. 306; *Sunset Orchard L. Co. v. Sherman N. Co.*, 121 Minn. 5; *Brewster v. Silverstein*, 78 N. Y. Misc. 123; *Daly I. S. & M. Co. v. United States M. & Mfg. Co.*, 76 N. Y. Misc. 574; *Metropolitan Shirt Waist Co. v. Kamioner* (Misc. [N. Y.]), 138 N. Y. Supp. 1067; *Saks v. Drake* (Misc. [N. Y.]), 138 N. Y. Supp. 631; *Polin v. Weisbrot*, 52 Pa. Super. Ct. 312.

Payment on account of a claim filed against a city is presumed to be in full. *Bowman v. Ogden City*, 33 Utah, 196.

Subsequent negotiations by the payor may show that an accord and satisfaction was not made. *Beattie Mfg. Co. v. Heinz*, 120 Mo. App. 465.

The satisfaction of a cause of action for personal injury made by the person injured bars his representatives after his death from asserting any claim because of the act of negligence for which satisfaction was made. *Read v. Great Eastern R. Co.*, L. R. 3 Q. B. 355; *Dibble v. New York & E. R. Co.*, 25 Barb. 183; § 1260.

⁴³ *Mann v. Haley*, 79 Vt. 66.

a sum of money which is undisposed of and not returned, notwithstanding an offer to credit it on any judgment that might be obtained.⁴⁴ If a receipt for money paid contains anything in the nature of an agreement upon the compromise or settlement of a disputed claim that the payee accepts and receives the sum designated in it in satisfaction and discharge of his claim, it is a contract and cannot be varied or contradicted by parol.⁴⁵

Where money is due and there is an agreement to accept something else in lieu of it, and that something else is delivered and accepted, the agreement cannot be said to be without consideration, though the thing so delivered and accepted is of less value than the nominal amount of the debt. Anything of legal value, whether a chose in possession or in action, actually received in full satisfaction of a debt is good for that effect.⁴⁶ Nor is the adequacy of the consideration affected because the value of the collateral thing received in satisfaction was fixed by agreement of the parties at a less sum than the amount of the debt. Thus, where a larger sum than \$750 was owing and actually due in money, an agreement to receive \$750 worth of salt and the actual reception of it in discharge of the whole debt was held to have that effect.⁴⁷ The right to compromise a suit may be exercised by the person who is au-

⁴⁴ *Lane v. Dayton, etc. Co.*, 101 Tenn. 581.

⁴⁵ *Komp v. Raymond*, 42 App. Div. (N. Y.) 32, 9 Am. Neg. Cas. 587; *Coon v. Knapp*, 8 N. Y. 402, 59 Am. Dec. 502; *Ryan v. Ward*, 48 N. Y. 204.

⁴⁶ *Missouri-Am. E. Co. v. Hamilton-B. S. Co.*, 165 Fed. 283, 91 C. C. A. 251; *Schagun v. Scott Mfg. Co.*, 162 Fed. 209, 89 C. C. A. 189; *Kaufman v. Sorrels*, 164 Ill. App. 324; 1 *Smith's Lead. Cases*, pt. 1, 445; *Jones v. Bullitt*, 2 Litt. 49; *Brooks v. White*, 2 Mete. (Mass.) 283, 37 Am. Dec. 95; *New York State Bank v. Fletcher*, 5 Wend. 85; *Frisbie v. Larned*, 21 id. 451; *Bullen v. McGillicuddy*, 2 Dana, 90; *Pope v. Tunstall*, 2 Ark. 209; *Booth v. Smith*, 3

Wend. 66; *Boyd v. Hitchcock*, 20 Johns. 76, 11 Am. Dec. 247; *Le Page v. McCrea*, 1 Wend. 164; *Sanders v. Branch Bank*, 13 Ala. 353; *Blinn v. Chester*, 5 Day, 359; *Watkinson v. Inglesby*, 5 Johns. 386; *Eaton v. Lincoln*, 13 Mass. 424; *Musgrove v. Gibbs*, 1 Dall. 216, 1 L. ed. 107; *Arnold v. Post*, 8 Bush, 3; *Churchill v. Bowman*, 39 Vt. 518; *Gavin v. Annan*, 2 Cal. 494.

⁴⁷ *Jones v. Bullitt*, 2 Litt. 49; *Woolfolk v. McDowell*, 9 Dana 268; *Gaffney v. Chapman*, 4 Robert. 275. But see *Howard v. Norton*, 65 Barb. 161.

In *Platts v. Walrath*, Hill & Denio, 59, it was held that giving a mortgage for a debt, less a certain deduction agreed to be made in con-

thorized to bring it in the first instance,⁴⁸ and a compromise made by one plaintiff will bind his co-plaintiffs if it appears that the amount paid was received as full satisfaction for the whole injury.⁴⁹ Where a statute gives the widow the prior right to sue for the death of her husband she may compromise her suit over the objections of her children and without let or hindrance from any one.⁵⁰ She may also compromise the whole right of action before suit is brought, and a payment to her of the sum agreed upon will discharge the wrong-doer.⁵¹ But if the suit is brought by an administrator on behalf of the widow and children she cannot compromise without the plaintiff's consent or the concurrence of the other beneficiaries.⁵²

§ 252. Agreement must be executed. The agreement or accord must be fully executed.⁵³ But if the agreed satisfaction consists of an agreement rather than the performance of it, the

sideration of the security, is not payment of the debt so that a note subsequently given for the sum deducted will be deemed without consideration.

⁴⁸ *Stephens v. Nashville, etc. R.*, 10 Lea 448; *Sweeney v. Nassau Elec. R. Co.*, 84 Misc. (N. Y.) 557, sustaining the plaintiff's settlement of a personal injury suit over his attorney's objection that his lien for services under the statute was thereby ignored.

⁴⁹ *Pogel v. Meilke*, 60 Wis. 248; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830.

⁵⁰ *Webb v. Railway Co.*, 88 Tenn. 119, 12 Am. Neg. Cas. 593.

⁵¹ *Holder v. Railroad*, 92 Tenn. 141, 36 Am. St. 77.

⁵² *Railroad v. Acuff*, 92 Tenn. 26.

A compromise between an employer and a contractor is not binding upon a subcontractor though the contract between the latter and his principal is similar to that between the two former parties. *Expanded Metal Fire-Proofing Co. v. Noel Const. Co.*, 87 Ohio St. 428.

⁵³ *Crouch v. Quigley*, 258 Mo. 651; *Cooke v. McAdoo*, 85 N. J. L. 692; *Eichelberger v. Mann*, 115 Va. 774; *Hearn v. Kiefe*, 38 Pa. 147, 80 Am. Dec. 472; *Green v. Lancaster County*, 61 Neb. 473; *Williams v. Stanton*, 1 Root, 426; *Pope v. Tunstall*, 2 Ark. 209; *Hall v. Smith*, 10 Iowa, 48; *Flack v. Garland*, 8 Md. 191; *Woodward v. Miles*, 24 N. H. 289; *Coit v. Houston*, 3 Johns. Cas. 243; *Watkinson v. Inglesby*, 5 Johns. 386; *Russell v. Lytle*, 6 Wend. 390, 22 Am. Dec. 537; *Bank v. De Grauw*, 23 Wend. 342, 35 Am. Dec. 569; *Peytoe's Case*, 9 Coke 77; *Walker v. Seaborne*, 1 Taunt. 526; *Fitch v. Sutton*, 5 East, 230; *Tuckerman v. Newhall*, 17 Mass. 581; *Spruneberger v. Dentler*, 4 Watts, 126; *Rising v. Patterson*, 5 Whart. 316; *Daniels v. Hatch*, 21 N. J. L. 391, 47 Am. Dec. 169; *Bayley v. Homan*, 3 Bing. N. C. 915; *Allies v. Probyn*, 5 Tyrwh. 1079; *Edwards v. Chapman*, 1 M. & W. 231; *Collingbourne v. Mantell*, 5 id. 292; *Gabriel v. Dresser*, 15 C. B. 622; *Brown v. Perkins*, 1 Hare, 564; *Hol-*

accord is executed when the agreement which is the consideration of the discharge is entered into, whether it is ever performed or not.⁵⁴ Formerly to an action on a bond, accord and satisfaction could be pleaded by deed only, for an obligation under seal could not be discharged but by an instrument of equal dignity.⁵⁵ But this rule is not now followed if there has been actual performance⁵⁶

§ 252a. **Rescission or exoneration before breach.** Rescission of an executory contract or exoneration before breach is not accord and satisfaction.⁵⁷ After breach, however, when the demand becomes due for damages, whatever may be the grade

ton v. Noble, 83 Cal. 7; Gulf, etc. R. Co. v. Gordon, 70 Tex. 80; Burgess v. Denison P. Mfg. Co., 79 Me. 266; Sanford v. Abrams, 24 Fla. 181; Hossie v. Empire L. Co., 41 Minn. 548; Johnson v. Hunt, 81 Ky. 321; Schlitz v. Meyer, 61 Wis. 418; Fink v. Joseph, 2 New Mex. 138; Brooklyn Heights R. Co. v. Brooklyn City R. Co., 151 App. Div. (N. Y.) 465; Montgomery v. Shirley, 159 Ala. 239; Grimmett v. Ousley, 78 Ark. 304; Kaufman v. Shaw, 10 Cal. App. 572; Prest v. Cole, 183 Mass. 283; Henderson v. McRae, 148 Mich. 324; Burr's D. T. Works v. Peninsular T. Mfg. Co., 142 Mich. 417; Wherley v. Rowe, 106 Minn. 494; Carter v. Chicago, etc. R. Co., 136 Mo. App. 719; Frederick v. Moran, 90 Neb. 86; Goffe v. Jones, 132 App. Div. (N. Y.) 864; King v. Atlantic C. L. R. Co., 157 N. C. 44, 48 L.R.A.(N.S.) 450; Houston v. Wagner, 28 Okla. 367; Berry v. Virginia State Ins. Co., 83 S. C. 13; Boston & M. R. v. Union Mut. F. Ins. Co., 83 Vt. 554. See Boston v. Ocean S. S. Co., 197 Mass. 561; § 246.

In *Johnson v. Charleston & S. R. Co.*, 58 S. C. 488 and *Petty v. Brunswick & W. R. Co.*, 109 Ga. 666, partial payment in accordance with the plaintiff's stipulation, was

held to be an accord. To the contrary is *Pennsylvania Co. v. Chapman*, 220 Ill. 428.

⁵⁴ *Byrd P. Co. v. Whitaker P. Co.*, 135 Ga. 865; *Woodward v. Miles*, 24 N. H. 289; *Watkinson v. Inglesby*, 5 Johns. 386; *Eaton v. Lincoln*, 13 Mass. 424; *Seaman v. Haskins*, 2 Johns. Cas. 195; *Heaton v. Angier*, 7 N. H. 397, 28 Am. Dec. 353; *Good v. Cheesman*, 2 B. & Ad. 328; *Reeves v. Hearne*, 1 M. & W. 323; *Buttigieg v. Booker*, 9 C. B. 689; *Kromer v. Heim*, 75 N. Y. 574, 31 Am. Rep. 491; *McCreery v. Day*, 119 N. Y. 1, 16 Am. St. 793, 6 L.R.A. 503; *Bennett v. Hill*, 14 R. I. 432.

⁵⁵ *Levy v. Very*, 12 Ark. 148; *Ligon v. Dunn*, 6 Ired. 133.

⁵⁶ *McCreery v. Day*, 119 N. Y. 1, 16 Am. St. 793, 6 L.R.A. 503; *Capital City Mut. F. Ins. Co. v. Detwiler*, 23 Ill. App. 656; *Hastings v. Lovejoy*, 140 Mass. 261, 54 Am. Rep. 462.

⁵⁷ *Barelli v. O'Connor*, 6 Ala. 617. It is said to be a general rule that a simple contract may, before breach, be waived or discharged without deed and without consideration; but after breach there can be no discharge except by deed or upon sufficient consideration. *Bytes on Bills*, 168. See *Foster v. Dawber*,

of the contract which is broken, it may be satisfied by matter *in pais* and is subject to the defense of accord and satisfaction. That is a good defense to an action for breach of covenant.⁵⁸ And the modern doctrine is that it is good to an action on a judgment.⁵⁹

SECTION 4.

RELEASE.

§ 253. **Definition.** A release of a chose in action is an immediate technical discharge of it by deed.⁶⁰ It operates di-

6 Ex. 838; *Dobson v. Espei*, 2 H. & N. 79. This is doubtless true of contracts mutually executory. In such contracts mutual waiver is a rescission. See 1 Smith's Lead. Cas. *465. If the consideration be executed on one side the executory obligation of the other party founded thereon cannot be waived without consideration, or such act of renunciation as would amount to a release, unless it has been acted upon. See upon this general subject, *Blood v. Enos*, 12 Vt. 625; *Johnson v. Reed*, 9 Mass. 78, 6 Am. Dec. 36; *Rogers v. Atkinson*, 1 Ga. 12; *Richardson v. Cooper*, 25 Me. 450; *Cuff v. Penn*, 1 M. & S. 21; *Goss v. Nugent*, 5 B. & Ad. 58; *Cummings v. Arnold*, 3 Mete. (Mass.) 486, 37 Am. Dec. 155; *Weld v. Nichols*, 17 Pick. 538; *Ward v. Walton*, 4 Ind. 75; *Low v. Forbes*, 18 Ill. 568; *Crowley v. Vitty*, 7 Ex. 322; *Grafton Bank v. Woodward*, 5 N. H. 99, 20 Am. Dec. 566; *Payne v. New South Wales C. Co.*, 10 Ex. 291; *Kellogg v. Olmsted*, 28 Barb. 96; *Hunt v. Barfield*, 19 Ala. 117; *Thurston v. Ludwig*, 6 Ohio St. 1; *Adams v. Nichols*, 19 Pick. 275, 31 Am. Dec. 137; *McKee v. Miller*, 4 Blackf. 222; *Harrison v. Close*, 2 Johns. 448, 3 Am. Dec. 444; *Sard v. Rhodes*, 1 M. & W. 155; *Crawford v. Millspaugh*, 13 Johns. 87; *Seymour v. Minturn*, 17

id. 169, 8 Am. Dec. 380; *Foster v. Dawber*, 6 Ex. 839; *King v. Gillett*, 7 M. & W. 55; *Langden v. Stokes*, Cro. Car. 383.

The technical distinction between a satisfaction before or after the breach is disregarded, and a new parol agreement followed by its actual performance, whether made or executed before or after the breach, is a good accord and satisfaction of a covenant. *McCreery v. Day*, 119 N. Y. 1, 16 Am. St. 793, 6 L.R.A. 503, and cases cited; *Hastings v. Lovejoy*, 140 Mass. 261, 54 Am. Rep. 462.

⁵⁸ *Payne v. Barnet*, 2 A. K. Marsh. 312; *Strang v. Holmes*, 7 Cow. 224; *Keeler v. Salisbury*, 33 N. Y. 648; *United States v. Howell*, 4 Wash. C. C. 620.

⁵⁹ *Savage v. Everman*, 70 Pa. 315, 10 Am. Rep. 676; *Jones v. Ransom*, 3 Ind. 327; *Reid v. Hibbard*, 6 Wis. 175; *Farmers' Bank v. Groves*, 12 How. 51; *McCullough v. Franklin C. Co.*, 21 Md. 256; *Campbell v. Booth*, 8 Md. 107; *Le Page v. McCrea*, 1 Wend. 164, 19 Am. Dec. 469; *Brown v. Feeter*, 7 Wend. 301; *Evans v. Wells*, 22 id. 324, 341; *Boyd v. Hitchcock*, 20 Johns. 76, 11 Am. Dec. 247; *Witherby v. Mann*, 11 Johns. 518; *Baum v. Buntyn*, 62 Miss. 10; § 251.

⁶⁰ A parol release of a money

rectly upon the demand to extinguish it, and must be pleaded as a release.⁶¹ But a release implies a consideration, and therefore the demand is inferentially satisfied.⁶² The cancelment of a released demand, however, is not the consequence of the supposed satisfaction, but the direct effect of the release. The release is not merely evidence of the extinguishment, but is itself the extinguisher.⁶³ Though it recites only a nominal consideration,⁶⁴ or, under statutes allowing the consideration of sealed instruments to be inquired into, it is proved to be only nominal, the release will still operate to extinguish the claim to which it relates.⁶⁵ An agreement by one of several defendants not to defend a suit supports a release as to him.⁶⁶ A release is binding notwithstanding the party released does not keep his promise to give the other employment, that being part of the consideration for the release,⁶⁷ or to pay notes given in consid-

judgment in consideration of the receipt of a less sum than it calls for is invalid, though the release be indorsed upon the execution issued in the original action. *Weber v. Couch*, 134 Mass. 26, 45 Am. Rep. 274.

Voluntary declarations by a creditor of an intention to release a debtor, unless accompanied by some act which amounts to a release at law, will not operate as an equitable release. *Irwin v. Johnson*, 36 N. J. Eq. 347, overruling *Leddel v. Starr*, 20 id. 274.

As every person signing an instrument becomes thereby a party thereto one signing a release in a representative capacity need not be mentioned as such in the body of the instrument. *Hemmick v. Baltimore & O. S. W. R. Co.*, 263 Ill. 241.

⁶¹ *Corbett v. Lucas*, 4 McCord, 323.

⁶² *Warner v. Durham, Hill & Denio*, 206; *Matthews v. Chicopee Mfg. Co.*, 3 Robert. 711; *McAllester v. Sprague*, 34 Me. 296; *King v.*

Atlantic C. L. R. Co., 157 N. C. 44, 48 L.R.A.(N.S.) 450.

A release under seal is presumed to be founded upon a consideration. *Hemmick v. Baltimore & O. S. W. R. Co.*, 263 Ill. 241.

⁶³ *McCrea v. Purmort*, 16 Wend. 460, 474; *Galveston, H. & S. A. Ry. Co. v. Walker*, — Tex. Civ. App. —, 163 S. W. 1038.

⁶⁴ *Wilt v. Franklin*, 1 Bin. 502, 2 Am. Dec. 474; *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; *Gully v. Grubbs*, 1 J. J. Marsh. 387; *Maclary v. Reznor*, 3 Del. Ch. 445.

⁶⁵ *Eckman v. Chicago, etc. R. Co.*, 169 Ill. 312, 38 L.R.A. 750; *Stearns v. Tappen*, 5 Duer, 294. See *Davis v. Bowker*, 2 Nev. 487; *Green v. Langdon*, 28 Mich. 222.

A cause of action may be released upon a consideration coming from a third person. *Compton v. Elliott*, 48 N. Y. Super. Ct. 211.

⁶⁶ *McChung v. Mabry*, 2 Tenn. Cas. 91.

⁶⁷ *Szymanski v. Chapman*, 45 App. Div. (N. Y.) 369.

eration of the release;⁶⁸ and so if the contract re-employing an injured servant does not fix the time the employment shall continue, the fault being his and he is discharged.⁶⁹ If there are two debts in existence, established and known, the payment of one is not a consideration for the release of the other.⁷⁰ A release procured by fraud or undue influence of the defendant or his agent will be treated as a nullity.⁷¹

§ 254. **Differs from accord and satisfaction.** A seal is not necessary to render a release and discharge of a liability effectual if the agreement embraces the demand and is upon a sufficient consideration. It can operate to extinguish the demand by way of accord and satisfaction,⁷² and in this form a

⁶⁸ Galveston, H. & S. A. Ry. Co. v. Walker, — Tex. Civ. App. —, 163 S. W. 1039.

⁶⁹ Texas Midland R. v. Sullivan, 20 Tex. Civ. App. 50; East Line, etc. R. Co. v. Scott, 72 Tex. 70, 13 Am. St. 753; Aderholt v. Seaboard A. L. R., 152 N. C. 411.

The consideration is sufficient though the agreement for employment provides therefor only so long as the employer shall be satisfied. Tindall v. Northern Pac. R. Co., 58 Wash. 118 (disapproving Missouri, etc. R. Co. v. Smith, 98 Tex. 47, 107 Am. St. 607, 66 L.R.A. 741); Cleveland, etc. R. Co. v. Hilligoss, 171 Ind. 417, 131 Am. St. 258; Forbes v. St. Louis, etc. R. Co., 107 Mo. App. 661.

⁷⁰ Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 580, 35 L. ed. 860.

A release given under a misapprehension as to the extent of the injury done to property does not affect the right to recover for a later injury to the same property. Adkins v. Indianapolis S. R. Co., 165 Ill. App. 300.

⁷¹ St. Louis, I. M. & S. R. Co., v. Reilly, 110 Ark. 182; Pierson v. Kingman Milling Co., 91 Kan. 775; New Bell Jellico Coal Co. v. Oxen-

dine, 155 Ky. 840; Interstate Coal Co. v. Trivett, 155 Ky. 825; Wisconsin Steel Co. v. Dixon, 159 Ky. 488; Petterson v. Butler Bros., 123 Minn. 516; Causey v. Seaboard Air Line R. Co., 166 N. C. 5; Texas & P. Ry. Co. v. Hubbard, — Tex. Civ. App. —, 169 S. W. 1058; Western U. Tel. Co. v. Walek, — Tex. Civ. App. —, 161 S. W. 902; Texas Cent. R. Co. v. Neill, — Tex. Civ. App. —, 159 S. W. 1180; Missouri, K. & T. Ry. Co. of Texas v. Maples, — Tex. Civ. App. —, 162 S. W. 426; Mattson v. Eureka Cedar Lumber & Shingle Co., 79 Wash. 266. But see Galveston, H. & S. A. Ry. Co. v. Walker, — Tex. Civ. App. —, 163 S. W. 1038.

A mere expression, by the defendant's agent, of an erroneous opinion as to the happening of a future event will not render a release void. Wingfield v. Wabash R. Co., 257 Mo. 347.

⁷² Earle v. Berry, 27 R. I. 221, 1 L.R.A.(N.S.) 867; Farmers' Bank v. Blair, 44 Barb. 641; Corbett v. Lucas, 4 McCord, 323; Coon v. Knap, 8 N. Y. 402, 59 Am. Dec. 502; Lewiston v. Junction R. Co., 7 Ind. 597.

debtor may avail himself of a release made by an agent in his own name.⁷³ A mere receipt may have such an effect; but it is only *prima facie* evidence of payment.⁷⁴ In Connecticut a receipt approximates in its effect to a release.⁷⁵ The general rule, however, is that a mere receipt is but evidence of the payment which it states, and is open to contradiction.⁷⁶ A release not under seal, and without consideration, is void.⁷⁷ Nor will equity compel a creditor to affix a seal to a release not founded on a consideration, even upon an averment that the seal was omitted by mistake.⁷⁸

§ 255. **Extrinsic evidence and construction.** Extrinsic proof is not allowed to restrict a release of all demands by showing it was not intended to cover particular ones within its terms;⁷⁹ but according to some authorities this rule is operative only between the parties to the contract, and a joint tort-feasor is not a party to a release given his co-wrongdoer and may contradict

⁷³ Evans v. Wells, 22 Wend. 324.

⁷⁴ Thompson v. Fausate, 1 Pet. C. C. 182; Maze v. Miller, 1 Wash. C. C. 328.

⁷⁵ Hurd v. Blackman, 19 Conn. 177; Bishop v. Perkins, id. 300; Tucker v. Baldwin, 13 id. 136, 33 Am. Dec. 384; Bonnell v. Chamberlin, 26 Conn. 487.

⁷⁶ Danziger v. Hoyt, 46 Hun 270; Coon v. Knap, 8 N. Y. 402, 59 Am. Dec. 502; Egleston v. Knickerbocker, 6 Barb. 458; Houston v. Shindler, 11 id. 36; White v. Parker, 8 id. 48; Thompson v. Maxwell, 74 Iowa, 415; Grant v. Frost, 80 Me. 202; Hart v. Gould, 62 Mich. 262; Elsberg v. Myrman, 41 Minn. 541; McFadden v. Missouri Pac. R. Co., 92 Mo. 343, 1 Am. St. 721; Shoemaker v. Stiles, 102 Pa. 549; Bulwinkle v. Cramer, 27 S. C. 376, 13 Am. St. 645; Hill v. Durand, 58 Wis. 160; 2 Jones on Evidence, §§ 502 *et seq.*

⁷⁷ Gulf, etc. R. Co. v. Minter, 42 Tex. Civ. App. 235; Crawford v.

Millspaugh, 13 Johns. 87; Seymour v. Minturn, 17 id. 169, 8 Am. Dec. 380; Dewey v. Derby, 20 Johns. 462; Barnard v. Darling, 11 Wend. 28.

⁷⁸ Jackson v. Stackhouse, 1 Cow. 122, 13 Am. Dec. 514.

⁷⁹ Green v. Chicago, etc. R. Co., 35 C. C. A. 68, 92 Fed. 873; Denver, etc. R. Co. v. Sullivan, 21 Colo. 302, 13 Am. Neg. Cas. 536; Deland v. Amesbury Mfg. Co., 7 Pick. 244; West Boylston Mfg. Co. v. Searle, 15 id. 225; Rice v. Woods, 21 id. 30. See Van Brunt v. Van Brunt, 3 Edw. Ch. 14; Hoos v. Van Hoesen, 1 Barb. Ch. 379. See also Swinburne v. Swinburne, 36 R. I. 255.

But a release of all demands against the defendant, reserving a right of action against another as trustee of stock claimed by the plaintiff, will not bar an action against such defendant where he has secretly received a transfer of the stock unknown to the plaintiff. Lane v. Wentworth, 69 Ore. 242.

it by parol evidence.⁸⁰ The weight of authority seems to be against the exception to the general rule.⁸¹ A release may extinguish a particular demand, although it was not in the minds of the parties at the time of its execution. It will be held to embrace demands which are within its terms, whether contemplated or not.⁸² But under a statute to the effect that a general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with his debtor, a release does not extend to claims of which the debtor was ignorant through his ignorance of law.⁸³ In construing releases, however, general words, and even those the most comprehensive, may be limited to particular demands, where it appears by the consideration, the recitals and the nature and circumstances of the demands, to one or more of which it is proposed to apply the release, that such restriction was intended by the parties.⁸⁴ And even where the word "release" is used, and the instrument is under seal, if it be apparent from the whole of it and the circumstances that the parties did not intend a release, such intention as may ap-

⁸⁰ *Johnson v. Von Scholley*, 218 Mass. 454; *O'Shea v. New York*, etc. R. Co., 44 C. C. A. 601, 105 Fed. 559, 13 Am. Neg. Rep. 520.

It may be shown by parol whether the delivery of a lease was intended to be absolute or conditional. *Stibel v. Grosberg*, 202 N. Y. 266, 36 L.R.A.(N.S.) 1147.

⁸¹ *Brown v. Cambridge*, 3 Allen, 474; *Goss v. Ellison*, 136 Mass. 503; *Denver*, etc. R. Co. v. *Sullivan*, 21 Colo. 302, 13 Am. Neg. Cas. 536.

⁸² *Quebec v. Gulf*, etc. R. Co., 98 Tex. 6, 66 L.R.A. 734; *Houston*, etc. R. Co. v. *McCarty*, 94 Tex. 298, 53 L.R.A. 507, 86 Am. St. 854; *San Antonio*, etc. R. Co. v. *Polka* (Tex. Civ. App.), 124 S. W. 226; *Hyde v. Baldwin*, 17 Pick. 307.

But demands originating at the time the release is given are not re-

leased. *Miller v. Schloss*, 159 App. Div. (N. Y.) 704.

⁸³ *Rued v. Cooper*, 119 Cal. 463.

⁸⁴ *Jeffreys v. Southern R. Co.*, 127 N. C. 377; *Rich v. Lord*, 18 Pick. 322.

A release will be construed from the standpoint occupied by the parties to it when it was executed; in order to do this extrinsic evidence is admissible to show the circumstances then existing and the nature of the transaction. The words used must not be added to or taken from. *Rowe v. Rand*, 111 Ind. 206. If only general words are used the instrument will be construed most strongly against its maker. *Ibid*.

It will not be given retroactive effect unless its terms require it. *Hughson v. Richmond & D. R. Co.*, 2 App. Cas. (D. C.) 98.

pear will prevail, and the instrument may be construed simply as an agreement not to charge the person to whom it is executed.⁸⁵ Where the release for personal injuries specified the injuries and expressed that it also covered all manner of actions, causes of action, claims and demands whatever from the beginning of the world to this day, the particular recital was a qualification of the general words, and these were limited by the specific recital of the injuries that the payment was made to cover; hence an injury unknown to both parties when the release was made was not included in it.⁸⁶ Reservations embodied in a release but not alleged in the complaint as a basis of action will be treated as surplusage.⁸⁷ A release of all claims for damages by reason of the construction of a railroad upon the lands of the releasor cuts off his right and any right of his lessee or grantee to recover for injuries resulting from the careful and skilful construction of the road, and carries with it to the company the right to do all incidental acts essential to the enjoyment of the right granted;⁸⁸ and an agreement on the part of the landowner to sell a railroad company a right of way across his land covers all damages for which the vendor is entitled to compensation,⁸⁹ unless they result from negligence and occur after the release is given.⁹⁰ A covenant to discontinue a pend-

⁸⁵ *Solly v. Forbes*, 2 Brod. & Bing. 46; 1 Par on Cont. 28. See *Jackson v. Stackhouse*, 1 Cow. 122, 13 Am. Dec. 514; *McIntyre v. Williamson*, 1 Edw. 34; *Kirby v. Turner*, Hopk. 309; *Matthews v. Chicopee Mfg. Co.*, 3 Robert. 711.

⁸⁶ *Texas & P. R. Co. v. Dashiell*, 198 U. S. 521, 49 L. ed. 1150; *Union Pac. R. Co. v. Artist*, 9 C. C. A. 14, 60 Fed. 365, 23 L.R.A. 581; *Lumley v. Wabash R. Co.*, 22 C. C. A. 60, 76 Fed. 66. See *McCarty v. Houston, etc. R. Co.*, 21 Tex. Civ. App. 568, 13 Am. Neg. Rep. 516.

⁸⁷ "Where mere negligence is alleged, and the plea avers a valid release 'from all liability * * * caused by the negligence of said defendant as alleged in said declara-

tion,' a contract exempting the defendant from liability, 'excepting such injury, loss, or damage as may be directly occasioned by the gross negligence' of the defendant, is not fatally variant from the averments of the plea." *Atlantic Coast Line R. Co. v. Wanchula Manufacturing & Timber Co.*, 67 Fla. 27.

⁸⁸ *Denver U. & P. R. Co. v. Barsaloux*, 15 Colo. 297; *Burrow v. Terre Haute & L. R. Co.*, 107 Ind. 432; *Hoffeditz v. Railroad Co.*, 129 Pa. 264; *Updegrove v. Pennsylvania, etc. R. Co.*, 132 Pa. 540, 7 L.R.A. 213. Compare *St. Louis, etc. R. Co. v. Hurst*, 25 Ill. App. 98.

⁸⁹ *Kemp v. Pennsylvania R.*, 156 Pa. 430.

⁹⁰ *Brown v. Pine Creek R. Co.*,

ing action at law and to release all claim or right of action for present or future damages arising from a specified cause bars all judicial proceedings for that cause—a suit for an injunction as well as an action for damages.⁹¹ In determining the scope to be given a release the consideration for it will have great influence; if that is nominal or small as compared with the rights surrendered, and the generality of the language used indicates that it affects rights of which the party who executed it was ignorant, equity will restrict its effect to that intended.⁹² The obligation imposed upon a railroad company to fence its road cannot be got rid of by any release it may obtain from the owner of the land over which the road is constructed.⁹³

§ 256. Who may execute. A release will be effectual to discharge a debt or liability within its terms although it is not executed by all in whom the right of action is vested, and though it is to only one of several persons jointly liable. Where several must join as plaintiffs in bringing an action a release of the cause of action by one of them is a bar.⁹⁴ One partner may, without being specially authorized thereto, bind his firm by a sealed release of a partnership claim.⁹⁵ The right to execute a release cannot be exercised to the detriment of third persons. If a

183 Pa. 38; *Missouri, etc. R. Co. v. Hopson*, 15 Tex. Civ. App. 126. See § 1090.

⁹¹ *Kennerty v. Etiwan P. Co.*, 17 S. C. 411, 43 Am. Rep. 607.

⁹² *Blair v. Chicago & A. R. Co.*, 89 Mo. 383; *Lusted v. Chicago & N. R. Co.*, 71 Wis. 391; *Kirchner v. New Home S. Mach. Co.*, 59 Hun, 186. See also, *Mattson v. Eureka Cedar Lumber & Shingle Co.*, 79 Wash. 266.

It cannot be shown that a release executed pursuant to an accord and satisfaction was without other consideration than it acknowledged. *Harvey v. Denver, etc. R. Co.*, 44 Colo. 258, 130 Am. St. 120.

⁹³ *Cincinnati, etc. R. Co. v. Hildreth*, 77 Ind. 504.

⁹⁴ *Osborn v. Martha's Vineyard*

R. Co., 140 Mass. 549; *Pattison v. Skillman*, 43 N. J. Eq. 392; *Wallace v. Kelsall*, 7 M. & W. 264; *Clark v. Dinsmore*, 5 N. H. 136; *Kimball v. Wilson*, 3 id. 96, 14 Am. Dec. 342; *Austin v. Hall*, 13 Johns. 286, 7 Am. Dec. 376; *Decker v. Livingston*, 15 Johns. 479; *Sherman v. Ballou*, 8 Cow. 304; *Pierson v. Hooker*, 3 Johns. 68, 3 Am. Dec. 467; *Napier v. McLeod*, 9 Wend. 120; *Bulkley v. Dayton*, 14 Johns. 387; *Murray v. Blatchford*, 1 Wend. 583, 19 Am. Dec. 537. See *Gram v. Cadwell*, 5 Cow. 489; *Bruen v. Marquand*, 17 Johns. 58; *Halsey v. Fairbanks*, 4 Mason 206; *Wiggin v. Tudor*, 23 Pick. 434; *Wilkinson v. Lindo*, 7 M. & W. 81; *Gibson v. Winter*, 5 B. & Ad. 96.

⁹⁵ *Allen v. Cheever*, 61 N. H. 32.

grantee by a covenant in a deed has assumed the payment of a mortgage upon the premises the grantor cannot, after the mortgagee has accepted the grantee as his security and without the mortgagee's assent, release the grantee.⁹⁶ The person who is entitled to the damages resulting from the death of another may release the right of action therefor.⁹⁷ If a ward, after attaining majority, makes a settlement with his guardian without the intervention of the court, and after having received the amount agreed to be coming to him gives a release to the guardian, he cannot thereafter trouble either court or guardian unless he shows that he has been prejudiced by the guardian's fraud.⁹⁸

§ 257. Effect when executed by or to one of several claiming or liable. One of several joint creditors may receive payment or satisfaction and discharge the entire obligation, and the others will be bound.⁹⁹ But the case must be free from fraud on the co-creditors who do not join.¹ Where, however, the release on its face purports to be a satisfaction of only the portion of the debt or claim belonging to the party executing it, it will have effect only to that extent. The demand will then be deemed severed with the debtor's consent, and a separate action may be brought for the residue by the creditors entitled thereto.² And such is the effect of a general release by one of two plaintiffs of

⁹⁶ *Gifford v. Corrigan*, 117 N. Y. 257, 15 Am. St. 508, 6 L.R.A. 610.

⁹⁷ *Stuebing v. Marshall*, 10 Daly, 406; *Hemmick v. Baltimore & O. S. W. R. Co.*, 263 Ill. 241. See § 6.

⁹⁸ *Luken's App.* 7 W. & S. 48; *Alexander's Est.*, 156 Pa. 368.

⁹⁹ *Hall v. Gray*, 54 Me. 230; *Piereson v. Hooker*, 3 Johns 68 (N. Y.) 3 Am. Dec. 467; *Kimball v. Wilson*, 3 N. H. 96, 14 Am. Dec. 342; *Lumbermen's Ins. Co. v. Preble*, 50 Ill. 332.

¹ *Id.* In *Upjohn v. Ewing*, 2 Ohio St. 13, it was held that one or less than all of several joint creditors, between whom no partnership exists, cannot release the common debtor, so as to conclude the co-creditors who do not assent to such release. Though they may thus de-

feat an action at law, in which all the joint creditors must join, it does not follow that a recovery in equity, where no such joinder is necessary, may not be had. See *Emerson v. Baylies*, 19 Pick. 55; 3 Par. on Cont. 617 and note.

² In *Holland v. Weld*, 4 Me. 255, there was a contract by one with four persons that he would clear certain obstructions from a river. Afterwards one of the four executed to him a release from all liability to such party, making the release for any damage sustained in consequence of any past or future non-performance. Mellen, C. J., said: "This release, in its terms, discharges Weld from his liabilities to Austin only, for any damage sus-

all actions, debts, claims and demands which the plaintiff has against the defendant.³ A release by the nominal creditor is not good against, but a fraud on, the real party in interest. If the party taking it and seeking to avail himself of it was aware that the releasor had no interest in the demand released the instrument will be disregarded.⁴ Where damages sustained by a wife because of personal injuries become community property on recovery, she may not release them without the concurrent action of her husband.⁵

A release of one of several joint or joint and several debtors or wrong-doers discharges all. The deed is taken most strongly against the releasor, and is conclusive evidence that he has been satisfied,⁶ though the intention not to release some of them is

tained by him. To give it any more broad and extensive operation would be contrary to the expressed intention of both of the parties. According to *Cole v. Knight*, 3 Mod. 277, and *Lyman v. Clark*, 9 Mass. 235, a release should be confined to the object which was in view, and on which it was plainly the intention of all that it should operate. The contract was originally joint; and had no release been given by Austin, an action must necessarily have been brought in the name of all the four against the defendant; but as he has accepted the release and availed himself of it so far as he was once liable to Austin, he has by this act converted the joint contract into a several one; and he must now permit the plaintiff and the other two promisees to consider the contract in that light and assert their claims against him accordingly. This course is manifestly just and sanctioned by settled principles." *Baker v. Jewell*, 6 Mass. 460, 4 Am. Dec. 162; *Carrington v. Crocker*, 37 N. Y. 336; *Parmalee v. Lawrence*, 44 Ill. 405.

³ *Crafts v. Sweeney*, 18 R. I. 730; *Boston & M. R. v. Portland*, etc. R.

Co., 119 Mass. 498, 20 Am. Rep. 338.

⁴ *Gram v. Cadwell*, 5 Cow. 489; *Legh v. Legh*, 1 Bos. & P. 447; 1 Par. on Cont. 27; 2 id. 617, and note; *Timan v. Leland*, 5 Hill, 237.

A surety paying the debt may be subrogated notwithstanding a legal release of it; and an intention to be subrogated will be presumed from the mere act of paying. *Neilson v. Fry*, 16 Ohio St. 552; *Dempsey v. Bush*, 18 id. 376.

⁵ *Justis v. Atchison*, etc. R. Co., 12 Cal. App. 639.

⁶ *Galveston, H. & S. A. Ry. Co. v. Walker*, — Tex. Civ. App. —, 163 S. W. 1038; *J. I. Case Threshing Machine Co. v. Bridger*, 133 La. 754; *The St. Cuthbert*, 157 Fed. 799; *Cleveland*, etc. R. Co. v. *Hilligoss*, 171 Ind. 417, 131 Am. St. 258; *Huber Mfg. Co. v. Silvers*, 85 Neb. 760, 133 Am. St. 689; *Smith v. South & W. R. Co.*, 151 N. C. 479; *Duck v. Mayeu*, (1892) 2 Q. B. 513; *Reynolds v. McLean*, 9 West Aust. L. R. 89; *Hale v. Spaulding*, 145 Mass. 482, 1 Am. St. 475 (the words used were "in full satisfaction for his liability"); *McClung v. Mabry*, 2 Tenn. Cas. 91; *O'Shea*

disclosed in the release.⁷ The general rule applies to wrongdoers though there was no concert of action among them, if the injury was single,⁸ and the effect is the same in some jurisdictions though a claim is made against one who was not in fact liable if he has given a consideration for a release,⁹ and was

v. New York, etc. R. Co., 44 C. C. A. 601, 13 Am. Neg. Rep. 520, 105 Fed. 559; Denver, etc. R. Co. v. Sullivan, 21 Colo. 302, 13 Am. Neg. Cas. 536; Hartigan v. Dickson, 81 Minn. 284, 13 Am. Neg. Rep. 578; Clark v. Mallory, 185 Ill. 227; DeLong v. Curtis, 35 Hun 94; Urton v. Price, 57 Cal. 270; Ellis v. Esson, 50 Wis. 138, 36 Am. Rep. 830; Lamb v. Gregory, 12 Neb. 506 (joint judgment debtors); Chapin v. C. & E. I. R. Co., 18 Ill. App. 47, 11 Am. Neg. Cas. 435; Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504; Coke Litt. 232; Bac. Abr., Release 9; Bronson v. Fitzhugh, 1 Hill 185; Rowley v. Stoddard, 7 Johns. 207; Catskill Bank v. Messenger, 9 Cow. 37; Hoffman v. Dunlop, 1 Barb. 185; Parsons v. Hughes, 9 Paige 591; Ward v. Johnson, 13 Mass. 148; Tuckerman v. Newhall, 17 id. 581; Wiggin v. Tudor, 23 Pick. 434; Houston v. Darling, 16 Me. 413; Ruble v. Turner, 2 Hen. & M. 39; Cornell v. Masten, 35 Barb. 157; Matthews v. Chicopee Mfg. Co., 3 Robert. 711; Mottram v. Mills, 2 Sandf. 189; Bloss v. Plymale, 3 W. Va. 393, 100 Am. Dec. 752; Brown v. Marsh, 7 Vt. 320; Armstrong v. Hayward, 6 Cal. 183; Frink v. Green, 5 Barb. 455; Rice v. Webster, 18 Ill. 321; Prince v. Lynch, 38 Cal. 528; Hunt v. Terrill's Heirs, 7 Marsh. 68; Dean v. Newhall, 8 T. R. 168; Hutton v. Eyre, 6 Taunt. 289; Lacey v. Kinaston, 1 Ld. Raym. 688, 12 Mod. 551; Johnson v. Collins, 20 Ala. 435; McAllister v. Dennin, 27 Mo. 40. See as to the

effect of a release to one of two joint tort-feasors under the statute of Kansas, Hager v. McDonald, 65 Fed. 200; Smith v. White, 73 Kan. 607.

⁷ Ducey v. Patterson, 37 Colo. 216, 9 L.R.A.(N.S.) 1066, 119 Am. St. 284.

Pleading guilty and paying a fine under an agreement, by one of several tort feasers will release a civil liability as to the others. Bryant v. Rich's Grill, 216 Mass. 344.

But it is otherwise in Kentucky where by statute, the jury may assess joint or several damages against several tort feasers. City of Covington v. Westbay, 156 Ky. 839.

⁸ Stone v. Dickinson, 5 Allen, 29, 81 Am. Dec. 727; Brown v. Cambridge, 3 Allen, 474; Goss v. Ellison, 136 Mass. 503; Aldrich v. Parnell, 147 id. 409; Seither v. Philadelphia T. Co., 125 Pa. 397, 4 L.R.A. 54; Tompkins v. Clay St. R. Co., 66 Cal. 163, 11 Am. Neg. Cas. 181; Shank v. Koen, 10 Ohio N. P. (N. S.) 513. Compare Arkansas Nat. Bank of Hot Springs v. Martin, 110 Ark. 578, holding that where a check fraudulently procured from the plaintiff is paid by a bank, with notice of the fraud, a release of the parties guilty of the fraud does not release the bank, it not being a joint wrongdoer.

⁹ Brewer v. Casey, 196 Mass. 384; Borchardt v. People's I. Co., 106 Minn. 134; Leddy v. Barney, 139 Mass. 394; Seither v. Philadelphia T. Co., Tompkins v. Clay St. R. Co.,

subject to suit for the joint liability.¹⁰ But if a release is given without the payment of any part of the damages sustained to one who is not a joint wrong-doer it will not necessarily release another who may have had some connection with the wrong.¹¹ A release is to be construed according to the intention of the parties, and if it or the facts and circumstances connected with it show that no satisfaction was given or received by or from those released, that the intention was simply to discharge them from the action because they were not liable, it will not affect the rights of the injured party against him who was in fact liable, the fact that it was not intended to release him being so shown.¹² As to this, however, the authorities are not in ac-

supra; *Hartigan v. Dickson*, 81 Minn. 284; *Miller v. Beck*, 108 Iowa 575, *Contra*, *Wardell v. McConnell*, 25 Neb. 558; *Missouri, etc. R. Co. v. McWherter*, 59 Kan. 345, citing *Bloss v. Plymale*, 3 W. Va. 393; *Wilson v. Reed*, 3 Johns. 175; *Snow v. Chandler*, 10 N. H. 92; *Bell v. Perry*, 43 Iowa, 368; *Owen v. Brockschmidt*, 54 Mo. 285; *Pogel v. Meilke*, 60 Wis. 248; *Kentucky & I. B. Co. v. Hall*, 125 Ind. 220, 14 Am. Neg. Cas. 555.

But in Kentucky such a release does not release another liable as a tort feisor and, further, the amount paid in condemnation for such release will be deducted from the judgment recovered from such tort feisor. *City of Louisville v. Nicholls*, 158 Ky. 516.

¹⁰ *Pickwick v. McCauliff*, 193 Mass. 70.

¹¹ *Shippey v. Kansas City*, 254 Mo. 1; *Pittsburgh R. Co. v. Chapman*, 145 Fed. 886, 76 C. C. A. 418; *Cleveland, etc. R. Co. v. Hilligoss*, 171 Ind. 417, 131 Am. St. 258; *Sexton Rice & I. Co. v. Sexton*, 48 Tex. Civ. App. 190; *Miller v. Beck*, 108 Iowa, 575, 582; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830; *Chicago v. Babcock*, 143 Ill. 358; *Long v.*

Long, 57 Iowa, 497; *Knapp v. Roche*, 94 N. Y. 729.

"A voluntary dismissal by the plaintiff as to one whom she had alleged to be a debtor *in solido* with a second alleged debtor, when there was really no debt due the plaintiff by the former, is not a remission or conventional discharge, which releases the second alleged debtor *in solido*." *Hall v. Allen Mfg. Co.*, 133 La. 1079; *Vredenburg v. Behan*, 33 La. Ann. 627.

¹² *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Borchardt v. People's I. Co.*, 106 Minn. 134; *Miller v. Fox*, 111 Tenn. 336; *Atchison, etc. R. Co. v. Classin* (Tex. Civ. App.), 134 S. W. 358; *Bailey v. Delta E. L., P. & Mfg. Co.*, 86 Miss. 634; *Derosa v. Hamilton*, 3 Pa. Dist. Rep. 404. The opinion of *Simonton, P. J.*, contains the result of a careful examination of English and American cases on the question of effectuating the intent of the parties giving releases.

An express reservation of the right of action against joint wrong-doers, co-defendants with those released, is effectual against those not released. *Edens v. Fletcher*, 79 Kan. 139, 19 L.R.A.(N.S.) 618.

cord.¹³ The general rule that the release of one of several joint or joint and several debtors or wrong-doers discharges all applies where one is discharged by law, as in bankruptcy, at the instance or with the consent of the creditor or the party injured.¹⁴ The release of one of several joint debtors, if it does not increase the original responsibilities of the others, will not work a dissolution of the contract to those not released.¹⁵ This is the case where parties are only separately liable; there the discharge of one does not discharge any other.¹⁶ The plaintiff, however, is entitled to only one satisfaction; and if the manner of releasing one involves satisfaction in whole or in part of the claim it will inure to the discharge, *pro tanto*, of all who are liable therefor,¹⁷ and this has been held to be so though the sum paid was a gratuity, it having been paid on account of the

A dismissal of the action as to one joint tort-feasor after verdict, but prior to the formal entry of judgment, is not a satisfaction by all the defendants. *Ronald v. Pacific T. Co.*, 65 Wash. 430.

¹³ *McBride v. Scott*, 132 Mich. 176, 61 L.R.A. 445, 102 Am. St. 416, citing *Ruble v. Turner*, 2 Hen. & M. 38; *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534; *Brogan v. Hanan*, 55 App. Div. (N. Y.) 92; *Brown v. Kuecheloe*, 3 Cold. 192, and distinguishing *Ellis v. Esson*, *infra*. The argument in the principal case is disapproved in *Musolf v. Duluth Edison E. Co.*, 108 Minn. 369, 24 L.R.A.(N.S.) 451.

¹⁴ *Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227; 1 Par. on Cont. 29.

¹⁵ *Mortland v. Himes*, 8 Pa. 265.

The release of an infant cosigner of a note after he has repudiated his liability on attaining his majority and reconveyed his interest in the land which was the consideration for the note does not discharge the other maker. *Young v. Currier*, 63 N. H. 419.

The defense of a release by operation of law is purely personal and the instrument is not cause for setting aside, at the instance of another creditor, a confession of judgment by the person who has been discharged for the amount due on the obligation covered by the release. *Thomas v. Mueller*, 106 Ill. 36.

¹⁶ *Bank v. Ibbotson*, 5 Hill, 461; *Van Rensselaer v. Chadwick*, 24 Barb. 333; *Mathewson v. Lydiate*, Cro. Eliz. 408, 470; *Bac. Abr.*, Release (G.); *Krbel v. Krbel*, 84 Neb. 160.

¹⁷ *St. Louis, etc. R. Co. v. Bass* (Tex. Civ. App.), 140 S. W. 860. See *Walsh v. New York Cent.*, etc. R. Co., 140 App. Div. (N. Y.) 1; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830; *Lord v. Tiffany*, 98 N. Y. 412, 50 Am. Rep. 689; *Kasson v. People*, 44 Barb. 347.

In *Babeock & W. Co. v. Pioneer I. Works*, 34 Fed. 338, the bill charged the joint infringement of a patent by P. and S., by the manufacture by P. for sale by S. of the patented article. A settlement was made between complainant and P.,

injury sustained by the plaintiff.¹⁸ The settlement which will release parties jointly liable must entirely discharge him with whom it was made.¹⁹ Where two are separately liable for the same debt and stand in such relation to each other that in case of payment by one there is a right to reimbursement or contribution from the other, a release of the party bound to reimburse or liable to contribute has been held to be a discharge of both. The reason the release of one joint obligor discharges the other is that if either pays the debt the other is liable to contribution, which would be defeated if it were permitted to exonerate only the party to whom it is made. Thus, where stockholders are personally liable, jointly and severally, for the debts of a corporation the discharge, by release under seal, of one stockholder was a discharge not only of all the others but also of the corporation.²⁰

the money paid by him "to cover the costs of complainant in this suit against P. and all damages for the infringement by said P. of the letters patent sued on;" all claims and demands against S. were expressly reserved. Held, that the stipulation released S. from liability for both costs and damages. See *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504.

¹⁸ *Atchison, etc. R. Co. v. Classin* (Tex. Civ. App.), 134 S. W. 353.

¹⁹ *Home Sav. Bank v. Oterbach*, 135 Iowa, 157, 124 Am. St. 267; *Louisville & E. M. Co. v. Barnes*, 117 Ky. 860, 64 L.R.A. 574. The opinion in this case and that in *Ellis v. Esson*, *supra*, cite the cases and fully discuss the question.

²⁰ *Prince v. Lynch*, 38 Cal. 528. Sawyer, C. J., said: "If not jointly liable in the strict sense of that term, as has been suggested, the legal incidents, as between the corporation and stockholders, to the extent of their personal liability, are, it seems to us, precisely the same. The stockholder is not a surety in any sense of the term. He is under

the constitution and statute primarily liable in the same sense as the corporation is primarily liable. The same identical act which casts the liability on the corporation also casts it on the stockholder. There are not separate contracts. The stockholder does not stand in the position of an indorser or guarantor. An indorser or guarantor is not liable on the same contract. His contract is a separate and distinct one of his own, to which the principal is no party. It is founded upon the principal contract, and finds its consideration only in that contract; but it is a separate and distinct contract, nevertheless, and the terms are different. Each is liable on his own particular contract, but there is no joint contract or joint obligation. The maker and indorser or guarantor of a note may be sued jointly, it is true, but this does not result from the fact that there is a single joint contract.

"It is suggested that the reason the release of one joint obligor discharges the other is, that if one

§ 258. What will operate as a release. A simple contract cannot operate as a release nor be pleaded as such; therefore such an agreement for the discharge of one of several parties jointly or jointly and severally liable must, as stated, be of such character as to discharge all by way of accord and satis-

pays the debt the other is liable to contribution, which would be defeated by the release if it were permitted to exonerate only the party to whom it is made. On this ground it is said to be held to extinguish the debt. Now this incident attends the relation in question, and this principle is as applicable to it as to the case of two joint makers of a note.

"Suppose the corporation is sued and a recovery had; the stockholder released must contribute his share, for the corporation can levy an assessment on all the stockholders, according to their respective shares, to raise funds to pay the judgment. The corporation must pay it, unless it too is discharged, and the other shareholders are entitled to have him contribute his share. Or, suppose the corporation is in funds, and pays without an assessment, it takes from the stockholder released his *pro rata* share of the fund which would otherwise go to him in dividends, and thus he is made to contribute notwithstanding his release. So, suppose McClelland had sued other stockholders of the corporation and recovered and collected from them the whole amount of his debt; the stockholder or stockholders so compelled to pay would have a claim for contribution against Lynch for his share, and thus either the right to contribution of the stockholder who has been compelled to pay, or the release of Lynch, must be defeated. Suppose, again, that Mc-

Clelland should discharge all the stockholders from personal liability, as has been suggested, and the corporation itself should still remain liable, each stockholder would still be liable to contribute his *pro rata* share, either in the form of an assessment levied by the corporation to pay the debt, or by a diminution of dividends, and the release would be defeated, or the corporation deprived of power to protect its property. One of two results must inevitably be reached. Either the debt is extinguished as to all by the release, or the release is wholly inoperative as to all. Thus the incidents and consequences are the same as between joint debtors and joint obligors in any other form. We think, therefore, that the case is within the rule, and that a valid release, under seal, discharges the corporation and other stockholders, as well as the stockholder released. The releases to the defendant, Lynch, referred to in the findings, were in due form and under seal, and we think, to the extent of the amount released, discharged the corporation as well as Lynch. But we think the court erred in holding that the whole \$416.66, due McClelland, was released. The language of the release is: 'I hereby release and discharge said Francis Lynch from *his proportion* of said company's said indebtedness to me.' The release by its express terms, then, is only 'from his proportion of said company's said indebtedness to me;' not from the whole. 'And

faction. If the agreement embraces the entire cause of action and purports, upon sufficient consideration, to discharge it, it will have that effect as to all the parties liable though made with only one.²¹ But a simple contract to discharge one of several who are liable will not have that effect by force of the agreement, as a release operates, but only by force thereof based upon a sufficient consideration for satisfaction of the entire demand.²² Hence a conventional discharge which has been given to only one of several who are bound, in order to have the effect of a release as to all and to be pleadable as such, must be a technical release under seal.²³

No special form of words is necessary if the intention is

this shall be said Lynch's receipt in full, to date, for his proportion and share of all indebtedness to me by said company, and a bar to any and all suits against said Lynch for the same;' that is to say, *for his proportion and share.* It is manifest that McClelland did not intend to release his whole demand, but only Lynch's share. Although Lynch might be liable under the act to pay McClelland the whole demand against the company, as held in Larrabee v. Baldwin, 35 Cal. 155, if the amount of the aggregate debts of the corporation upon which he was personally responsible was sufficient; yet, the whole would not be *his share* of the indebtedness, because he would be entitled to recover the excess paid by him over his share from the corporation, and to call upon his co-stockholders, who were personally liable, to contribute. The fact that he might be liable personally, under the statute, in the first instance, to pay the whole to the creditor, does not increase or diminish or in any way affect the amount of his share of the demand."

²¹ Ellis v. Esson, 50 Wis. 138, 56 Am. Rep. 830; Eastman v. Grant,

34 Vt. 390; Matthews v. Chicopee Mfg. Co., 3 Robert. 711.

²² Fitzgerald v. Union S. Co., 89 Neb. 393, 33 L.R.A.(N.S.) 983; Ellis v. Esson, *supra*; Walker v. McCulloch, 4 Me. 421; McAllester v. Sprague, 34 id. 296; Rowley v. Stoddard, 7 Johns. 207; Harrison v. Close, 2 id. 449, 3 Am. Dec. 444; Farmers' Bank v. Blair, 44 Barb. 641; Shaw v. Pratt, 22 Pick. 305; Smith v. Bartholomew, 1 Mete. (Mass.) 276, 35 Am. Dec. 365. See Honegger v. Wettstein, 47 N. Y. Super. Ct. 125.

²³ Bloss v. Plymale, 3 W. Va. 393, 100 Am. Dec. 752; Frink v. Green, 5 Barb. 455; De Zeng v. Bailey, 9 Wend. 336; Rowley v. Stoddard, 7 Johns. 207; McAllester v. Sprague, 34 Me. 296; Bronson v. Fitzhugh, 1 Hill, 185; Shaw v. Pratt, 22 Pick. 305; McAllister v. Dennin, 27 Mo. 40; Berry v. Gillis, 17 N. H. 9, 43 Am. Dec. 584; Hillas v. Fuller, 143 N. Y. Supp. 15; Blackmer v. McCabe, 86 Vt. 303; Commercial & F's. Nat. Bank v. McCormick, 97 Md. 703; Valley Sav. Bank v. Mercer, 97 Md. 458. See Home Tel. Co. v. Fields, 150 Ala. 306.

In Mitchell v. Allen, 25 Hun 543,

clear to discharge the debt.²⁴ Various acts will have the effect of a release.²⁵ The act of surrendering a note or other evidence of debt will work that result.²⁶ But a conditional release does not take effect until the fulfilment of the condition.²⁷ A bequest of the debt to the debtor;²⁸ the intermarriage of the debtor and creditor;²⁹ appointment of the debtor executory,³⁰ and the intentional destruction of the evidence of indebtedness,³¹ will produce the same result. So, taking judgment against one of several jointly bound without issuing process against the others releases those not sued;³² and so does taking the body of the debtor or one of several on execution³³ and discharging him or them from custody. Under a statute which authorizes any surety to require a creditor or obligee forthwith to institute an action upon the accrual of the right to do so and which provides that if it is not done within a reasonable time the surety shall be discharged, only such sureties as have given the notice required are released by the neglect to sue.³⁴ A release of damages by a widow whose husband was killed is not invalid because it was executed in order that another person, who

an unsealed instrument acknowledged the payment of money from one of several persons liable for the releasor's injuries; it expressly provided that it was not to affect the other defendants, and that the claims against them were retained. It was held that the discharge of all was a necessary legal result of the satisfaction and discharge of one. The court approved *Ruble v. Turner*, 2 Hen. & Munf. (Va.) 38, where three persons were sued for an assault and battery: pending suit an unsealed stipulation acknowledged satisfaction from one of them and provided that it was not to affect the liability of the others. It was held to work a discharge of all.

²⁴ 2 Par. on Cont. 713.

²⁵ See *Roeckefeller v. Wedge*, 149 Fed. 130, 79 C. C. A. 26.

²⁶ *Beach v. Endress*, 51 Barb. 570;

Vanderbeck v. Vanderbeck, 30 N. J. Eq. 265; *Kelly v. Protected Home Circle*, 152 Ill. App. 183.

²⁷ *Stowe v. United States Exp. Co.*, 179 Mich. 349.

²⁸ *Hobart v. Stone*, 10 Pick. 215.

²⁹ *Curtis v. Brooks*, 37 Barb. 476; *Smiley v. Smiley*, 18 Ohio St. 543.

³⁰ *Thomas v. Thompson*, 2 Johns. 470; *Eichelberger v. Morris*, 6 Watts, 42; *Fishel v. Fishel*, 7 id. 44; *Raab's Est.*, 16 Ohio St. 274.

³¹ *Booth v. Smith*, 3 Woods, 19.

³² *Mitchell v. Brewster*, 28 Ill. 163; *Anderson v. Levan*, 1 W. & S. 334; *Jones v. Johnson*, 3 id. 276, 78 Am. Dec. 760; *Stewart's App.*, 3 Watts, 476.

³³ *Gould v. Gould*, 4 N. H. 173; *Palethorpe v. Leshner*, 2 Rawle, 272; *Sharp v. Speckenagle*, 3 S. & R. 464.

³⁴ *Cochran v. Orr*, 94 Ind. 433.

was named by him as the beneficiary in a mutual insurance policy on his life, might realize the amount due, a condition of it being that any employee of a designated railway company who was a member of the society should release the company from all liability for injuries to him.³⁵ An agreement by the owner of property which has been seized under a writ against a third person that it may be sold and the proceeds retained in its place does not release a cause of action for the taking and selling.³⁶ A contract between master and servant which gives the latter, when physically injured, whether as the result of his own negligence or not, or when he is sick, the right to pecuniary aid and other valuable benefits, and which make the acceptance of these operate as a release of the master, is not contrary to public policy.³⁷ An unsealed order for the payment of money is not a release if it has not been collected or negotiated.³⁸

§ 259. **Covenant not to sue.** A covenant with a sole debtor or all the debtors never to sue or not to sue without any limitation of time, will, on the principle of avoiding circuity of action, have the effect of a release.³⁹ For the same reason a

³⁵ State v. Baltimore & O. R. Co., 36 Fed. 655. See Fuller v. Baltimore & O. Relief Ass'n, 67 Md. 433.

³⁶ Sartwell v. Moses, 62 N. H. 355.

³⁷ Petty v. Brunswick & W. R. Co., 109 Ga. 666. See § 6.

But in the absence of such a contract the receipt of benefits such as are usually paid to injured employees will not support a release nor require the tender back thereof before a suit can be maintained. Tweeten v. Tacoma Railway & Power Co., 127 C. C. A. 378, 210 Fed. 828.

³⁸ Boston v. Ocean S. S. Co., 197 Mass. 561.

³⁹ Chicago & A. R. Co. v. Averill, 224 Ill. 516; McChesney v. Bell, 59 Ill. App. 84; White v. Richmond & D. R. Co., 110 N. C. 456; Kennerly v. Etiwan P. Co., 17 S. C. 411, 43 Am. Rep. 607; Clopper v. Union

Bank, 7 Har. & J. 92; Parker v. Holmes, 4 N. H. 97; Hodges v. Smith, Cro. Eliz. 623; Cuyler v. Cuyler, 2 Johns. 186; Arnold v. Park, 8 Bush, 3; 2 Saund. 47s, note (1); Deux v. Jefferies, Cro. Eliz. 353; Ford v. Beach, 11 Q. B. 842; Willis v. DeCastro, 4 C. B. (N. S.) 216; Badeley v. Vigurs, 4 El. & B. 71; Giles v. Spencer, 3 C. B. (N. S.) 244; Phelps v. Johnson, 8 Johns. 54; Clark v. Bush, 3 Cow. 151; Brown v. Williams, 4 Wend. 360; Hosack v. Rogers, 8 Paige, 229; Hastings v. Dickinson, 7 Mass. 155, 5 Am. Dec. 34; Shed v. Pierce, 17 Mass. 623; Williamson v. McGinnis, 11 B. Mon. 74, 52 Am. Dec. 561; Lane v. Owings, 3 Bibb, 247; Harvey v. Harvey, 3 Ind. 473; Reed v. Shaw, 1 Blackf. 245; Jackson v. Stackhouse, 1 Cow. 122, 13 Am. Dec. 514; Garnett v. Macon, 6 Call, 308; Lacy v. Kynaston, 2 Salk. 575, 12

covenant by the creditor to indemnify the debtor against the particular debt is a release.⁴⁰ But a covenant not to sue one of several joint debtors, joint obligors, or joint tortfeasors or to indemnify him, is not a release; the covenantee's only remedy is by action on the covenant,⁴¹ because it cannot be inferred from such a covenant that it was the intention to discharge the debt.⁴² It cannot avail as an estoppel in order to avoid circuity of action. It is said by high authority that a covenant containing no words of release has never been construed as a release unless it gave the party claiming the benefit of that construction a right of action which would precisely countervail that to which he was liable; and, unless, also, it was the intention of

Mod. 648, 1 Ld. Raym. 688; Dean v. Newhall, 8 T. R. 168. See Kowling v. Manly, 2 Abb. Pr. (N. S.) 377.

⁴⁰ Connop v. Levy, 11 Q. B. 769; Clark v. Bush, 3 Cow. 151.

⁴¹ Balsley v. Hetzel, 182 Ill. App. 136; Johnson v. Von Scholley, 218 Mass. 454; Chicago v. Babcock, 143 Ill. 358; Benton v. Mullen, 61 N. H. 125; Tuckerman v. Newhall, 17 Mass. 581; Miller v. Fenton, 11 Paige, 18; Harrison v. Close, 2 Johns. 448, 3 Am. Dec. 444; Catskill Bank v. Messenger, 9 Cow. 37; Rowley v. Stoddard, 7 Johns. 207; Bank v. Osgood, 4 Wend. 607; Couch v. Mills, 21 id. 424; Shed v. Pierce, 17 Mass. 623; Goodnow v. Smith, 18 Pick. 414, 29 Am. Dec. 600; Aylesworth v. Brown, 31 Ind. 270; Carondelet v. Desnoyer, 27 Mo. 36; Walker v. McCulloch, 4 Me. 421; Williamson v. McGinnis, 11 B. Mon. 74, 52 Am. Dec. 561; Lane v. Owings, 3 Bibb. 247; Frink v. Green, 5 Barb. 455; Snow v. Chandler, 10 N. H. 92, 34 Am. Dec. 140; Mason v. Jouett, 2 Dana, 107; Berry v. Gillis, 17 N. H. 9, 43 Am. Dec. 584; Durell v. Wendell, 8 N. H. 369; Parker v. Holmes, 4 id. 97; Smith v. Mapleback, 1 T. R. 441; Hutton v. Eyre,

6 Taunt. 289; Gibson v. Gibson, 15 Mass. 112; Ward v. Johnson, 6 Munf. 6, 8 Am. Dec. 729; Thimbleby v. Barron, 3 M. & W. 210; Dow v. Tuttle, 4 Mass. 414, 3 Am. Dec. 226; Aloff v. Scrimshaw, 2 Salk. 573; Hoffman v. Brown, 6 N. J. L. 429; Fullman v. Valentine, 11 Pick. 159; Garnett v. Macon, 6 Call, 308; Lacy v. Kynaston, 2 Salk. 575, 12 Mod. 548, 1 Ld. Raym. 688; Dean v. Newhall, 8 T. R. 168; Carey v. Bilby, 129 Fed. 203, 63 C. C. A. 361; Texarkana Tel. Co. v. Pemberton, 86 Ark. 329; Chicago & A. R. Co. v. Averill, 224 Ill. 516; Musolf v. Duluth Edison E. Co., 108 Minn. 369, 24 L.R.A.(N.S.) 451; Robertson v. Trammell, 98 Tex. 364, 37 Tex. Civ. App. 53.

⁴² Id. Ruggles v. Patton, 8 Mass. 480; Sewall v. Sparrow, 16 id. 24; Shed v. Pierce, 17 id. 623; Snow v. Chandler, 10 N. H. 92, 34 Am. Dec. 140; Walker v. McCulloch, 4 Me. 421; Durell v. Wendell, 8 N. H. 369; Kropidlowski v. Pfister & V. L. Co., 149 Wis. 421, 39 L.R.A.(N.S.) 509; Walsh v. New York, etc. R. Co., 204 N. Y. 58, 37 L.R.A.(N.S.) 1137; Himmelberger-H. L. Co. v. Dallas, *infra*.

the parties that the last instrument should defeat the first.⁴³ And where two are jointly and severally bound or liable a covenant not to sue one does not amount to a release of the other,⁴⁴ unless, perhaps, the covenant be given after a suit had been brought separately against one, and the creditor had by that action chosen to consider the covenantee the sole debtor.⁴⁵ The amount paid, however, upon the demand by way of partial discharge as a consideration for such a covenant will be regarded as satisfaction to that extent.⁴⁶ Nor will a covenant with a debtor not to sue for a limited time suspend the right of action.⁴⁷

The release of the principal debtor will absolve the sureties, and the release of a primary security will discharge collaterals.⁴⁸ But it is competent to provide otherwise and to reserve a right to resort to securities.⁴⁹ And a release may, by express provision, discharge one of several who are liable and exempt others

⁴³ Garnett v. Macon, 6 Cal. 308. See Berry v. Gillis, *supra*.

⁴⁴ Louisville Times Co. v. Lancaster, 142 Ky. 122; Commercial & F's. Nat. Bank v. McCormick, 97 Md. 703; St. Louis, etc. R. Co. v. Bass — Tex. Civ. App. —, 140 S. W. 860; Sexton Rice & I. Co. v. Sexton, 48 Tex. Civ. App. 190; Duck v. Mayeu, [1892] 2 Q. B. 511; Nickerson v. Suplee, 174 Ill. App. 136; Chicago v. Babcock, *supra*; Bates v. Wills Point Bank, 11 Tex. Civ. App. 73; Lacy v. Kynaston, 12 Mod. 548, 551; Ward v. Johnson, *supra*; Tuckerman v. Newhall, 17 Mass. 581; Hutton v. Eyre, 6 Taunt. 289.

⁴⁵ Shed v. Pierce, 17 Mass. 623.

⁴⁶ Snow v. Chandler, 10 N. H. 92, 34 Am. Dec. 140; Himmelberger-H. L. Co. v. Dallas, 165 Mo. App. 49.

⁴⁷ *Id.* Durbin v. Northwestern S. Co., 36 Ind. App. 123; Guard v. Whiteside, 13 Ill. 7; Foster v. Purdy, 5 Mete. (Mass.) 442; Howland v. Marvin, 5 Cal. 501; Clark v. Russel, 3 Watts 213; Hamaker v. Eberley, 2 Binn. 510; Berry v. Bates, 2 Blackf. 118; Reed v. Shaw,

1 *id.* 245; Thalman v. Barbour, 5 Ind. 178; Lowe v. Blair, 6 Blackf. 282; Pearl v. Wells, 6 Wend. 291; Chandler v. Herrick, 19 Johns. 129; Winans v. Huston, 6 Wend. 471; Perkins v. Gilman, 8 Pick. 229; Couch v. Mills, 21 Wend. 424. But see Clopper v. Union Bank, 7 Har. & J. 92, 16 Am. Dec. 294; Blair v. Reid, 20 Tex. 310; Morgan v. Butterfield, 3 Mich. 615.

⁴⁸ United States v. Knabe, 147 Fed. 802; Jackson v. Stackhouse, 1 Cow. 122, 13 Am. Dec. 514; Mottram v. Mills, 2 Sandf. 189; Newcomb v. Raynor, 21 Wend. 108, 34 Am. Dec. 219; Brown v. Williams, 4 Wend. 360.

A release by an acceptor of the drawer, discharging him from any claim for damages, etc., as drawer of a bill, will not bar an action by the acceptor for money paid to take up the bill for the drawer's accommodation. Pearce v. Wilkins, 2 N. Y. 469, affirming Wilkins v. Pearce, 5 Denio, 541.

⁴⁹ Faneuil Hall Nat. Bank v. Meloon, 183 Mass. 66, 97 Am. St. 416;

from its operation. In such case the action may be brought against all for the purpose of recovery against those not released.⁵⁰ Such a reservation or limitation cannot be made by parol.⁵¹ When, however, the debtor or one of several debtors jointly bound stipulates that his discharge shall not prevent a recovery against other parties it is implied that he will not set it up against them when they have paid the demand and call on him for reimbursement or contribution.⁵² A release cannot take effect *in futuro* or upon a future right of action, but only upon some present right either complete or inchoate; it may be so framed as to cut off a conditional or contingent liability, as for example that of an indorser.⁵³

Pierce v. Sweet, 33 Pa. 151; Bruen v. Marquand, 17 Johns. 58; Stewart v. Eden, 2 Cai. 121, 2 Am. Dec. 222; Sohler v. Loring, 6 Cush. 537; Hutchins v. Nichols, 10 id. 299; Seymour v. Minturn, 17 Johns. 169; Keeler v. Bartine, 12 Wend. 110; Hubbell v. Carpenter, 5 N. Y. 171. See *Matthews v. Chicopee Mfg. Co.*, 3 Robert. 711.

⁵⁰ *Northern Ins. Co. v. Potter*, 63 Cal. 157; *Pettigrew Mach. Co. v. Harmon*, 45 Ark. 290; *Twopenny v. Young*, 3 B. & C. 211; *Lancaster v. Harrison*, 4 M. & P. 561, 6 Bing. 726; *Solly v. Forbes*, 2 Brod. & Bing. 38; *North v. Wakefield*, 13 Q. B. 538. *Contra*, *Louisville & N. R. Co. v. Allen*, 67 Fla. 257.

⁵¹ *Bronson v. Fitzhugh*, 1 Hill, 185; *Brooks v. Stuart*, 9 A. & E. 854.

⁵² 1 Par. on Cont. 285; *Hubbell v. Carpenter*, 5 N. Y. 171; *Pitman on Pr. & Surety*, 181-2, 189. See 1 *Brandt on Suretyship* (2d ed.), § 147.

⁵³ *Reed v. Tarbell*, 4 Mete. (Mass.) 93; *Nichols v. Tracy*, 1 Sandf. 278; *Pierce v. Parker*, 4 Mete. (Mass.) 80; *Hastings v. Dickinson*, 7 Mass. 153, 5 Am. Dec.

34; *Gibson v. Gibson*, 15 Mass. 110, 8 Am. Dec. 94.

Parsons says (2 Par. on Cont. 714): "A release, strictly speaking, can operate only on a present right, because one can give only what he has, and can only promise to give what he may have in future. But where one is possessed of a distinct right, which is to come into effect and operation hereafter, a release in words of the present may discharge this right."

In *Martin v. Baltimore & O. R. Co.*, 41 Fed. 125, an employee of defendant became a member of a relief association, and as a condition of membership and in consideration of funds paid by defendant to said association and its guaranty of the payment of the benefits promised by the association signed a contract releasing defendant from any liability to him by reason of accident while in its service. Bond, J., charged the jury that if, prior to the plaintiff's employment, he signed such contract and received the benefits arising therefrom before and after suit brought, and gave receipts for the money paid, which receipts released and discharged the defendant, he could not recover. See § 6.

SECTION 5.

TENDER.

§ 260. **Right to make.** Though a *tender*, not accepted, does not go to the extent of liquidation it is so connected with the subject of payment as to justify some consideration of it in this connection. A debtor has the right at common law, before suit, to tender the amount due to his creditor upon a certain and liquidated demand and thereby save himself from the payment of subsequent interest and costs.

§ 261. **On what demands it may be made.** It seems that a tender may be made on a *quantum meruit*,⁵⁴ but not on a claim for unliquidated damages.⁵⁵ It may be pleaded in an action on a bare covenant for the payment of money.⁵⁶ In an action for breach of contract the court cannot compel the acceptance in mitigation of damages of the property for the nondelivery of which the action is brought on a tender of it being made on the trial.⁵⁷

§ 262. **When it may be made.** At common law the tender must be made before the commencement of the suit,⁵⁸ but this

⁵⁴ *Johnson v. Lancaster*, 1 Str. 576. See *Dearle v. Barrett*, 2 A. & E. 82.

⁵⁵ *Id.*; *Green v. Shurtliff*, 19 Vt. 592; *Gregory v. Wells*, 62 Ill. 232; *Cilley v. Hawkins*, 48 Ill. 308; *McDowell v. Keller*, 4 Cold. 258; *Dayys v. Richardson*, 21 Q. B. Div. 202; *Kaw Valley F. Ass'n v. Miller*, 42 Kan. 20; *Gamus v. Tew*, 163 Ala. 358.

If a tender for such damages is authorized by statute, it must be kept good. *Dunbar v. DeBoer*, 44 Ill. App. 615. *Contra*. *McPherson v. James*, 69 id. 337.

⁵⁶ *Johnson v. Clay*, 7 Taunt. 486, 1 Moore, 200. See *Mitchell v. Gregory*, 1 Bibb, 449; § 383.

⁵⁷ *Colby v. Reed*, 99 U. S. 560, 25 L. ed. 484.

⁵⁸ *Levan v. Sternfeld*, 55 N. J. L.

41; *Colby v. Reed*, 99 U. S. 560, 25 L. ed. 484; *Bac. Abr.*, *Tender*; *Fishburne v. Sanders*, 1 N. & McC. 242; *Reed v. Woodman*, 17 Me. 43; *Knight v. Beach*, 7 Abb. Pr. (N. S.) 241; *Suffolk Bank v. Worcester Bank*, 5 Pick. 106; *Jackson v. Law*, 5 Cow. 248; *Retan v. Drew*, 19 Wend. 304.

In *Sweetland v. Tuthill*, 54 Ill. 215, *Walker, J.*, said: "It is first urged that our practice does not warrant the payment of money into court, so as to escape the payment of the costs of the suit. This may be true, but we deem it unnecessary to determine that question in this case. The law does clearly authorize a debtor to make a tender of the amount he owes his creditor, and thus relieve himself from costs if a suit shall afterwards be brought.

limitation has long since been generally abrogated by statute. It is no answer to a plea of tender, before the commencement of the suit, that the plaintiff had, before such tender, retained an attorney and instructed him to sue out a writ against the defendant and the attorney had accordingly applied for such writ before the tender, and it was afterwards sued out.⁵⁹ In strictness the plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract, and therefore it is not good if made after the day fixed for payment.⁶⁰ But this rigid rule is not adhered to in this country and in many of the states the right of tender at any time after the debt is due is recognized.⁶¹ Tender of the sum due on a mortgage any time before foreclosure discharges the lien,⁶² and under a statute authorizing the redemption of mortgaged chattels any time before foreclosure the mortgagor may so make a tender notwithstanding the mortgagee has taken possession of the property under the mortgage after condition broken.⁶³ Where goods have been sold and title reserved as security for the unpaid portion of the price and payments have been received after the time fixed for full payment the vendor cannot retake the goods without notice and demand. A tender on demand is sufficient to protect the vendee's right of possession.⁶⁴

And no reason is perceived why a debtor may not, even after a suit is brought, and at any time before the trial, make a sufficient tender and relieve himself from future costs." See *Thurston v. Marsh*, 14 How. Pr. 572.

⁵⁹ *Briggs v. Calverly*, 8 T. R. 629. See *Kirton v. Braithwaite*, 1 M. & W. 310; *Hull v. Peters*, 7 Barb. 331.

⁶⁰ *Hume v. Peploe*, 8 East, 168; *Poole v. Tumbridge*, 2 M. & W. 223; *Dobie v. Larkan*, 10 Ex. 776; *City Bank v. Cutter*, 3 Pick. 414; *Suffolk Bank v. Worcester Bank*, 5 id. 106; *Dewey v. Humphrey*, id. 187; *Frazier v. Cushman*, 12 Mass. 277; *Rose v. Brown*, Kirby, 293, 1 Am. Dec. 22; *Tracy v. Strong*, 2 Conn. 659; *Ashburn v. Poulter*, 35 id. 553.

Suth. Dam. Vol. I.—50.

⁶¹ *Dillingham v. Kerr* (Tex. Civ. App.), 139 S. W. 911; *Gottschalk v. Meisenheimer*, 62 Wash. 299; 2 Par. on Cont. 642.

A tender will be ineffectual if not made within a reasonable time. *Eliot Five Cent Sav. Bank v. Commercial Union Assur. Co.*, 142 Mass. 142; *Union Inst. v. Phoenix Ins. Co.*, 196 Mass. 230, 14 L.R.A. (N.S.) 459.

⁶² *Murray v. O'Brien*, 56 Wash. 361, 28 L.R.A. (N.S.) 998 (before suit); *Thomas v. Seattle B. & M. Co.*, 48 Wash. 560, 15 L.R.A. (N.S.) 1164, 125 Am. St. 945; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145.

⁶³ *Davies v. Dow*, 80 Minn. 223.

⁶⁴ *People's F. & C. Co. v. Crosby*, 57 Neb. 282, 73 Am. St. 504, citing

A tender by the defendant to the plaintiff pending an appeal by the latter from a judgment in his favor, if refused, stops interest.⁶⁵ If payment is required to be made within a certain period which ends on Sunday a tender the next day is in time.⁶⁶ It may be made on an interest-bearing debt before it is due, tendering the amount which would be due at maturity.⁶⁷ Some doubt has been expressed whether a tender is good of a debt not bearing interest before it is due.⁶⁸ A vendor cannot be placed in default by a tender of the purchase-money before the stipulated time for payment;⁶⁹ nor can a premature tender affect the security for a debt;⁷⁰ nor any other right of the creditor.⁷¹ A tender on a past-due obligation is good though preliminary notice of it is not given.⁷² The necessity of such notice in England when a *post diem* tender of the money due upon a mortgage is made rests entirely on custom.⁷³

In computing the time, after entry for condition of a mortgage broken, within which a mortgagor may redeem the day of entry is to be excluded.⁷⁴ And where payment must be made,

O'Rourke v. Hadcock, 114 N. Y. 541; Taylor v. Finley, 48 Vt. 78; New Home S. M. Co. v. Bothane, 70 Mich. 443.

⁶⁵ Ferrea v. Tubbs, 125 Cal. 687.

⁶⁶ Sands v. Lyon, 18 Conn. 18.

⁶⁷ Eaton v. Emerson, 14 Me. 335; Tillou v. Britton, 9 N. J. L. 120; Saunders v. Frost, 5 Pick. 259; Bacon v. Hooker, 153 Mass. 554.

A tender of the amount due on a promissory note is good if made at the time fixed for payment, though before the expiration of the days of grace, interest for such days being included. Wyckoff v. Anthony, 9 Daly, 417. On appeal this question was not passed upon, it being held that the right to object to the tender at the time it was made was waived. Wyckoff v. Anthony, 90 N. Y. 442.

⁶⁸ 2 Par. on Cont. 642. See McHard v. Whetcroft, 3 Har. & McH. 85.

⁶⁹ Rhorer v. Bila, 83 Cal. 51; Reed v. Rudman, 5 Ind. 409; Cogan v. Cook, 22 Minn. 137.

⁷⁰ Noyes v. Wyckoff, 114 N. Y. 204.

⁷¹ Moore v. Kime, 43 Neb. 517; Burns v. True, 5 Tex. Civ. App. 74; Abshire v. Corey, 113 Ind. 484. *

⁷² Sharp v. Wyckoff, 39 N. J. Eq. 376. Compare Caldwell v. Kimbrough, 91 Miss. 877.

⁷³ Browne v. Lockhart, 10 Sim. 420, 424.

⁷⁴ Wing v. Davis, 7 Me. 31.

The necessity of a tender for such purpose is denied. Quin v. Brittain, Hoff. Ch. 353; Beach v. Cooke, 14 N. Y. 508; Casserly v. Witherbee, 119 N. Y. 522, especially if the person seeking to redeem does not know, because of the mortgagee's fault, the sum due. Aust v. Rosenbaum, 74 Miss. 893.

as in such a case within a certain period, it has been made a question at what time of the last day the right of payment or tender expires. In the old cases it is held that payment should be made at a convenient time in which the money may be counted before sunset.⁷⁵ It is probable that the courts would

⁷⁵ In *Wade's Case*, 5 Coke, 114a, it was said: "Although the last time of payment of the money by force of the condition is a convenient time in which the money may be counted before sunset, yet, if the tender be made to him who ought to receive it at the place specified in the condition, at any time of the day, and he refuse it, the condition is forever saved, and the mortgagor or obligor need not make a tender of it again before the last instant." See *Coke Litt.* 202.

In *Wing v. Davis*, 7 Me. 31, the validity of a tender made late in the evening of the last day to redeem after entry for condition broken was in question. Mellen, C. J., said: "In *Hill v. Grange*, 1 Plowd. 178, the condition was to pay rent within ten days after certain feasts, in which case the justices unanimously held that the lessee had liberty within the ten days; and, therefore, they observe 'the lessee is in no danger as long as he has time to come and pay it; and he has time to come and pay it as long as the tenth day continues, and the tenth day continues until the night comes; and when the night is come, then his time elapses. So that his time to pay continues until the separation of day and night. And in arguing this point, Robert Brook, chief justice, and Saunders, said that if the rent reserved was a great sum, as £500 or £1,000, the lessee ought to be ready to pay it in such convenient time before sunset in which the money might be counted; for the

lessor is not bound to count it in the night, after sunset, for if so he might be deceived; for Brook said: '*Qui ambulat in tenebris nescit quā vadit.*' The language of the court in the case of *Greeley v. Thurston* does not advance a different principle. The question is, what is the whole day in relation to a tender in contracts of this character. We are not aware that modern decisions have changed the law as established by the old cases; or the facts necessary to be proved to support a plea of tender, except so far as the conduct of the creditor may in certain cases amount to a waiver of objections against the formality of the tender, or in case of his artful avoidance or evasion. In the case before us there is nothing like a waiver as to the unseasonableness of the hour; in fact, this was the objection made by the defendants at the time of the alleged tender, which was attempted to be made not long before midnight, when the defendants and their families were asleep, and all the lights extinguished. No reason has been assigned why a payment or a tender was delayed to so unusual an hour; and if a loss to the plaintiff is the consequence of this strange delay, he must thank his own imprudence. We do not decide that a tender may not, in any circumstances, be good, though made after the departure of daylight; it is not necessary to intimate any opinion on the point. Our decision is founded on the facts of this case; and the tender not having

not now recognize the rule as a fixed and arbitrary requirement, without regard to circumstances necessitating a tender while

been made in due season, we need not inquire as to the sufficiency of the sum which was offered."

In *Greeley v. Thurston*, 4 Me. 479, 16 Am. Dec. 285, the question was when the default of the maker of a promissory note occurred, he claiming that he had the whole of the last day in which to pay it, and that until that day is passed he cannot be said to have broken his contract. *Weston, J.*, said: "There is no question that with regard to bonds, mortgages and instruments in writing, other than notes of hand or bills of exchange, the party who engaged to pay money, or to perform any other duty, fulfills his contract, if he does so on any part of the day appointed. Unless the case of negotiable paper forms an exception to the general rule which attaches to other written contracts, the maker of a negotiable note of hand and the acceptor of a bill of exchange are not liable to be sued until the day after these instruments become due and payable. In the case of *Leftey v. Mills*, 4 T. R. 170, we have the opinion of Mr. Justice Buller, given in strong terms, although the decision was finally placed upon another ground, that the general rule before intimated does not apply to bills of exchange. In that case a clerk called with the bill, upon which the question arose, at the house of the defendant, the acceptor, on the day it became due, and, not finding him at home, left word where the bill might be found, that the defendant might send and take it up; this not being done at six o'clock in the evening it was noted for nonpayment. Between seven and eight o'clock the same

clerk called again on the defendant with the bill, who then offered to pay the amount of it, but refused to pay an additional half-crown for the notary. Lord Kenyon was of opinion, at the trial, that the tender was sufficient, and directed a verdict for the defendant. A rule was obtained to show cause why the verdict should not be set aside and a new trial granted. The court said, in granting the rule, that the main question was whether the acceptor had the whole day to pay the bill in, or whether it became due on demand at any time on the last day. After argument, Lord Kenyon stated in this, as in other contracts, the acceptor had the whole day; but said, if there were any difference between bills of exchange and other contracts in this respect, the claim of the notary could not be supported, this being an inland bill payable fourteen days after sight, and the statute of William, which first authorized a protest upon inland bills, giving it only upon such bills as were payable a certain number of days after date. Upon this last ground Buller, J., concurred; and he added: 'I cannot refrain from expressing my dissent to what has fallen from my lord respecting the time when the payment of bills of exchange may be enforced. One of the plaintiff's counsel has correctly stated the nature of the acceptor's undertaking, which is to pay the bill on demand on any part of the third day of grace; and that rule is now so well established that it will be extremely dangerous to depart from it. With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace; now

the daylight lasts. There is some reason for holding a tender unseasonable which is made late at night if the creditor has gone to bed, and declines to consider it on that ground, where no cause for so delaying it exists.⁷⁶ A late judicial exposition of the question' is to the effect that, where no place is named in the agreement for the making of payment, or no established usage prevails to the contrary, as in the case of notes and bills, the payer has the whole of the day, at any place where he may meet the payee, and both may have the proper means and opportunity of making and receiving the tender. The party bound must do all that, without the concurrence of the other, he can do to make the payment or perform the act, and that at a convenient time before midnight, such time varying according to the *quantum* of payment or the nature of the act to be done. If he is to pay money it must be tendered at a sufficient time before midnight for the tenderee to receive and count it.⁷⁷ This rule may well be qualified by adding a condition that the tender shall be made at such time as will give the creditor an opportunity to ascertain the state of the account between him and his debtor; because he is not bound to know at his peril at all times the exact sum due him;⁷⁸ and besides the law will doubtless take account of the fact that business men are not at

that supposes a default in payment, for a protest cannot exist unless default be made. But if the party has until the last moment of the day to pay the bill, the protest cannot be made on that day. Therefore the usage on bills of exchange is established; they are payable any time on the last day of grace, on demand, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be an unreasonable hour; but, on the other hand, to say that the demand should be postponed until midnight would be to establish a rule attended with mischievous consequences.' Upon consideration we adopt the views of Mr. Justice Bul-

ler, and it is our opinion that bills of exchange and negotiable notes should be paid on demand, if made at a reasonable hour, on the day they fall due; and if not then paid, that the acceptor or maker may be sued on that day, and the indorser and drawer also, after notice given or duly forwarded." *Shed v. Brett*, 1 Pick. 401; *City Bank v. Cutter*, 3 Pick. 414.

⁷⁶ *Wing v. Davis*, 7 Me. 31.

⁷⁷ *Smith v. Walton*, 5 *Houst.* 141, following *Startup v. Macdonald*, 6 M. & G. 593, 624, 46 Eng. C. L. 623.

⁷⁸ *Root v. Bradley*, 49 Mich. 27; *Waldron v. Murphy*, 40 Mich. 668; *Chase v. Welsh*, 45 Mich. 345.

all times prepared to surrender the evidences of their claims against their debtors. Commercial paper being payable on the day of maturity at any reasonable hour when demanded, a breach of the contract to pay may occur whenever such demand is made. In the absence, however, of any demand, the debtor upon such paper undoubtedly has the same time on the last day to fulfill his promise as when he is indebted in any other form.⁷⁹

§ 263. *In what money.* The offer must be made in legal tender money of the country if it is demanded.⁸⁰ But where bank or treasury notes which circulate as money, though not made a legal tender, are offered the objection that they are not legal tender is deemed one of form and waived if not specially made, or if objection is rested on some other ground;⁸¹ for to invalidate a tender or to divest an offer to pay of the legal

⁷⁹ Sweet v. Harding, 19 Vt. 587.

⁸⁰ Wilson v. MeVey, 83 Ind. 108; Collier v. White, 67 Miss. 133; Wharton v. Morris, 1 Dall. 124; Moody v. Mahurin, 4 N. H. 296; Lee v. Biddis, 1 Dall. 175; Long v. Waters, 47 Ala. 624; Hallowell & A. Bank v. Howard, 13 Mass. 235; Lange v. Kohne, 1 McCord, 115; Smith v. Keels, 15 Rich. 318; Magraw v. McGlynn, 26 Cal. 420; Martin v. Bott, 17 Ind. App. 444 (a finding that a tender was made of the "lawful sum in money" is not a finding that it was made in legal tender). See Tate v. Smith, 70 N. C. 685; Graves v. Hardesty, 19 La. Ann. 186; Parker v. Broas, 20 id. 167; Harris v. Jex, 55 N. Y. 421, 14 Am. Rep. 285.

Statutes may affect the rule, as where they provide that demands against counties shall be paid by warrants, in which event they must be accepted whether worth their face or not. Thompson v. St. Charles County, 227 Mo. 220.

The identical money received need

not be tendered. Louisville & N. R. Co. v. Helm, 121 Ky. 645.

⁸¹ Koehler v. Buhl, 94 Mich. 496; Cooley v. Weeks, 10 Yerg. 141; Ball v. Stanley, 5 id. 199, 26 Am. Dec. 263; Fosdick v. Van Husan, 21 Mich. 567; Curtiss v. Greenbanks, 24 Vt. 536; Warren v. Mains, 7 Johns. 476; Holmes v. Holmes, 12 Barb. 137; Wheeler v. Knaggs, 8 Ohio, 172; Lockyer v. Jones, Peake, 180n.; Wright v. Reed, 3 T. R. 554; Brown v. Saul, 4 Esp. 267; Polglass v. Oliver, 2 Cr. & J. 15; Tiley v. Courtier, id. 16n.; Saunders v. Graham, Gow, 121; Brown v. Dysinger, 1 Rawle, 408; Snow v. Perry, 9 Pick. 539; Towson v. Havre de Grace Bank, 6 H. & J. 53; Williams v. Rorer, 7 Mo. 555; Seawell v. Henry, 6 Ala. 226; Noe v. Hodges, 3 Humph. 162; Cummings v. Putnam, 19 N. H. 569; Brown v. Simons, 44 id. 475; Snow v. Perry, 9 Pick. 539; Stahr v. Hickman G. Co., 132 Ky. 496; Thompson v. St. Charles County, 227 Mo. 220. Compare Holland v. Mutual F. Co., 8 Ga. App. 714.

effect of a tender, if the objection is to the medium or currency and not to the sum offered, the ground of it must be stated or the right to object in that respect will be waived, and it cannot afterwards be taken advantage of in court on the score of the tender not being legal; in other words, an objection on a point of fact works a waiver of an objection on points of law.⁸² It is a general rule that if a tender is refused on a specified ground of objection no other can afterwards be relied upon.⁸³ This applies, however, only to such objections as could be obviated, and not to a tender made before a debt is due.⁸⁴ An offer of depreciated bank notes, without any explanation, is in legal effect but an offer of compromise or of accord and satisfaction, and not a legal tender,⁸⁵ unless they are tendered to the bank which issued them.⁸⁶ Even a check for money handed the payee or sent by a letter is a good tender, where no objection is made on that ground, but only to the amount.⁸⁷ But when the party entitled to payment is not present and has no opportunity to urge the objection he cannot be presumed to have waived it by his silence.⁸⁸ A note for dollars payable in gold and silver

⁸² Neal v. Finley, 136 Ky. 346; Bunte v. Schumann, 46 N. Y. Misc. 593; Polglass v. Oliver, 2 Cr. & J. 15; Gradle v. Warner, 140 Ill. 123. See Waldron v. Murphy, 40 Mich. 668, and § 270.

⁸³ McGrath v. Gegner, 77 Md. 331, 39 Am. St. 415.

In Moynahan v. Moore, 9 Mich. 9, it was said to be "a well established principle, that an objection made at the time of tender precludes all others, and if that be not well grounded the tender will be held good." See Perkins v. Dunlap, 5 Me. 268, 271; Hull v. Peters, 7 Barb. 331; Carman v. Pultz, 21 N. Y. 547; Keller v. Fisher, 7 Ind. 718; Stokes v. Recknagle, 38 N. Y. Super. Ct. 368; § 270.

⁸⁴ Mitchell v. Cook, 29 Barb. 243.

⁸⁵ Newberry v. Trowbridge, 13 Mich. 263.

A certified check was tendered

and returned for insufficiency in amount, but the court found it was sufficient; the check was then deposited in court and while there deposited, the bank on which it was drawn failed. It was held that the check, if accepted, would have been only conditional payment, and the loss resulting from its nonpayment must be borne by the drawer. Larsen v. Breene, 12 Colo. 480.

⁸⁶ Northampton Bank v. Balliet, 8 W. & S. 311, 42 Am. Dec. 297.

⁸⁷ Jennings v. Mendenhall, 7 Ohio St. 258; Jones v. Arthur, 8 Dowl. P. C. 442; Shipp v. Stacker, 8 Mo. 145; Petrie v. Smith, 1 Bay, 115; Wyckoff v. Anthony, 9 Daly, 417; Harriman v. Meyer, 45 Ark. 37; Kitchell v. Schneider, 180 Ind. 589; Owens v. Commonwealth Trust Co., 183 Ill. App. 605.

⁸⁸ Sloan v. Petrie, 16 Ill. 262;

is payable in money, and neither bullion, nor gold and silver in any other form than money is a legal tender.⁸⁹ In an action for the breach of a covenant of seizin a tender of the amount paid by the grantee and of the unpaid notes and mortgage executed by him to secure the balance of the purchase price is good.⁹⁰

§ 264. **By whom.** Of course it may be made by an authorized agent.⁹¹ Where the tender is made in behalf of the debtor strict authority at the time does not seem to be requisite; it being for his benefit and in his name it may be effectual without such agency as would enable the person making it to do any act which would bind the debtor. Thus, a tender made for an infant by his uncle has been held good though he was not at that time his guardian.⁹² So when an agent was sent to tender a sum less than that demanded and he added of his own funds to the sum furnished by his principal and tendered the full amount required, it was good.⁹³ A tender made by an inhabitant of a school district to one having a claim against it was held good, though such inhabitant was not regularly authorized to do so.⁹⁴ A corporation appointed three agents to tender a sum to B. and obtain from him a reconveyance of a certain estate conveyed to him by the corporation as security for a debt; one of the three made the tender and it was held good.⁹⁵ A person having no interest in the tender has no right to make it in his own behalf.⁹⁶ He should make it in behalf of the debtor and so inform the creditor.⁹⁷ The creditor must object on the ground of a want of authority or the right to do so is waived.⁹⁸ If a tender is made by the debtor's prior authority

Hubbard v. Chenango Bank, 8 Cow. 88; Ward v. Smith, 7 Wall. 447.

⁸⁹ Hart v. Flynn, 8 Dana, 190.

⁹⁰ Conrad v. Trustees of Grand Grove, 64 Wis. 258.

⁹¹ Eslow v. Mitchell, 26 Mich. 500.

⁹² Brown v. Dysinger, 1 Rawle, 408. See Coke Litt. 206b.

⁹³ Read v. Goldring, 2 M. & S. 86.

⁹⁴ Kincaid v. School Dist., 11 Me. 188.

⁹⁵ St. Paul Division No. 1, Sons of Temperance v. Brown, 11 Minn. 356.

⁹⁶ Mahler v. Newbaur, 32 Cal. 168, 51 Am. Dec. 571.

⁹⁷ Id.; McDougald v. Dougherty, 11 Ga. 570.

⁹⁸ Lampley v. Weed, 27 Ala. 621.

or is subsequently ratified it is good.⁹⁹ Any person may make a tender for an idiot.¹ A tender of the amount due one who has purchased land at a tax sale is not good if it is made by several persons, one of whom has no right to redeem.² A mortgagee may refuse a tender of the amount due him made by one who is a stranger to him and to the mortgagor, and who is not acting in the interest or at the request of the latter though he had tax titles on the mortgaged property, they not being subject to the mortgage.³ One who has purchased mortgaged premises and mortgaged chattels thereon from the mortgagor, the former subject to existing liens, has no authority to make a tender of the amount due on the latter, the debt accrued thereby being payable on demand and none being made.⁴ But it is otherwise where a tender is made by the mortgagor's grantee after the debt is due, the creditor having knowledge of the transfer.⁵ A tender of the amount of a mortgage lien by the assignee in insolvency of the mortgagor has the same effect as if made by the latter;⁶ and so of a tender by the vendee of chattels,⁷ and by any person interested in the property respecting which the tender was made.⁸ A tender by a subsequent grantee of the equity of redemption is good.⁹ An executor has no authority to make a tender to a legatee in a jurisdiction in which his foreign letters have not been recognized although the funds tendered were realized from the personal property of the testator situated in the jurisdiction in which the tender was made. A tender so made is not validated by the subsequent issuance of letters from a court in the jurisdiction in which the legatee was at the time it was made.¹⁰

⁹⁹ *Forderer v. Schmidt*, 154 Fed. 475, 84 C. C. A. 426; *Harding v. Davies*, 2 C. & P. 77; *McIniffe v. Wheelock*, 1 Gray, 600; *Eslow v. Mitchell*, 26 Mich. 500.

¹ *Coke Litt.* 206b; *Brown v. Dyingier*, 1 Rawle, 468.

² *Bender v. Bean*, 52 Ark. 132.

³ *Sinclair v. Learned*, 51 Mich. 335.

⁴ *Noyes v. Wyckoff*, 114 N. Y. 204, 30 Hun, 466.

⁵ *Yeager v. Groves*, 78 Ky. 278.

⁶ *Davies v. Dow*, 80 Minn. 223.

⁷ *Thomas v. Seattle B. & M. Co.*, 48 Wash. 560, 15 L.R.A.(N.S.) 1164, 125 Am. St. 945; *Flanigan v. Seelye*, 53 Minn. 23.

⁸ *Kent B. & L. Co. v. Middleton*, 112 Md. 10.

⁹ *Kortright v. Cady*, 21 N. Y. 343.

¹⁰ *Welch v. Adams*, 152 Mass. 74, 9 L.R.A. 244.

§ 265. **To whom.** A tender should, in general, be made direct to the creditor.¹¹ But it may be made to his attorney¹² or authorized agent,¹³ although such attorney falsely denies his authority,¹⁴ or such agent has been instructed not to receive it.¹⁵ A tender to an agent is good though it was made on the supposition that he continued to be the party in interest.¹⁶ An attorney, having a demand for collection, wrote the debtor requesting him to pay it at the attorney's office; the debtor subsequently made a tender in the absence of the attorney to his clerk in his office, and it was held good.¹⁷ Such a request of payment gives the debtor a right to treat any person having charge of such office in the absence of the attorney as authorized to receive the money.¹⁸ But a letter from the attorney, demanding payment to him instead of at his office, will not warrant a tender to a writing clerk there who disclaims and has not authority to receive it.¹⁹

When an instrument is payable at a bank and is lodged there for collection the bank becomes the agent of the payee to receive payment. The agency extends no further, and without special

¹¹ *Cassville R. M. Co. v. Aetna Ins. Co.*, 105 Mo. App. 146; *Southwestern Tel. & T. Co. v. Luckett* (Tex. Civ. App.), 127 S. W. 856; *Briede v. Babst*, 131 La. 159; *Hornby v. Cramer*, 12 How. Pr. 490; *Smith v. Smith*, 2 Hill, 351.

A tender pending appeal is good if made to the opposite party in person. *Ferrea v. Tubbs*, 125 Cal. 687.

¹² *Salter v. Shove*, 60 Minn. 483; *Brown v. Mead*, 68 Vt. 215; *Billiot v. Robinson*, 13 La. Ann. 529; *Wilmot v. Smith*, 3 C. & P. 453.

¹³ *Louisville & N. R. Co. v. Helm*, 121 Ky. 645; *Hargous v. Lahens*, 3 Sandf. 213; *Goodland v. Blewith*, 1 Camp. 477; *Anonymous*, 1 Esp. 349; *Continental Ins. Co. v. Miller*, 4 Ind. App. 553.

¹⁴ *McIniffe v. Wheelock*, 1 Gray, 600.

¹⁵ *Muffatt v. Parsons*, 1 Marsh. 55, 5 Taunt. 307.

¹⁶ *Conrad v. Trustees of Grand Grove*, 64 Wis. 258.

¹⁷ *Wilmot v. Smith*, 3 C. & P. 453; *Kirton v. Braithwaite*, 1 M. & W. 310.

¹⁸ *Watson v. Hetherington*, 1 C. & K. 36; *Kirton v. Braithwaite*, *supra*.

¹⁹ *Bingham v. Allport*, 1 N. & M. 398.

A tender to an attorney with whom a demand is lodged for collection, before suit is brought, is unavailing; if made after suit is commenced the costs must be tendered. *Thurston v. Blaisdall*, 8 N. H. 367.

In *Finch v. Boning*, 4 C. P. Div. 143, the judges disagreed as to the effect of a disclaimer by a solicitor's clerk who said the solicitor was out of the office and he, the clerk, had no instructions.

authority such agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the consent of the community.²⁰ A tender may be made to a clerk in a store for goods there purchased and it will be equivalent to a tender made to the principal, even though prior thereto the claim has been lodged with an attorney for suit. Such clerk can also waive, either by implication or expressly, any objection to the validity of the tender on the ground of its being in bank bills and not in specie.²¹ Where there is no general agency to collect, but power simply to receive the sum demanded, a tender of a less sum to such special agent is invalid; as where the plaintiff sent his son to demand a specific amount for an unliquidated claim it was held that an offer to him of a less sum could not be considered as a tender to the plaintiff.²² Where an agent of the defendants had been notified not to receive a tender, but to refer the plaintiff to a third person named, of which the plaintiff had notice, the latter was at liberty to seek the person to whom he had been so referred or the defendants, at his election, and could make the tender to either.²³ A tender made to the holder of a note is good though he subsequently assigns it;²⁴ but it is otherwise as to a tender to the original payee if he has transferred the obligation.²⁵ A mortgagor or his assignee must make tender to the mortgagee or person claiming under him; it cannot be made to the assignee of the contract secured by the mortgage.²⁶ Money due to a *cestui que trust* should be tendered to the trustee.²⁷ But a tender to an executor while in another state, before he had acted or qualified, will not stop interest.²⁸ If a tender is made to a clerk, agent, or other representative of the creditor it must be shown that he had authority to receive the money.²⁹ A debt due

²⁰ Ward v. Smith, 7 Wall. 447, 19 L. ed. 207. See § 231.

²¹ Hoyt v. Byrnes, 11 Me. 475.

²² Chipman v. Bates, 5 Vt. 143.

²³ Hoyt v. Hall, 3 Bosw. 42.

²⁴ Abshire v. Corey, 113 Ind. 484.

²⁵ Burns v. True, 5 Tex. Civ. App. 74.

²⁶ Smith v. Kelley, 27 Me. 237, 46 Am. Dec. 595.

²⁷ Chahoon v. Hollenback, 16 S. & R. 425, 16 Am. Dec. 587; Cook v. Kelley, 9 Bosw. 358; Hayward v. Munger, 14 Iowa, 516.

²⁸ Todd v. Parker, 1 N. J. L. 45.

²⁹ Hargous v. Lahens, 3 Sandf.

jointly to several persons may be tendered to either, but should be pleaded as tendered to all.³⁰ If no place has been appointed for payment a tender to the creditor wherever he may be found is good,³¹ but if it is made without notice at an unusual or unfit place it may be declined if it is necessary for the creditor to examine the account between him and his debtor.³² On the refusal of an actual tender by the creditor of a city, money placed in the hands of its treasurer as a special fund and which is available to the creditor at will does not draw interest.³³

§ 266. **It must be sufficient in amount.** The tender must include the full amount due. A tender of part of a debt is inoperative.³⁴ The creditor is not obliged to receive it. The

213; *Goodland v. Blewith*, 1 Campb. 477; *Anonymous*, 1 Esp. 349; *Jewett v. Earle*, 53 N. Y. Super. Ct. 349. And if he states he has no authority to receive it and says he will speak to one who has, the tenderer must wait a reasonable time to learn whether the tender has been accepted or rejected. *Sisson v. Barnum*, 157 App. Div. (N. Y.) 149.

³⁰ *Wyckoff v. Anthony*, 9 Daly, 417; *Douglas v. Patrick*, 3 T. R. 683; *Southard v. Pope*, 9 B. Mon. 264; *Beebe v. Knapp*, 28 Mich. 53; *Flanigan v. Seelye*, 53 Minn. 23. See *Dawson v. Ewing*, 16 S. & R. 371.

³¹ *Slingerland v. Morse*, 8 Johns. 474; *Hunter v. Le Conte*, 6 Cow. 728. See § 214.

³² *Waldron v. Murphy*, 40 Mich. 668; *Chase v. Welsh*, 45 id. 345; *Root v. Bradley*, 49 Mich. 27.

³³ *Eau Claire v. Eau Claire W. Co.*, 137 Wis. 517. See § 274, note.

³⁴ *Kitchell v. Schneider*, 180 Ind. 589; *Browning, King & Co. v. Chamberlain*, 210 N. Y. 270; *Oakes v. Buckman*, 87 Vt. 187; *Ebersole v. Addington*, 156 Ala. 575; *Wood v. Howland*, 127 Iowa, 394; *Crook v. New York L. Ins. Co.*, 112 Md. 268; *Kingsley v. Anderson*, 103

Minn. 510; *Schwantowsky v. Dykowsky* (Tex. Civ. App.), 132 S. W. 373; *Foxley v. Rich*, 35 Utah, 162; *Hackett v. Van Dusen*, 132 Wis. 204; *San Pedro L. Co. v. Reynolds*, 111 Cal. 588; *Helphrey v. Chicago*, etc. R. Co., 29 Iowa, 480; *Louisiana M. Co. v. Le Sassier*, 52 La. Ann. 2070; *Hoppe & S. B. Co. v. Sacks*, 11 Ohio C. C. 3; *Elderkin v. Fellows*, 60 Wis. 339; *Dixon v. Clark*, 5 C. B. 365; *Baker v. Gasque*, 3 Strobb. 25; *Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564; *Boyden v. Moore*, 5 Mass. 365.

In the last case *Parsons, C. J.*, said: "It is a well-known rule that the defendant must take care at his peril to tender enough; and if he does not, and if the plaintiff replies that there is more due than is tendered, which is traversed, the issue will be against the defendant, and it will be the duty of the jury to assess for the plaintiff the amount due on the promise; and if not covered by the money tendered, he will have judgment for the balance. . . . In calculating there may be, and probably must arise, fractions not to be expressed in the legal money of account; these fractions are trifles, and may be reject-

debtor must, at his peril, tender enough; if his tender is less it will be of no avail, though the deficiency is small and occurred by mistake.³⁵ If a tender is made after suit it must cover the costs and interest due.³⁶ The fact that the plaintiff did not inform the defendant that he had summoned witnesses was of no importance. If the defendant desired any information as to the amount of the plaintiff's costs from him he should have inquired, for he knew a suit had been brought and some costs had accrued, and if he chose to make a tender without inquiry the plaintiff certainly was not in fault.³⁷ Tender of the amount due on a note must include attorney's fees when the note stipulates for their payment and is in the hands of an attorney for collection, and there is a dispute as to the amount due.³⁸ But

ed. . . . If any sum large enough to be discharged in the current coin of the country is a trifle which, although due, the jury are not obliged to award to the plaintiff, the creditor, it will be difficult to draw a line and say how large a sum must be not to be a trifle. The law fixes no such rule." See next note.

Under the code of California a tender is not ineffectual because it is insufficient in amount unless it is objected to for that reason at the time it is made. *Oakland Bank v. Applegarth*, 67 Cal. 86.

³⁵ *Bolton v. Gifford*, 45 Tex. Civ. App. 140; *Kleeb v. McInturff*, 71 Wash. 419.

In *Harris v. Jex*, 55 N. Y. 421, 14 Am. Rep. 285, a tender was made upon a debt contracted prior to the passage of the legal tender law of 1862; and this tender was made in legal tender notes after the decision in *Hepburn v. Griswold*, 8 Wall. 603, 19 L. ed. 513, and before the reversal of that case in *Knox v. Lee*, 12 Wall. 457, 20 L. ed. 287; it was refused because it was not the currency payable. And it was

held that the plaintiff was justified in refusing the tender; he had a right to refuse on the decision of the highest judicial tribunal in the land; that decision, for the time being, was the law, and not merely the evidence of it; but it was intimated that if the tender had been kept good it would have been a defense to interest and costs, after the decision of *Knox v. Lee*.

The failure to tender the interest for three days after the maturity of a note and prior thereto is immaterial. *Matzger v. Page*, 62 Wash. 170. And so of the failure to tender one and one quarter cents due as interest. *Milligan v. Marshall*, 38 Pa. Super. 60.

³⁶ *Browning, King & Co. v. Chamberlain*, 210 N. Y. 270; *Donaldson v. Severn River G. Co.*, 138 Fed. 691; *O'Meara v. Cardiff C. Co.*, 154 Ill. App. 321; *Smith v. Wilbur*, 35 Vt. 133; *Briede v. Babst*, 131 La. 159.

³⁷ *Rouyer v. Miller*, 16 Ind. App. 519. See *Haskell v. Brewer*, 11 Me. 258; *Nelson v. Robson*, 17 Minn. 284.

³⁸ *Smith v. Pileher*, 130 Ga. 350.

if the payee refuses to give information concerning the fees or the maker be ignorant of the employment of an attorney, or the tender be refused upon other grounds and the maker be thereby misled the court would protect him in making the tender.³⁹ The necessity of tendering the whole sum due does not require the debtor to tender a sum to cover all demands his creditor may have against him. He may tender for the payment of any one of several debts which is distinct and separable.⁴⁰ A tender of a gross sum upon several demands, without designating the amount tendered upon each, is sufficient.⁴¹ Where, however, there are several separate demands sued for, and there has been a tender made of a less sum than the amount demanded for the whole, but not specifically applied to any separable portion of it, it has been held that it cannot be applied in pleading to either.⁴² A tender of the amount justly due by the condition of a bond is good although less than the penalty.⁴³ The penalty is only nominally the debt, and the tender of that sum which if paid would satisfy the bond will be

³⁹ *Emerson v. White*, 10 Gray, 351; *People v. Banker*, 8 How. Pr. 258; *Collier v. White*, 67 Miss. 133.

But a tender made before defendant was served with process is good though costs are not included. *Ashburn v. Poulter*, 25 Conn. 553.

⁴⁰ *Wright v. Robinson*, 84 Hun, 172; *North Chicago St. R. Co. v. Le Grand Co.*, 95 Ill. App. 435; *Hurt v. Cook*, 151 Mo. 417; *East Tennessee, etc. R. Co. v. Wright*, 76 Ga. 532; 2 Par. on Cont. 641.

⁴¹ *Johnson v. Cranage*, 45 Mich. 14; *Thetford v. Hubbard*, 22 Vt. 440.

⁴² *Hardingham v. Allen*, 5 C. B. 793. If A., B. and C. have a joint demand, and C. has a separate demand against D., and D. offers A. to pay him both the debts, which A. refuses, without objecting to the form of the tender, on account of being entitled only to the joint de-

mand, D. may plead this tender in bar of an action on the joint demand, and should state it as a tender to A., B. and C. *Douglas v. Patriek*, 3 T. R. 683. But see *Strong v. Harvey*, 3 Bing. 304, where it is held that if a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all will not support a plea stating that a certain portion of this sum was tendered for the debt of one.

It was held in *Hampshire Manuf's Bank v. Billings*, 17 Pick. 89, that a tender of the amount due on a joint and several promissory note by a surety while an action brought by a holder against the principal was pending will not discharge the surety from his liability unless he offers to indemnify the holder against the costs of such action.

⁴³ *Tracy v. Strong*, 2 Conn. 659.

effectual.⁴⁴ If money has been paid in compromise and settlement of a claim fraudulently effected it is sufficient to tender the sum received; interest on it need not be added, nor the money voluntarily expended for the benefit of the party making the tender.⁴⁵ A tender is not invalidated by being of a larger sum than the amount it is offered to pay or is demanded even though change is requested, unless objection is made to it on that account.⁴⁶

⁴⁴ See *Fraser v. Little*, 13 Mich. 195; *Spencer v. Perry*, 18 Mich. 394.

⁴⁵ *Louisville & N. R. Co. v. Helm*, 121 Ky. 645.

⁴⁶ *North Chicago St. R. Co. v. Le Grand Co.*, 95 Ill. App. 435.

In *Dean v. James*, 4 B. & Ad. 546, it was held that a tender of 20*l.* 9*s.* 6*d.* in bank notes is sufficient to support a plea of tender of 20*l.* Taunton, J., referring to *Watkins v. Robb*, 2 Esp. 710, said: "There the defendant tendered a 5*l.* note and demanded 6*d.* change, which the defendant was not bound to give." *Betterbee v. Davis*, 3 Camp. 71. *Littledale, J.*, said: "This case falls within the third resolution in *Wade's Case*, 5 Co. 115, that if a man tender more than he ought to pay it is good, for *omne majus continet in se minus*, and the other is bound to accept so much of it as is due to him." The argument against the tender was that a subsequent demand must be of the specific sum tendered, and if that sum is more than the plaintiff's demand, it would be inapplicable. Referring to this *Littledale, J.*, continues: "As to replying a demand it is not the plaintiff's business to demand more than is actually due; it is enough if in his replication he admits that the sum due was tendered, but alleges that he afterwards demanded that and it was refused."

Lord Abinger said in *Bevans v.*

Rees, 5 M. & W. 306: "I am prepared to say that if the creditor knows the amount due to him, and is offered a larger sum, and without any objection of a want of change makes quite a collateral objection, that will be a good tender." *Black v. Smith*, Peake, 88; *Cadman v. Lubbeck*, 5 D. & Ry. 289; *Hubbard v. Chenango Bank*, 8 Cow. 89; *Patterson v. Cox*, 25 Ind. 261; *Douglas v. Patrick*, 3 T. R. 683; *Dean v. James*, 4 B. & Ad. 546; *Astley v. Reynolds*, 2 Str. 916; *Strong v. Harvey*, 3 Bing. 304; *Robinson v. Cook*, 6 Taunt. 336; *Blow v. Russell*, 1 C. & P. 365.

Cadman v. Lubbeck, 5 D. & Ry. 289. Where the defendant, who owed the plaintiff 108*l.* for principal and interest on two promissory notes, in consequence of an application from the plaintiff's attorney for the amount sent a person to the attorney, who told such attorney that he came to settle the amount due on the notes, and desired to be informed what was due, and laid down 150 sovereigns on a desk, out of which he desired the attorney to take what was due for such principal and interest, but the attorney refused to do so, unless a shop account due from the plaintiff to the defendant was fixed at a certain amount, held to be a good tender. *Bevans v. Rees*, 5 M. & W. 306. A tender has been held vitiated by de-

§ 267. **Same subject.** The creditor is entitled to payment in money made legal tender by law, and the debtor has a right to make payment in that currency. Debts made payable in the denominations of the legal tender currency are solvable in that currency at par without regard to when or where they were contracted, or the relative value of the denominations in that currency at and after the contract was made. The legal tender currency for the time being, when the contract is performed or enforced, is the currency applicable to it.⁴⁷ If money be payable in the legal currency of another country the legal, rather than the market, equivalent is the amount to be paid. A contract to pay in "dollars" may require payment in either coin or legal tender currency provided by the government according to the intention of the parties. Treasury notes, commonly called "greenbacks," are the currency payable, unless the contract itself indicates the intention that the debt be paid in coin.⁴⁸ A

livering a counter-claim at the same time. Thus, where a defendant tendered seven sovereigns in payment of a demand of 6*l.* 17*s.* 6*d.*, and said to the plaintiff, "There, take your demand," and at the same time delivered a counter-claim upon the plaintiff of 1*l.* 5*s.*, who said you must go to my attorney: Held, not a good tender to an action for the 6*l.* 17*s.* 6*d.* *Brady v. Jones*, 2 D. & R. 305; and see *Holland v. Phillips*, 6 Esp. 46. See *Laing v. Meader*, 1 C. & P. 257.

In *Saunders v. Frost*, 5 Pick. 259, 269, there was a tender of a mortgage debt which was not due, and bearing interest, and of which only interest was due. Objection was made by counsel that the tender was made of a debt not due. The tender was of a sum equal to the interest and the principal. *Parker, C. J.*, said: "But it appears to us that, in order to avail himself of this objection, the defendant ought to have shown a willingness to take what was due and to have stated that he

claimed to hold possession only for the nonpayment of interest." *Odom v. Carter*, 36 Tex. 281.

A tender of \$5 by a street-car passenger who has no smaller money is reasonable, and his ejection from the car thereafter is unlawful. *Barratt v. Market St. C. R. Co.*, 81 Cal. 296, 8 Am. Neg. Cas. 69, 15 Am. St. 61, 6 L.R.A. 336.

⁴⁷ *Story on Prom. Notes*, § 390 and note; *George v. Concord*, 45 N. H. 434; *Wood v. Bullens*, 6 Allen, 516; *Pong v. De Lindsey*, 1 Dyer, 82*a*; *Dooley v. Smith*, 13 Wall. 604, 20 L. ed. 547; *Legal Tender Cases*, 12 id. 457; *Trebilcock v. Wilson*, id. 687; *Vorges v. Giboney*, 38 Mo. 458; *Warnibold v. Schlichting*, 16 Iowa, 243; *Murray v. Harrison*, 47 Barb. 484; *Wilson v. Morgan*, 4 Robert. 58; *Strong v. Farmers'* etc. Bank, 4 Mich. 350; *Wills v. Allison*, 4 Heisk. 385; *Bond v. Greenwald*, id. 453; *Caldwell v. Craig*, 22 Gratt. 340.

⁴⁸ *Trebilcock v. Wilson*, *supra*.

contract to pay in "dollars" in gold and silver is a contract for the direct payment of money; neither bullion, gold dust, gold and silver bars, old spoons and rings, are a proper tender in satisfaction.⁴⁹ But current bank notes, which pass as money, offered in payment and not objected to on that ground, will constitute a good tender.⁵⁰ When a debtor tenders a bank check in payment of a debt and the creditor expressly waives all objection to that mode of payment and only objects on some other ground, it is good;⁵¹ but not, as a rule, otherwise.⁵² If numerous payments have been made by the debtor to the creditor by checks and no objection to them has been raised, a tender by check is sufficient, though it would be otherwise if the creditor informed his debtor of an objection to continue receiving them.⁵³ If a check is objected to on any other ground than that it is not money the effect of the tender can only be got rid of by a personal demand and a refusal to pay.⁵⁴ Where a note is payable to a bank in which the debtor has a deposit his check on such bank is a good tender,⁵⁵

⁴⁹ *Hart v. Flynn*, 8 Dana, 190. See *Lang v. Waters*, 47 Ala. 624; *McCune v. Erfort*, 43 Mo. 134.

⁵⁰ *Brown v. Simons*, 44 N. H. 475; *Ball v. Stanley*, 5 Yerg. 199, 26 Am. Dec. 263; *Noe v. Hodges*, 3 Humph. 162; *Seawell v. Henry*, 6 Ala. 226; *Cummings v. Putnam*, 19 N. H. 569; *Williams v. Rorer*, 7 Mo. 556; *Cooley v. Weeks*, 10 Yerg. 141; *Snow v. Perry*, 9 Pick. 539; *Wheeler v. Knaggs*, 8 Ohio, 169; *Fosdick v. Van Husan*, 21 Mich. 567; *Curtiss v. Greenbanks*, 24 Vt. 536; *Petrie v. Smith*, 1 Bay, 115; *Brown v. Dyingier*, 1 Rawle, 408. See *Ward v. Smith*, 7 Wall, 447, 19 L. ed. 207.

⁵¹ *Kollitz v. Equitable Mut. F. Ins. Co.*, 92 Minn. 234; *Dale v. Richards*, 21 D. C. 312; *Jennings v. Mendenhall*, 7 Ohio St. 258.

The court say in the last case cited: "On a somewhat extensive examination of the cases, it seems to us that mere silence is held to

Suth. Dam. Vol. I.—51.

be a waiver of objection in the case of current bank notes, for the reason that they constitute the common currency of the country, and are by all classes paid out and received as money, which is a reason that does not fully apply to bank checks. All the cases, however, proceed on the principle that where all objection to the proposed medium of payment is waived, the tender is good, though not made in coin; and the only difference between them is on the question as to what shall be held to be conclusive of such waiver."

⁵² *Te Pool v. Shutt*, 57 Neb. 592.

⁵³ *Wright v. Robinson*, 84 Hun, 172; *Mitchell v. Vermont C. M. Co.*, 67 N. Y. 280; *McGrath v. Gegner*, 77 Md. 331, 39 Am. St. 415.

⁵⁴ *Daly v. Egan*, 12 Viet. L. R. 81.

⁵⁵ *Shipp v. Staeker*, 8 Mo. 145.

"Lawful current money" of a

but a note or other obligation of the creditor is not a legal tender. A tender for part of an entire demand and set-off for the residue cannot be pleaded.⁵⁶

§ 268. **How made.** As a general rule the money must be actually produced and placed within the power of the creditor to receive it unless he dispense with its production by express declaration or other equivalent act.⁵⁷ A mere verbal offer to pay a certain sum does not constitute a tender.⁵⁸ The cases concur in the foregoing rule, but differ somewhat in its application. Where there is a verbal offer of a particular sum and the creditor insists on more being due in such manner as

state means money issued by congress. *Wharton v. Morris*, 1 Dall. 124, 1 L. ed. 65; *McChord v. Ford*, 3 T. B. Mon. 166. "Current lawful money" is the same. *Lee v. Biddis*, 1 Dall. 175, 1 L. ed. 88. But "currency," where bank notes are the only currency, does not mean money. *McChord v. Ford*, *supra*; *Lange v. Kohne*, 1 McCord, 115.

A tender in confederate money was not good although it was at the time the circulating currency in the community. *Graves v. Hardesty*, 19 La. Ann. 186. See *Parker v. Broas*, 20 id. 167; but see, also, *Phillips v. Gaston*, 37 Ga. 16; *Tate v. Smith*, 70 N. C. 685.

⁵⁶ *Cary v. Baneroft*, 14 Pick. 315, 25 Am. Dec. 393; *Hallowell & A. Bank v. Howard*, 13 Mass. 235; *Searles v. Sadgrove*, 85 Eng. C. L. 639, 5 El. & Bl. 639.

⁵⁷ *Pinney v. Jorgenson*, 27 Minn. 26; *Deering H. Co. v. Hamilton*, 80 Minn. 162; *Te Poel v. Shutt*, 57 Neb. 592; *Brown v. Gilmore*, 8 Me. 107, 22 Am. Dec. 223; *Ladd v. Pat-ten*, 1 Crauch C. C. 263; *Thomas v. Evans*, 10 East, 101; *Liebrandt v. Myron Lodge*, 61 Ill. 81; *Dickinson v. Shee*, 4 Esp. 68; *Walker v. Brown*, 12 La. Ann. 266; *Sands v. Lyon*, 18 Conn. 18; *Strong v. Blake*,

46 Barb. 227; *Matheson v. Kelly*, 24 Up. Can. C. P. 598; *Holmes v. Holmes*, 12 Barb. 137; *Bakeman v. Pooler*, 15 Wend. 637; *Breed v. Hurd*, 6 Pick. 356; *Gilmore v. Holt*, 4 id. 258; *Eastland v. Longshorn*, 1 N. & McC. 194; *Southworth v. Smith*, 7 Cusb. 391; *Lohman v. Crouch*, 19 Gratt. 331; *Dunham v. Jackson*, 6 Wend. 22; *McIntire v. Clark*, 7 id. 330; *Sargent v. Graham*, 5 N. H. 440, 22 Am. Dec. 469. See *Champion v. Joslyn*, 44 N. Y. 653; *Hill v. Place*, 5 Abb. Pr. (N. S.) 18, 7 Robert. 389; *Borden v. Borden*, 5 Mass. 67, 4 Am. Dec. 32; *Slingerland v. Morse*, 8 Johns. 474; *Blight v. Ashley*, 1 Pet. C. C. 15; *Thayer v. Brackett*, 12 Mass. 450; *Cary v. Baneroft*, 14 Pick. 315, 25 Am. Dec. 393; *Moore v. Brown*, 46 Tex. Civ. App. 523.

⁵⁸ *Shank v. Groff*, 45 W. Va. 543; *De Wolfe v. Taylor*, 71 Iowa 648; *Eastman v. Rapids*, 21 Iowa 590; *Camp v. Simon*, 34 Ala. 126; *Steele v. Biggs*, 22 Ill. 643; *Hornby v. Cramer*, 12 How. Pr. 490; *Sheredine v. Gaul*, 2 Dall. 190, 1 L. ed. 344; *Bacon v. Smith*, 2 La. Ann. 441; *Hunter v. Warner*, 1 Wis. 141. See *Harris v. Mulock*, 9 How. Pr. 402; *Hill v. Place*, 7 Robert. 389; *Lee v. Hill*, 92 S. C. 114.

amounts to a declaration that the offered sum would not be received, the actual production of the money is not necessary.⁵⁹ The immediate departure of the creditor on such an offer being made or any intentional evasion of the debtor, would seem to be equivalent to an express refusal of it, and equally to excuse the production of the money.⁶⁰ So on a verbal offer of a specified sum in legal tender notes in which the debt might be paid, a declaration by the creditor that he would receive nothing but gold or silver would dispense with the actual production of the offered money.⁶¹ An absolute refusal to receive the amount or, in case of mutual executory contracts, to do the act in consideration of which it is to be paid, is a waiver of production.⁶² But the debtor must have the money to immediately comply

⁵⁹ *Smith v. Old Dominion B. & L. Ass'n*, 119 N. C. 257; *Bradford v. Foster*, 87 Tenn. 11; *Johnson v. Garlichs*, 63 Mo. App. 578; *Graham v. Frazier*, 49 Neb. 90; *Bender v. Bean*, 52 Ark. 132; *Pinney v. Jorgenson*, 27 Minn. 26; *Black v. Smith*, Peake, 88; *Jackson v. Jacob*, 3 Bing. N. C. 869; *Sands v. Lyon*, 18 Conn. 18; *Read v. Goldring*, 2 M. & S. 86; *Finch v. Brook*, 1 Scott, 70; *Ex parte Danks*, 2 De Gex, M. & G. 936; *Murray v. Roosevelt*, Anth. 101; *Vaupell v. Woodward*, 2 Sandf. Ch. 143; *Stone v. Sprague*, 20 Barb. 509; *Dana v. Fiedler*, 1 E. D. Smith, 463; *Slingerland v. Morse*, 8 Johns. 474; *Everett v. Saltus*, 15 Wend. 474; *Warren v. Mains*, 7 Johns. 476; *State v. Spicer*, 4 Houst. 100; *Hazard v. Loring*, 10 Cush. 267; *Strong v. Blake*, 46 Barb. 227; *Appleton v. Donaldson*, 3 Pa. 381.

In *Dunham v. Jackson*, 6 Wend. 22, it was held that a hesitating refusal, based on a claim of more than is due, will not dispense with the actual production of the money. *Sargent v. Graham*, *supra*; *Harding v. Davies*, 2 C. & P. 77.

⁶⁰ *Continental Ins. Co. v. Miller*, 4 Ind. App. 553; *Adams Exp. Co. v. Harris*, 120 Ind. 73, 16 Am. St. 315, 7 L.R.A. 214; *West v. Averill G. Co.*, 109 Iowa, 488; *Hurt v. Cook*, 151 Mo. 417; *Schayer v. Commonwealth L. Co.*, 163 Mass. 322; *Gilmore v. Holt*, 4 Pick. 257; *Southworth v. Smith*, 7 Cush. 391; *Judd v. Ensign*, 6 Barb. 258; *Houbie v. Volkening*, 49 How. Pr. 169; *Sands v. Lyon*, 18 Conn. 18; *Raines v. Jones*, 4 Humph. 490; *Littel v. Nichols*, Hard. 66; *Holmes v. Holmes*, 12 Barb. 137. But see *Leatherdale v. Sweepstone*, 3 C. & P. 342; *Knight v. Abbott*, 30 Vt. 577; *Thorne v. Mosher*, 20 N. J. Eq. 267, 36 Am. Rep. 542.

⁶¹ *Chinn v. Bretches*, 42 Kan. 316; *Hanna v. Ratekin*, 43 Ill. 462; *Hayward v. Munger*, 14 Iowa 516; *Wynkoop v. Cowing*, 21 Ill. 570.

⁶² *Murray v. Roosevelt*, Anth. 101; *Hazard v. Loring*, 10 Cush. 267; *Vaupell v. Woodward*, 2 Sandf. Ch. 143; *Strong v. Blake*, 46 Barb. 227; *Stone v. Sprague*, 20 id. 509; *Appleton v. Donaldson*, 3 Pa. 381; *Dana v. Fiedler*, 1 E. D. Smith 463; *Slingerland v. Morse*, 8 Johns. 474;

with his offer; having it in a bag is no objection.⁶³ In some cases it is held that such a refusal will not dispense with the actual production of the money; that there must be some declaration or equivalent act to the effect that the debtor need not offer it.⁶⁴ The sight of the money may tempt the creditor to accept it.⁶⁵ The question whether the production has been dispensed with is for the jury, and if they find the facts specially and do not find the fact of dispensation the court will not infer it.⁶⁶ The money must be actually at hand and ready to be produced immediately if it should be accepted. It is not enough that a third person has it on the spot and is willing to loan it unless he actually consents to do so for the purpose of the tender.⁶⁷ At an interview between the plaintiff and the defendant the latter was willing to pay £10, and a third person offered to go up-stairs and fetch that sum, but was prevented by the plaintiff saying "he cannot take it." Such offer was a good tender.⁶⁸ A tender made by holding an unstated sum in

Everett v. Saltus, 15 Wend. 474; Warren v. Mains, 7 Johns. 476; Thompson v. Lyon, 40 W. Va. 78.

⁶³ Conway v. Case, 22 Ill. 127; Breed v. Hurd, 6 Pick. 356; Davis v. Stonestreet, 4 Ind. 101; Harding v. Davies, 2 C. & P. 77; Borden v. Borden, 5 Mass. 67, 4 Am. Dec. 32; Sucklinge v. Coney, Noy, 74; Behaly v. Hatch, Walk. (Miss.) 369, 12 Am. Dec. 570. Compare Sharp v. Todd, 38 N. J. Eq. 234.

⁶⁴ Catterson v. Ireland, 60 Wash. 208; Thomas v. Evans, 10 East, 101; Douglas v. Patrick, 3 T. R. 683; Dickinson v. Shee, 4 Esp. 68; Finch v. Brook, 1 Bing. N. C. 253; Leatherdale v. Sweepstone, 3 C. & P. 342; Firth v. Purvis, 5 T. R. 432; Kraus v. Arnold, 7 Moore, 59; Brown v. Gilmore, 8 Me. 107, 22 Am. Dec. 223; Bakeman v. Pooler, 15 Wend. 637.

⁶⁵ Finch v. Brook, *supra*.

⁶⁶ Id., 2 Greenlf. Ev., § 603.

The burden of proving readiness

and ability to pay is upon the debtor. Ladd v. Mason, 10 Ore. 308; Park v. Wiley, 67 Ala. 310.

⁶⁷ Sargent v. Graham, 5 N. H. 440, 22 Am. Dec. 469; Bakeman v. Pooler, 15 Wend. 637; Breed v. Hurd, 6 Pick. 356; Eastland v. Longshorn, 1 N. & McC. 194.

⁶⁸ Harding v. Davies, 2 C. & P. 77. But in Kraus v. Arnold, 7 Moore, 59, the defendant ordered A. to pay the plaintiff £7 12s., and the clerk of the plaintiff demanded £8, on which A. said he was only ordered to pay £7 12s., which sum was in the hands of B., and B. put his hand to his pocket with a view to pulling out his pocketbook to pay £7 12s., but did not do so, by the desire of A.; but B. could not say whether he had that sum about him, but swore he had it in his house, at the door of which he was standing at the time. Held, not a legal tender, because the money was not produced.

hand, peremptorily rejected without inquiry as to amount, is good.⁶⁹ To make a valid tender under a statute providing that an offer in writing to pay a particular sum of money is, if not accepted, equivalent to the actual production and tender of the money, the party must have the ability to produce the money and must act in good faith. Such an offer does not deprive the creditor of the right to a reasonable time in which to ascertain the amount due and to determine whether he will accept.⁷⁰

And in *Glasscott v. Day*, 5 Esp. 48, it was held the tender was not good because the money was not in sight; the witness supposed it was in the desk, but never saw it produced; and it did not appear that if the creditor had been willing to accept the money it could be immediately paid; the money should be at hand and capable of immediate delivery.

In *Breed v. Hurd*, 6 Pick. 356, a witness told the plaintiff that the defendant had left money with him to pay his bill, and that if the plaintiff would make it right by deducting a certain sum he would pay it, at the same time making a motion with his hand towards his desk, at which he was then standing; he swore that he believed, but did not know, that there was money enough in his desk; but if there was not, he would have obtained it in five minutes if the plaintiff would have made the deduction; but the plaintiff replied that he would deduct nothing. Held, not a tender.

⁶⁹ *State v. Spicer*, 4 Houst. 100. It appeared in this case that the parties met, and the debtor, in his wagon, which stopped on meeting the creditor, said: "I've got the money to pay you," specifying the claim, and put his hand into his pocket to take out the bag which

contained the money; while he was doing this the creditor said, "I want nothing to do with such a cut-throat as you," and walked rapidly away. The jury found that the debtor was thereby prevented from producing the money and offering it to the creditor, and it was held a good tender. *Sands v. Lyon*, 18 Conn. 18.

In *Knight v. Abbott*, 30 Vt. 577, the defendant, desiring to make a tender, said to the plaintiff as he was passing in a wagon, "I want to tender you this money for labor you have done for me," at the same time holding a sum in his hand equal to his indebtedness, but not mentioning any amount; the plaintiff did not reply, nor stop his team. Held, not a good tender.

In *Thorne v. Mosher*, 20 N. J. Eq. 257, A. offered to pay money to B., holding her purse in her hand in sight of B., who saw the purse, but not the bills. A. opened the purse, and was in the act of taking out the bills, but stopped on account of the refusal of B. to receive the money. Held, that the offer was neither payment nor tender, but the refusal was an excuse for not making a tender.

⁷⁰ *Hyams v. Bamberger*, 10 Utah 1.

§ 269. **Where to be made.** If a debt is payable at a particular place the creditor has a right to receive the money there.⁷¹ When payable at a bank the designation of place imports a stipulation that the holder will have the instrument on which the money is payable at the bank to receive payment and that the debtor will have the funds there to pay it; and it is the general usage in such cases to lodge the instrument with the bank for collection. If the instrument is not there lodged and the debtor is there at maturity with the necessary funds to pay it he so far satisfies the contract that he cannot be made responsible for any future damages, either in costs of suit or interest for the delay.⁷² Having money, however, in a bank where a note is payable is not a tender unless it is in some way appropriated to the note.⁷³ A tender to the cashier of the amount of a note payable at his bank, coupled with a demand of the note, is not good, it not being there at the time and the money not being deposited nor afterwards offered.⁷⁴ Where no place of payment is appointed the debt is payable anywhere, and it is the duty of the debtor to seek the creditor if within the state.⁷⁵ If the

⁷¹ *Glover v. Central I. Co.*, 133 Ga. 62; *Redman v. Murrell*, 117 La. 516; *United States v. Gurney*, 4 Cranch, 333, 2 L. ed. 638; *Adams v. Rutherford*, 13 Ore. 78. See § 214.

⁷² *Ward v. Smith*, 7 Wall. 447, 19 L. ed. 207; *Cheney v. Bilby*, 20 C. C. A. 291, 74 Fed. 52.

⁷³ *Myers v. Byington*, 34 Iowa, 205.

⁷⁴ *Balme v. Wambaugh*, 16 Minn. 116; *Hill v. Place*, 7 Robert. 389. See *Rowe v. Young*, 2 Brod. & Bing. 165; *Bacon v. Dyer*, 12 Me. 19; *Wallace v. McConnell*, 13 Pet. 136; *Sterling v. Head Camp*, 28 Utah 526.

⁷⁵ *Prest v. Cole*, 183 Mass. 283; *Littell v. Nichols*, Hardin, 66; *Houbie v. Volkening*, 49 How. Pr. 169; *Harris v. Mulock*, 9 id. 402.

In the last case it appeared that the creditor went to the debtor's

office to receive payment. While in the act of counting one of several packages of bank bills delivered to him by the debtor as payment, he suddenly left the office by reason of insulting language addressed to him by the latter. It was held that the money not being current coin, it would not be a tender if the creditor objected to it for that reason; therefore to constitute that money a tender, the debtor was obliged to give the creditor time sufficient to ascertain whether the money was such as he would be willing to receive instead of coin; and the creditor having cause to leave on account of the insulting language before such examination was completed, the tender was not sufficient; the debtor must seek the creditor for that purpose. See *Mathis v. Thomas*, 101 Ind. 119; § 214.

creditor is without the state the tender is dispensed with and no rights are lost by inability to make it.⁷⁶ The publication of a notice of a change in the place designated for payment of the principal of bonds does not affect their holders without actual notice of such change.⁷⁷

§ 270. **Must be unconditional.** A tender must be unconditional,⁷⁸ or at least cannot be clogged by any condition to which the creditor can have reasonable objection;⁷⁹ so that if he takes the money and there is more due he may still bring an action for the residue.⁸⁰ An offer of a certain sum in full of a demand is not a good tender.⁸¹ But a tender is not vitiated by being an

⁷⁶ *Buckner v. Finley*, 2 Pet. 587, 7 L. ed. 329; *Smith v. Smith*, 25 Wend. 405; *Hale v. Patton*, 60 N. Y. 233, 19 Am. Rep. 168; *Allshouse v. Ramsay*, 6 Whart. 331, 37 Am. Dec. 417; *Gill v. Bradley*, 21 Minn. 15; *Gage v. McSweeney*, 74 Vt. 370.

⁷⁷ *Kelley v. Phenix Nat. Bank*, 17 App. Div. (N. Y.) 496. See *Williamson County v. Farson*, 101 Ill. App. 328, aff'd 199 Ill. 71.

⁷⁸ *Barnes v. Hill City Lumber Co.*, 34 S. D. 158; *Leischner v. Kaiser*, 156 Ill. App. 123; *Crane v. Renville State Bank*, 73 Kan. 287; *Southwick v. Himmelman*, 109 Mich. 76; *Dunbar v. Springer*, 256 Ill. 53; *Rose v. Duncan*, 49 Ind. 269; *Jennings v. Major*, 8 C. & P. 61; *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 148; *Wagenblast v. McKean*, 2 Grant's Cas. 393; *Cothren v. Scanlan*, 34 Ga. 555; *Pulsifer v. Shepard*, 36 Ill. 513; *Shaw v. Sears*, 3 Kan. 242; *Hunter v. Warner*, 1 Wis. 141; *Gibson v. Lyon*, 115 U. S. 439, 29 L. ed. 440.

⁷⁹ *Connecticut Mut. L. Ins. Co. v. Stinson*, 86 Ill. App. 668; *Bevans v. Rees*, 5 M. & W. 306; *Richardson v. Jackson*, 8 id. 298; *Wheelock v. Tanner*, 39 N. Y. 481; *Foster v. Drew*, 39 Vt. 51; *Dedekam v. Vose*, 3 Blatchf. 44. See *Moynahan v.*

Moore, 9 Mich. 9; *Hepburn v. Auld*, 1 Cranch, 321, 2 L. ed. 122.

⁸⁰ *Moore v. Norman*, 52 Minn. 83, 38 Am. St. 526, 18 L.R.A. 359; *Beckman v. Birchard*, 48 Neb. 805; *Te Pool v. Shutt*, 57 Neb. 592; *Mitchell v. King*, 6 C. & P. 237; *Hartings v. Thorley*, 8 id. 573; *Jennings v. Major*, id. 61; *Pearcock v. Dickerson*, 2 id. 51n.; *Benkard v. Babcock*, 27 How. Pr. 391; *Henwood v. Oliver*, 1 G. & D. 25, 1 Q. B. 409; *Bowen v. Owen*, 11 id. 130; *Wood v. Hitchcock*, 20 Wend. 47; *Loring v. Cooke*, 3 Pick. 48; *Roosevelt v. Bull's Head Bank*, 45 Barb. 579.

A conditional tender becomes absolute on paying the money into court. *Tilden v. Gordon*, 34 Wash. 92.

⁸¹ *Mann v. Roberts*, 126 Wis. 142; *Taylor v. Scott*, 178 Ill. App. 487; *Shiland v. Loeb*, 58 App. Div. (N. Y.) 565; *L'Hommiedieu v. The H. L. Dayton*, 38 Fed. 926; *Noyes v. Wyckoff*, 114 N. Y. 204; *Tompkins v. Batie*, 11 Neb. 147, 38 Am. Rep. 361; *Boulton v. Moore*, 14 Fed. 922; *Shuck v. Chicago*, etc. R. Co., 73 Iowa 333; *Griffith v. Hodges*, 1 C. & P. 419; *Strong v. Harvey*, 3 Bing. 304; *Cheminant v. Thornton*, 2 C. & P. 50;

offer of payment under protest. If the debtor absolutely offers to pay he does not vitiate the offer by protesting.⁸² There have

Thayer v. Brackett, 12 Mass. 450; Mitchell v. King, 6 C. & P. 237; Wood v. Hitchcock, 20 Wend. 47.

In the last case Cowen, J., said: "It was clearly a tender to be accepted as the whole amount due, which is holden to be bad by all the books. The tender was also bad because the defendant would not allow that he was ever liable for the full amount of what he tendered. His act was within the rule which says he shall not make a protest against his liability. He must also avoid all counter-claim, as of set-off against part of the debt due. That this defendant intended to impose the terms, or raise the inference that the acceptance of the money should be in full and thus conclude the plaintiff against litigating all further or other claim, the referees were certainly entitled to say. That the defendant intended to question his liability to part of the amount tendered is equally obvious, and his object was at the same time to adjust his counter-claim. It is not of the nature of a tender to make conditions, but simply to pay the sum tendered as for an admitted debt. Interlarding any other object will always defeat the effect of the act as a tender. Even demanding a receipt or an intimation that it is expected, as by asking, 'Have you got a receipt?' will vitiate. The demand of a receipt in full would of course be inadmissible."

The reason of this rule is obvious where the debtor does not in fact tender all that is due; for if a debtor tenders a certain sum as all that is due, and the creditor receives it, under these circumstances it might compromise his rights in seeking to

recover more; but if the same sum was tendered *unconditionally*, no such effect would follow. Sutton v. Hawkins, 8 C. & P. 259. The reason why a tender has so often been held invalid when a receipt in full has been demanded seems not to have been merely because a receipt was asked for, but rather because a part was offered in full payment. See Sanford v. Bulkley, 30 Conn. 344.

In Holton v. Brown, 18 Vt. 224, 46 Am. Dec. 148, it was held that a tender to pay a note is vitiated by demand of it, and refusing to accept a discharge of the mortgage and a receipt for the payment, the holder not being able at the time to find the note. See Wilder v. Seelye, 8 Barb. 408; Story on Prom. Notes, § 106 *et seq.*; §§ 243, 244; Balme v. Wambaugh, 16 Minn. 116.

In Robinson v. Ferreday, 8 C. & P. 752, it was held that a tender was not vitiated by the person making it saying, at the time, that it was all that the debtor considered was due; but if he offers the sum "as all that is due," it is different. Sutton v. Hawkins, 8 C. & P. 259; Field v. Newport, etc. R. Co., 3 H. & N. 409; Thorpe v. Burgess, 8 Dowl. P. C. 603. And in Bowen v. Owen, 11 Q. B. 130, a tenant sent to his landlord 26*l.*, with a letter in these words: "I have sent with the bearer 26*l.* to settle on year's rent of Nant-y-pair." The landlord refused to take it, saying that more was due. Held, a good tender.

⁸² Manning v. Lunn, 2 C. & K. 13; Scott v. Uxbridge & R. R. Co., L. R. 1 C. P. 596; Sweny v. Smith, L. R. 7 Eq. 324. But see Wood v. Hitch-

been some intimations that even asking a receipt would vitiate a tender; and it is probable the requirement to give one stamped would have that effect;⁸³ but it is believed that the tenderer may ask a simple receipt for what is paid.⁸⁴ At all events, if the creditor refuse the tender wholly on the ground of more being due he cannot afterwards object thereto because the debtor required a receipt.⁸⁵ A tender, however, which is accompanied by a demand for a receipt in full is conditional and invalid.⁸⁶

cock, 20 Wend. 47, quoted from in the preceding note.

An offer to the effect that "I am willing to pay you the named sum to avoid litigation; it is not due you, but I am willing to pay," if accompanied by the money (which is not necessary in Iowa) is not a good tender. *Kuhns v. Chicago, etc. R. Co.*, 65 Iowa, 528.

⁸³ *Laing v. Meader*, 1 C. & P. 257. See *Ryder v. Townsend*, 7 D. & R. 119.

⁸⁴ *Lovett v. Eastern O. Co.*, 68 W. Va. 667. See 2 Par. on Cont. 645, note *m*; *Jones v. Arthur*, 8 Dowl. P. C. 442; *Bowen v. Owen*, 11 Q. B. 130.

Under the code of California the debtor may demand a receipt. *Ferreira v. Tubbs*, 125 Cal. 687. And so in Georgia; but nothing more than a receipt can be demanded. *De Graffenreid v. Menard*, 103 Ga. 651.

A tender of taxes may be conditioned upon the giving of a receipt, the statute requiring that the officer do that. *State v. Central Pac. R. Co.*, 21 Nev. 247.

⁸⁵ *Richardson v. Jackson*, 8 M. & W. 298; *Cole v. Blake, Peake*, 179.

⁸⁶ *Purdin v. Hancock*, 67 Ore. 164; *Union Esperanza Min. Co. v. Shandon Min. Co.*, 18 N. M. 153; *Sigel-C. L. S. Co. v. Holly*, 44 Colo. 580; *Pittsburg P. G. Co. v. Leary*, 25 S. D. 256, 31 L.R.A.(N.S.) 746; *Northern Pac. R. Co. v. Goss*, 203

Fed. 904, 122 C. C. A. 198; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165; *Noyes v. Wyckoff*, 114 N. Y. 204; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 558, 26 Am. Rep. 627; *Bowen v. Owen*, 11 Q. B. 130; *Griffith v. Hodges*, 1 C. & P. 419; *Glasscott v. Day*, 5 Esp. 48; *Higham v. Baddely*, Gow, 213; *Foord v. Noll*, 2 Dowl. (N. S.) 617; *Finch v. Miller*, 5 C. B. 428; *Sanford v. Bulkley*, 30 Conn. 344; *Richardson v. Boston C. Laboratory*, 9 Mete. (Mass.) 42; *Perkins v. Beek*, 4 Cranch C. C. 68; *Hart v. Flynn*, 8 Dana 190; *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 148; *Siter v. Robinson*, 2 Bailey, 274; *Brooklyn Bank v. DeGrauw*, 23 Wend. 342, 35 Am. Dec. 569; *Wood v. Hitchcock*, 20 Wend. 47; *Eddy v. O'Hara*, 14 id. 221; *Clark v. Mayor*, 1 Keyes, 9; *Thayer v. Brackett*, 12 Mass. 450; *Wagenblast v. McKean*, 2 Grant's Cas. 393; *Pulsifer v. Shepard*, 36 Ill. 513; *Cothran v. Scanlan*, 34 Ga. 555; *Shaw v. Sears*, 3 Kan. 242; *Hunter v. Warner*, 1 Wis. 141; *Rose v. Duncan*, 49 Ind. 269.

Where a tender was made in "greenbacks," and refused because payment in coin was demanded, it was considered a valid tender, if the court should be of opinion that the debtor was entitled to pay in such money. The money was paid into court, to be drawn only on its order "or by the plaintiff, if he shall ac-

A tender of money in payment of a debt to be available must be without qualification; that is, there must not be anything raising an implication that the debtor intends to cut off or bar a claim for any amount beyond the sum offered.⁸⁷ A tender of money to pay negotiable paper may be so far conditional as to

cept the same as tendered." The plaintiff obtained an order of the court and drew the money, and the order recited that he should not be prejudiced by his acceptance and appropriation of the amount. Lindsay, J., said: "So long as the legal tender notes remained in the hands of the court, or its agent, the Farmers' Bank, they constituted a standing and continuous offer to Robb, which he had the option at any time to accept '*as tendered.*' But he could not of his own volition take out and appropriate such notes upon any other conditions than those upon which the tender was made. Nor had the court the power to change or modify these conditions. If it should finally be adjudged that the tender was sufficient in law, the appellant would be entitled to his costs, and the title to the money on deposit would be vested in Robb. Upon the other hand, if the court should adjudge that Robb was entitled to have his note paid in gold coin, a judgment specifically enforcing his contract would be rendered, and Wells would have the right to withdraw from the hands of the court the legal tender notes on deposit. The rule is different where there is no controversy as to the character of the money tendered; but where the plaintiff claims a larger amount than the defendant concedes to be due, in such cases the tender establishes the liability of the party sued for the amount tendered, and the plaintiff has a right to accept that

amount as a payment *pro tanto*, and continue the litigation for the balance claimed, he being responsible for costs subsequently accruing, in case he fails to recover judgment for such balance or some part thereof. Here it was all the time in the power of Robb to waive his objection to the character of the money tendered and accept it in satisfaction of his debt: but as it was lawful money, as held recently by the supreme court of the United States (Knox v. Lee and Parker v. Davis), it was not within the power of the circuit court to permit him to take possession of it as property, and account to appellant for its value in coin, nor to compel the latter to pay it out upon any debt for less than its face value. As the unauthorized order of the court under which Robb obtained possession of the money tendered was made at his instance, and contrary to the objections of his debtor, he occupies no better attitude than he would have done had he withdrawn the money from the bank, as he had a right to do, under the order directing the deposit to be made. He must be held to have waived objection to the character of the money tendered, and to have accepted it as a payment of his debt." Wells' Adm'r v. Robb, 9 Bush, 26.

⁸⁷ Wood v. Hitchcock, 20 Wend. 47; Roosevelt v. Bull's Head Bank, 45 Barb. 579; Wilder v. Seelye, 8 id. 408; Sanford v. Bulkley, 30 Conn. 344; Perkins v. Beck, 4 Cranch C. C. 68; Brooklyn Bank

be accompanied by a demand for its surrender,⁸⁸ unless the creditor asserts in good faith that the sum tendered is insufficient.⁸⁹ The debtor may require that a pledge be surrendered.⁹⁰ The rule as to such paper is exceptional, to withdraw it from circulation and for recourse to other parties.

The general doctrine in respect to tender is that no condition can be annexed which, by acceptance, would preclude any question which would otherwise be open to the creditor. He should be at liberty to accept the tender and to say he does not take it in full satisfaction of his demand; or that he does not forego any right by its acceptance except to deny that so much was paid and such benefits to the tenderer as are consequent by legal intendment. The party making the tender should be content to allow the creditor to take the money and get more if the jury find him entitled to it; or to assert any other right consistent with the mere acceptance of the money and applying it to the subject.⁹¹ If, however, there is no dispute as to the amount of the debt a tender may always be restricted by such conditions

v. De Grauw, 23 Wend. 342, 35 Am. Dec. 569; *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 148; *Hart v. Flynn*, 8 Dana 190; *Eddy v. O'Hara*, 14 Wend. 221; *Clark v. Mayor*, 1 Keyes 9; *Cheminant v. Thornton*, 2 C. & P. 50; *Strong v. Harvey*, 3 Bing. 304; *Mitchell v. King*, 6 C. & P. 237; *Brady v. Jones*, 2 Dow. & Ry. 305; *Benkard v. Babcock*, 27 How. Pr. 391; *Rose v. Duncan*, 49 Ind. 269; *Finch v. Miller*, 5 C. B. 428; *Sutton v. Hawkins*, 8 C. & P. 259.

⁸⁸ *Spears v. Fields*, 72 S. C. 395; *Bailey v. Buchanan County*, 115 N. Y. 297, 6 L.R.A. 562; *Strafford v. Welch*, 59 N. H. 46; *Cutler v. Gould*, 43 Hun 516; *Wilder v. Seelye*, 8 Barb. 408; *Rowley v. Ball*, 3 Cow. 303, 15 Am. Dec. 266; *Smith v. Rockwell*, 2 Hill 482; *Hansard v. Robinson*, 7 B. & C. 90. See *Story on Bills*, §§ 448-9; *Chitty on Bills*, 423; *Story on Prom. Notes*, §§ 106,

112, 143, 244; *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668; *Dooley v. Smith*, 13 Wall. 604, 20 L. ed. 547.

⁸⁹ *Moore v. Norman*, 52 Minn. 83, 38 Am. St. 526, 18 L.R.A. 359.

⁹⁰ *Cass v. Higenbotam*, 100 N. Y. 253; *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. 435; *Johnson v. Cranage*, 45 Mich. 14; *Johnson v. Garliehs*, 63 Mo. App. 578.

⁹¹ *Beardsley v. Beardsley*, 29 C. C. A. 538, 86 Fed. 16. See *Jennings v. Major*, 8 C. & P. 61; *Thayer v. Brackett*, 12 Mass. 450.

A party qualifies his tender when he demands in return what, according to his own theory of his rights, he is strictly entitled to for the money he pays, and even though such theory is legally correct, if that theory is questioned. This is illustrated by *Loring v. Cooke*, 3 Pick. 48. A tender was made to redeem from an execution sale. The

as by the terms of the contract are precedent to or simultaneous with the payment of the debt or proper to be performed by the

amount tendered was not the subject of dispute; but the debtor demanded a release which was not necessary to cancel the sale, and the purchaser's inchoate title, and a release had been prepared by the tenderer ready for execution. The purchaser refused to execute it and claimed to hold his purchase to secure other debts. This right was held not to exist, as the English doctrine of tacking was not recognized; but the tender was invalidated by the demand of a release, though if executed it would have extinguished no right which the purchaser could have asserted. In the subsequent case of *Saunders v. Frost*, 5 Pick. 259, 275, a tender was made on a mortgage debt after the mortgagee had taken possession to foreclose for interest in arrear, the principal not being due. The tender was of the whole mortgage debt, including interest computed to the date of the tender, and not to the maturity of the debt. The court held that as to the principal the tender was not good; for the creditor had a right to keep his debt at interest until the time appointed for payment. But it was no objection to the tender in respect to interest due that a larger sum was tendered; nor that a discharge of the mortgage was demanded; for since the statute entitled the mortgagor to a discharge on payment of the mortgage debt the demand of such discharge was only of the performance of a duty imposed by law. So it seems that the tender, as to interest, was not rendered nugatory by being accompanied by a condition which was only admissible when a tender could rightfully be made of

the mortgage debt. It was sustained because it was the duty of the mortgagee to inform the mortgagor that possession was held only for the interest due; and the mortgagee should have shown a willingness to accept payment of such interest.

In *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668, the court held that under a statute which requires a mortgagee of lands to discharge a mortgage of record, after having received full payment, a mortgagor is not entitled to demand such discharge when tendering such full payment; that the mortgagee could not be required to do so merely upon a tender of the amount as a condition to his right to receive the amount. Biddle, J., said: "When one party is to perform an act, whose right does not depend upon any act to be performed by the other party, the tender must be without condition as where money is to be paid without condition. The current of authorities—indeed we believe it to be quite uniform—holds that the party bound to pay the money cannot make a good tender upon the condition that the party to whom the money is to be paid shall give him a written receipt therefor; and in the case of a non-commercial promissory note the authorities are in conflict whether a good tender can be made upon the condition that the note shall be surrendered; but in the case of commercial paper the authorities seem to be uniform that a tender upon condition that the paper shall be surrendered is good, because such paper might be put in circulation after payment, and

tenderee,⁹² as that he shall discharge a mortgage,⁹³ return collateral security,⁹⁴ give a release,⁹⁵ surrender mortgaged chattels, if a reasonable time be given,⁹⁶ or apply the money tendered to a particular demand.⁹⁷ If the holder of a note secured by mortgage claims them under an oral assignment from the payee and the latter has warned the maker not to pay the holder the maker may require a written assignment or release from the payee as a condition of a tender.⁹⁸ A tender in payment of a mortgage is not conditional.⁹⁹ But if a tender is made upon condition its acceptance is an acceptance of the condition.¹ Thus a creditor who accepts money offered on condition that it be received in full satisfaction of a demand does so subject to the condition,

innocent parties become liable; not so, however, with non-commercial paper; after payment by the maker it becomes harmless against him, wherever it may go."

A tender to be good must not be upon any condition prejudicial to the party to whom it was made. See *Wheelock v. Tanner*, 39 N. Y. 481; *Hepburn v. Auld*, 1 Cranch, 321, 2 L. ed. 122. D. purchased some oats of F., who took goods worth \$41.78 in part payment. D. tendered \$170 to F., telling him that if he took \$130 of the amount it closed the whole business; and if he took the \$170 it settled the oat business and left the account for the goods standing; held not conditional; D. merely explained his tender. *Foster v. Drew*, 39 Vt. 51.

A tender of the amount due on a judgment, accompanied by a demand for the assignment of the security or writ, will not entitle the person making it to be subrogated to the plaintiff's rights therein. *Forest O. Co.'s App.*, 118 Pa. 138.

⁹² *Neely v. Williams*, 149 Fed. 60, 79 C. C. A. 82; *Wadleigh v. Phelps*, 149 Cal. 627; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165; *Johnson v.*

Cranage, 45 Mich. 14; *Lamb v. Jeffrey*, 41 Mich. 719; *Brink v. Freoff*, 40 Mich. 614.

⁹³ *Halpin v. Phenix Ins. Co.*, *supra*; *Wheelock v. Tanner*, 39 N. Y. 481; *Salinas v. Ellis*, 26 S. C. 337. See *Jewett v. Earle*, 53 N. Y. Super. Ct. 349; *Werner v. Tuck*, 52 Hun 269.

⁹⁴ *Howard P. Co. v. Glover*, 7 Ga. App. 548; *Cass v. Higenbotam*, 100 N. Y. 253; *Ocean Nat. Bank v. Fant*, 50 N. Y. 474; *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. 435.

⁹⁵ *Saunders v. Frost*, 5 Pick. 259.

⁹⁶ *Lightfoot v. Hurd*, 113 Mo. App. 612; *Brink v. Freoff*, 40 Mich. 610.

⁹⁷ *Remm v. Landon*, 44 Ind. App. 430.

⁹⁸ *Kennedy v. Moore*, 91 Iowa 39.

⁹⁹ *Davis v. Dow*, 80 Minn. 223.

¹ *St. Joseph School Board v. Hull*, 72 Mo. App. 403; *Rosena v. Porter*, 112 Mich. 13; *Potter v. Douglass*, 44 Conn. 546; *Walston v. Denny*, 84 Ill. App. 417; *Adams v. Helm*, 55 Mo. 468; *Kronenberger v. Binz*, 56 id. 121; *Lee v. Dodd*, 20 Mo. App. 284; *Kofoed v. Gordon*, 122 Cal. 315.

notwithstanding he may then or subsequently protest.² In some of these cases checks or drafts sent by mail to the creditor "in full satisfaction" or as "payment in full" were retained, and in some of them the claims were disputed. But ordinarily the retention of a check inclosed in a letter which refers to the amount as the balance due an accounts between the parties will not be an accord and satisfaction so as to bar an action for the balance due.³ "It is only in cases where a dispute has arisen between the parties as to the amount due and a check is tendered on one side in full satisfaction of the matter in controversy that the other party will be deemed to have acquiesced in the amount offered by an acceptance and retention of the check."⁴ If the amount of the claim is in dispute and the creditor advises his debtor that the amount for which his check was given has been credited to his account and has not been accepted in full, the debtor will be deemed to have acquiesced in that application unless he expresses to the creditor his dissent.⁵ To constitute the acceptance of less than is due an accord and satisfaction of a disputed and unliquidated claim the money must be tendered in satisfaction and the tender accompanied

² *Treat v. Price*, 47 Neb. 875, citing *Fuller v. Kemp*, 138 N. Y. 231, 20 L.R.A. 785; *Reynolds v. Empire L. Co.*, 85 Hun 470; *Donohue v. Woodbury*, 6 Cush. 150, 52 Am. Dec. 777; *McDaniels v. Lipham*, 21 Vt. 222. To the same effect are *Nassoioy v. Tomlinson*, 148 N. Y. 326, 51 Am. St. 695; *Bull v. Bull*, 43 Conn. 455; *Hilliard v. Noyes*, 58 N. H. 312; *Brick v. Plymouth County*, 63 Iowa 462; *Hinkle v. Minneapolis, etc. R. Co.*, 31 Minn. 434; *Freiberg v. Moffett*, 91 Hun 17; *Anderson v. Standard G. Co.*, 92 Me. 429, 69 Am. St. 522; *Ennis v. Pullman P. C. Co.*, 165 Ill. 161; *Lang v. Lane*, 83 Ill. App. 543; *Pollman C. & S. Co. v. St. Louis*, 145 Mo. 651; *Logan v. Davidson*, 18 App. Div.

(N. Y.) 353, affirmed without opinion 162 N. Y. 624; *Connecticut River L. Co. v. Brown*, 68 Vt. 239; *Murphy v. Little*, 69 Vt. 261; *Ostrander v. Scott*, 161 Ill. 339; *Vorhis v. Elias*, 54 App. Div. (N. Y.) 412; *Lewinson v. Montauk T. Co.*, 60 App. Div. (N. Y.) 572; *Hamilton v. Stewart*, 105 Ga. 300.

³ *Eames V. B. Co. v. Prosser*, 157 N. Y. 289; *McKay v. Myers*, 168 Mass. 312; *Day v. Lea*, 22 Q. B. Div. 610.

⁴ *Eames V. B. Co. v. Prosser, supra*; *Hodges v. Truax*, 19 Ind. App. 651 (reviewing many cases).

⁵ *Strock v. Brigantine T. Co.*, 23 N. Y. Misc. 358; *McKeen v. Morse*, 1 C. C. A. 237, 49 Fed. 253.

with such acts and declarations as make its acceptance a condition to that end.⁶

When mutual acts are to be done by two parties at the same time and the right of each depends upon the performance of the other either may tender his part of the performance upon the condition that the other discharges his duty; and neither is compelled to perform unless the other does so also, as when land is bargained and sold to be conveyed upon payment of the purchase-money. In such a case neither can be compelled to perform his part of the agreement except on the performance by the other of his part; that is, the vendee cannot demand the conveyance without tendering the purchase-money, and the vendor cannot demand the purchase-money without tendering the conveyance; and either may make a good tender to the other upon the condition that he will perform his part of the agreement.⁷ If the performance of precedent or contemporaneous conditions is refused the person whose duty it is to pay has done all that is required of him when he has made a tender; he is thereby excused from keeping it good.⁸ But where it is provided by statute that a tender shall be unconditional except for a receipt in full or delivery of the obligation one who has completed the payment of the purchase-money of land and is entitled to evidence of the title, conditions a tender by making it dependent upon the execution of a conveyance.⁹

§ 271. Effect of accepting. Acceptance of a tender, when made as full payment, has the effect of entire satisfaction in case of a disputed claim.¹⁰ But the acceptance of a proper

⁶ *Kingsville P. Co. v. Frank*, 81 Ill. App. 586; *Lang v. Lane*, 83 id. 543.

⁷ *Scott v. Beach*, 172 Ill. 273; *Comstock v. Lager*, 78 Mo. App. 390; *Clark v. Weis*, 87 Ill. 438, 29 Am. Rep. 60; *Englebach v. Simpson*, 12 Tex. Civ. App. 188; *Wheeler v. Tanner*, 39 N. Y. 486; *Mankel v. Belscamper*, 84 Wis. 218; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165; *Englander v. Rogers*, 41 Cal. 420; *Heine v. Treadwell*, 72 id. 217;

Storey v. Krewson, 55 Ind. 397, 23 Am. Rep. 668.

⁸ *Cannon v. Handley*, 72 Cal. 133; *Washburn v. Dewey*, 17 Vt. 92; *White v. Dobson*, 17 Gratt. 262; *McDaniel v. Kimbrell*, 3 G. Greene 335.

⁹ *De Graffenreid v. Menard*, 103 Ga. 651; *Elder v. Johnson*, 115 Ga. 691.

¹⁰ *Carter v. Carter*, 129 Mo. App. 467; *St. Joseph School Board v.*

tender, accompanied by no such condition, does not preclude the creditor from proceeding for more.¹¹ An appeal is not waived by the receipt of a payment. The acceptance of a sum tendered on account of a claim only extinguishes it when it is all the creditor is entitled to or it is received as being so.¹²

§ 272. **Must be kept good.** Unless the conduct of the party who is entitled to payment excuses the other from so doing¹³ he must keep his tender good; that is the debtor must at all times be prepared to meet a demand for money tendered; if he fails to do so he places himself in default and loses the benefit of his tender.¹⁴ And the rule applies in chancery and at

Hull, 72 Mo. App. 403; Towslee v. Healy, 39 Vt. 522; Springfield & N. R. Co. v. Allen, 46 Ark. 217; United States v. Adams, 7 Wall. 463, 19 L. ed. 249; Jenks v. Burr, 56 Ill. 450; Draper v. Pierce, 29 Vt. 250; Cole v. Champlain T. Co., 26 Vt. 87; McDaniels v. Bank, 29 Vt. 230, 70 Am. Dec. 406; Adams v. Helm, 55 Mo. 468.

It is held in some cases that an unaccepted tender is an admission that there is a sum due the teree equal to it, and this although it be defective or be made in a case where it is not binding and cannot be pleaded. *Denver, etc. R. Co. v. Harp*, 6 Colo. 420; *Cilley v. Hawkins*, 48 Ill. 309. These cases are of doubtful authority, because the legal effect of such a tender is no more than a mere offer of compromise. No doubt is entertained that where a tender is made under a mistaken belief by the party who made it that the sum tendered was due, evidence is admissible to rebut the inference that a debt was thereby admitted. *Ashuelot R. Co. v. Cheshire R. Co.*, 60 N. H. 356.

¹¹ *Tilden v. Gordon*, 34 Wash. 92; *Higgins v. Halligan*, 46 Ill. 173; *Ryal v. Rich*, 10 East, 47; *Sleight v. Rhineland*, 1 Johns. 192.

¹² *Benkard v. Babcock*, 2 Robert. 175.

¹³ See § 268.

¹⁴ *Abbott v. Herron*, 90 Ark. 206; *Kelly v. Keith*, 85 Ark. 30; *Parker v. Grotatowsky*, 129 Ga. 623; *Lee v. Manley*, 154 N. C. 244; *Godwin's Est.*, 22 Pa. Super. 469; *Middle States L. B. & C. Co. v. Hagerstown M. & U. Co.*, 82 Md. 506; *Parker v. Beasley*, 116 N. C. 1, 33 L.R.A. 231; *Shank v. Groff*, 45 W. Va. 543; *McDaniel v. Upton*, 45 Ill. App. 151; *Beardsley v. Beardsley*, 29 C. C. A. 538, 86 Fed. 16; *Crain v. McGoon*, 86 Ill. 431; *Sanders v. Peek*, 131 id. 407; *Aulger v. Clay*, 109 Ill. 487; *Wyckoff v. Anthony*, 9 Daly 417; *Rainwater v. Hummell*, 79 Iowa, 571; *Wilson v. McVey*, 83 Ind. 108; *Park v. Wiley*, 67 Ala. 310; *Wilder v. Seelye*, 8 Barb. 408; *State v. Briggs*, 65 N. C. 159; *Bronson v. Rock Island, etc. R. Co.*, 40 How. Pr. 48; *Mohn v. Stoner*, 14 Iowa, 115, 11 id. 30; *Warrington v. Pollard*, 24 id. 281, 95 Am. Dec. 727; *Kortright v. Cady*, 23 Barb. 490, 5 Abb. Pr. 358; *Brooklyn Bank v. DeGrauw*, 23 Wend. 342, 35 Am. Dec. 569; *Pulsifer v. Shepard*, 36 Ill. 513; *Nelson v. Oren*, 41 Ill. 18; *Cullen v. Green*, 5 Harr. 17; *Clark v. Mullenix*, 11 Ind. 532; *Jarboe v.*

law.¹⁵ It is not necessary to keep for the creditor the identical money tendered. The tenderer is at liberty to use it as his own; all he is under obligation to do is to be ready at all times to pay the debt in current money when requested.¹⁶

A refusal by the debtor, after a tender, to pay the money tendered on demand of the creditor deprives the offer of all legal availability and effect.¹⁷ For this purpose the debtor should keep the money in his own possession. A deposit of it with a third person for the creditor, with or without giving him notice thereof, will not exempt him from this necessity; the creditor will be under no obligation to apply to the depositary for it. If he thinks proper to accept the tender he may call on the debtor himself for it. In that case, unless the debtor pays or tenders the sum, he will lose the benefit of the previous tender.¹⁸ Hence the debtor is entitled to the benefit of his

McAtee, 7 B. Mon. 279; Livingston v. Harrison, 2 E. D. Smith 197; Call v. Scott, 4 Call 402; Mason v. Croom, 24 Ga. 211; Brock v. Jones, 16 Tex. 461; Webster v. Pierce, 35 Ill. 158; Wood v. Merchants', etc. Co., 41 Ill. 267; Suver v. O'Riley, 80 Ill. 104; Haynes v. Thom, 28 N. H. 386; Nantz v. Lober, 1 Duv. 304; Hayward v. Hague, 4 Esp. 93; Peirse v. Bowles, 1 Stark. 323; Spybey v. Hide, 1 Camp. 181; Rivers v. Griffiths, 1 D. & Ry. 215; Coles v. Bell, 1 Camp. 478, note; Coore v. Callaway, 1 Esp. 115.

Under statutes making a tender equivalent to payment a tender need not be kept good in order that it may extinguish a lien. Kelley v. Clark, 23 Idaho 1. See Reynolds v. Price, 88 S. C. 525.

¹⁵ De Wolf v. Long, 7 Ill. 679; Doyle v. Teas, 5 Ill. 202; Brooklyn Bank v. DeGrauw, 23 Wend. 342, 35 Am. Dec. 569; Stow v. Russell, 36 Ill. 18; McDaniel v. Up-ton, 45 Ill. App. 151 (holding that the rule applies to justices' courts); Rankin v. Rankin, 216 Ill. 132; Suth. Dam. Vol. I.—52.

Healy v. Protection Mut. F. Ins. Co., 213 Ill. 99. *Contra*, Murray v. O'Brien, 56 Wash. 361, 28 L.R.A. (N.S.) 998.

A plaintiff failing in his suit in equity after tender and deposit of money in court brought error, and pending the proceedings in error withdrew the deposit; held, not a waiver of error. Vail v. McMillan, 17 Ohio St. 617.

¹⁶ Cheney v. Bilby, 20 C. C. A. 291, 74 Fed. 52; Thompson v. Lyon, 40 W. Va. 87; Curtiss v. Greenbanks, 24 Vt. 536. But see Quynn v. Wheteroft, 3 Harr. & Mell. 352; Roosevelt v. Bull's Head Bank, 45 Barb. 579; Security State Bank v. Waterloo Lodge, 85 Neb. 255.

¹⁷ Nantz v. Lober, 1 Duval, 304; Rose v. Brown, Kirby, 293, 1 Am. Dec. 22.

¹⁸ Rainwater v. Hummell, 79 Iowa 571; Town v. Trow, 24 Pick. 168.

But a tender is kept good where, after the creditor's refusal to accept, the money is deposited in bank to his credit and subsequently

tender if he is ready with the money on a demand made to himself personally although he may have made the tender by his attorney.¹⁹

The demand for the money after a tender and refusal must be of the precise sum tendered,²⁰ and must be made by some one authorized to receive it and give the debtor a discharge.²¹ Where the tender had been made by two persons demand on one was sufficient.²² If money is tendered with which the debtor has a right then to discharge the debt and sufficient to satisfy it, he is not to bear the loss of its subsequent depreciation.²³

§ 273. **Waiver and omission of tender on sufficient excuse.** There is probably no difference in respect to the effect of stopping interest as damages, based on default, between an actual tender or tender with some punctilio waived and a readiness to pay, and a tender altogether prevented by the conduct of the creditor; as, for example, by his absence or concealment. For this effect it is only needful to negative default.²⁴ Where, however, the debt bears interest by agreement of the parties after it is payable an actual tender is doubtless essential to stop interest unless the creditor prevents it by some fraudulent evasion.²⁵

paid to the clerk of the court for the creditor's benefit. *Kitchell v. Schneider*, 180 Ind. 589.

¹⁹ *Berthold v. Reyburn*, 37 Mo. 586. A defendant's attorney having made a tender the plaintiff's attorney subsequently agreed to take it, but it was held this assent was not such a demand as would avoid the tender. The demand for such a purpose must be made upon the debtor personally.

²⁰ *Anderson v. Griffith*, 51 Ore. 116; *Spybey v. Hide*, 1 Camp. 181; *Rivers v. Griffiths*, 1 Dow. & Ry. 215.

²¹ *Coles v. Bell*, 1 Camp. 478, note; *Coore v. Calloway*, 1 Esp. 115.

²² *Peirse v. Bowles*, 1 Stark. 523.

A letter, demanding payment of a debt, sent to the debtor's house.

to which an answer is returned that the demand should be settled, was held to be sufficient evidence of a demand on an issue of a subsequent demand and refusal to a plea of tender. *Hayward v. Hague*, 4 Esp. 93.

A tender may lose its effect by mutual waiver, as where afterward the debtor, at the suggestion of the creditor, consents to retain the money. He cannot afterwards set it up as a defense. *Terrell v. Walker*, 65 N. C. 91.

²³ *Anonymous*, 1 Hayw. 183. See *Jeter v. Littlejohn*, 3 Murph. 186.

²⁴ *Thompson v. Lyon*, 40 W. Va. 87; *Thorne v. Mosher*, 20 N. J. Eq. 257. See *Creek L. & I. Co. v. Davis*, 28 Okla. 579.

²⁵ *Gilmore v. Holt*, 4 Pick. 258;

Where a tender is made to the creditor, not in currency which he is bound to receive, but in bank bills current at par as money, and not objected to on that account; or is made by a check on a bank, assented to as a mode of payment, the offer is a sufficient tender. And where there is a verbal offer to pay and the debtor is prepared to make his offer good, but omits to produce the money to the view of the creditor because the latter says it need not be produced as he will not receive it, the proffer is in substance and legal effect a tender.²⁶ The law interprets the conduct of the parties in the ceremony of tender according to their apparent intentions, and determines its sufficiency upon the objections then stated. We have seen that certain incidents, such as demanding a receipt for what is paid, or change where there is an offer of a larger amount, or bank bills instead of money which is legal tender, must be specially objected to at the time. Silence is a tacit waiver of such objections. Other objections may also be waived by implication on the maxim of *expressio unius est exclusio alterius*. A general rule on this subject is that if a tender is refused on a specific ground the creditor will not be permitted afterwards to raise any other objection which, if stated at the time it was made, could have been obviated.²⁷ A tender of money, left with the creditor notwithstanding his refusal to receive it, becomes good where the

Southworth v. Smith, 7 Cush. 391; Cheney v. Bilby, 20 C. C. A. 291, 74 Fed. 52.

²⁶ Packard v. Mobile, 151 Ala. 159; Ronaldson & P. Co. v. Bynum, 122 La. 687; Stephenson v. Kilpatrick, 166 Mo. 262, 267; Holmes v. Holmes, 9 N. Y. 525; Hall v. Norwalk F. Ins. Co., 57 Conn. 105; Roe v. State, 82 Ala. 68; McDanel v. Kimbrell, 3 G. Greene, 335; Manhattan L. Ins. Co. v. Smith, 44 Ohio St. 156, 58 Am. Rep. 806; Mathis v. Thomas, 101 Ind. 119; Hoffman v. Van Diemen, 62 Wis. 362; Sharp v. Todd, 38 N. J. Eq. 324; Duffy v. Patten, 74 Me. 396; Koon v. Snodgrass, 18 W. Va. 320. See § 268.

²⁷ Hull v. Peters, 7 Barb. 331;

Carman v. Pultz, 21 N. Y. 547; Keller v. Fisher, 7 Ind. 718; Mitchell v. Cook, 29 Barb. 243; Haskell v. Brewer, 11 Me. 258; Hayward v. Munger, 14 Iowa 516; Graves v. McFarlane, 2 Cold. 167; Bradshaw v. Davis, 12 Tex. 336; Nelson v. Robson, 17 Minn. 284; Rudolph v. Wagner, 36 Ala. 698; Stokes v. Reeknagel, 38 N. Y. Super. Ct. 368; Ricker v. Blanchard, 45 N. H. 39; Abbot v. Banfield, 43 id. 152; Schroeder v. Pissis, 128 Cal. 209; Ricketts v. Buckstaff, 64 Neb. 851; Nolan v. Foley, 141 Iowa 671; Neal v. Finley, 136 Ky. 346; Kent B. & L. Co. v. Middleton, 112 Md. 10; Gilman v. Cary, 198 Mass. 318; Witt v. Dersham, 146 Mich. 68;

latter on demand refuses to give it up.^{27a} The repudiation of the contract between the parties excuses a tender.²⁸

§ 274. Tender must be pleaded and money paid into court.

If the money tendered is not demanded by the creditor and he brings suit the defendant must plead the tender and his plea must be accompanied by payment of the money into court for the creditor,²⁹ unless the effect of the tender is merely the extinguishment of a lien without discharging the debt, in which case payment into court is not necessary.³⁰ It is also unnecessary if it is merely desired to stop interest;³¹ and so where

Moulton v. Kolodzik, 97 Minn. 423; Merrill v. Hexter, 52 Ore. 138; Gottschalk v. Meisenheimer, 62 Wash. 299; Walsh v. Colvin, 53 Wash. 309; Weinberg v. Naher, 51 Wash. 591, 22 L.R.A.(N.S.) 956; Hidden v. German S. & L. Soc., 48 Wash. 384; Zeimantz v. Blake, 39 Wash. 6. See Moore v. Beiseker, 147 Fed. 367, 77 C. C. A. 545.

^{27a} Rogers v. Rutter, 11 Gray 410.

²⁸ Kuhlman v. Wieben, 129 Iowa 188, 2 L.R.A.(N.S.) 666.

²⁹ McPheters v. Kimball, 99 Me. 505; Portsmouth Sav. Bank v. Yeiser, 81 Neb. 343; Reusens v. Arkenburgh, 135 App. Div. (N. Y.) 75; Towles v. Carpenter, 62 W. Va. 151; Colby v. Reed, 99 U. S. 560, 25 L. ed. 484; Matthews v. Lindsay, 20 Fla. 962; Allen v. Cheever, 61 N. H. 32; Halpin v. Phenix Ins. Co., 118 N. Y. 165; Coghlen v. South Carolina R. Co., 32 Fed. 316; Morrison v. Jacoby, 114 Ind. 84; Roberts v. White, 146 Mass. 256; Park v. Wiley, 67 Ala. 310; Frank v. Pickens, 69 id. 369; Goss v. Bowen, 104 Ind. 207; Fernald v. Young, 76 Me. 356; Jenkins v. Briggs, 65 N. C. 159; Claffin v. Hawes, 8 Mass. 261; Harvey v. Hackley, 6 Watts 264; Nelson v. Oren, 41 Ill. 18; Brown v. Ferguson, 2 Denio, 196; Sheriden v. Smith, 2 Hill 538; Livingston v.

Harrison, 2 E. D. Smith, 197; Robinson v. Gaines, 3 Call, 243; Hume v. Peploe, 8 East, 168; Giles v. Hartis, 1 Ld. Raym. 254; Becker v. Boon, 61 N. Y. 317; Karthaus v. Owings, 6 Har. & J. 134; Griffin v. Tyson, 17 Vt. 35; Cullen v. Green, 5 Harr. 17; Mason v. Croom, 24 Ga. 211; Brock v. Jones, 16 Tex. 461; Clark v. Mullenix, 11 Ind. 532; Marine Bank v. Rushmore, 28 Ill. 463; Webster v. Pierce, 35 Ill. 158; Warrington v. Pollard, 24 Iowa, 281, 95 Am. Dec. 727; Jarboe v. McAtee, 7 B. Mon. 279; De Goer v. Kellar, 2 La. Ann. 496; Alexandrie v. Salloy, 14 id. 327; Call v. Scott, 4 Call, 402; State v. Briggs, 65 N. C. 159; National M. & T. Co. v. Standard S. Mach. Co., 181 Mass. 275. See Terrell v. Walker, 65 N. C. 91; and for a construction of the code of Oregon, see Holladay v. Holladay, 13 Ore. 523, 536.

³⁰ Cass v. Higenbotam, 100 N. Y. 248. See § 277.

³¹ Ferrea v. Tubbs, 125 Cal. 687.

If tender is made after forfeiture and the money refused, it must be paid into court or the tender be kept good. Bronson v. Leibold, 87 Conn. 293. *Contra*, Donaldson v. Severn River G. Co., 138 Fed. 691.

A public treasurer need not pay

there has been a breach of the vendor's contract to put the vendee of land into possession, the former having told the vendee that he would not comply with the contract.³² And if the vendor puts himself in a position to make it appear that a tender of the purchase price would be refused if made, the vendee may plead an offer to bring the money into court, and may have specific performance.³³ If there is uncertainty as to the amount due, the plaintiff may have specific performance by pleading readiness to bring the money into court whenever the sum is liquidated.³⁴ The payment made before trial is final; the debtor cannot speculate on the effect of the evidence and add to the sum paid after the trial has begun.³⁵ If the pleadings do not object to the failure to allege payment into court the money may be paid in during the trial, and, in the absence of an objection in the record, the appellate court will assume that it was so paid.³⁶

§ 275. **Effect of plea of tender.** The plea of tender is a conclusive admission that the sum tendered is due;³⁷ and if the money is not paid into court the plaintiff may sign judgment.³⁸ But the tender and plea go no further than to admit

money held by him pending the determination of the rights of litigants into court to avoid liability for interest and costs. *Newport W. & L. Co. v. Drew*, 141 Cal. 103; *Eau Claire v. Eau Claire W. Co.*, 137 Wis. 555.

³² *Murray v. Nickerson*, 90 Minn. 197; *Irwin v. Askew*, 74 Ga. 581.

³³ *Kerr v. Hammond*, 97 Ga. 567.

³⁴ *Id.*; *Irvin v. Gregory*, 13 Gray, 215.

³⁵ *Frank v. Pickens*, 69 Ala. 369.

A payment at the time of filing the answer will not affect the costs unless there is a specification of the amount paid on the claim and for costs. *The Good Hope*, 40 Fed. 608.

³⁶ *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165.

³⁷ *Dessinger v. Gevurtz*, 69 Ore. 304; *Birmingham & A. R. Co. v.*

Maddox, 155 Ala. 292; *Wells v. Missouri-Edison E. Co.*, 108 Mo. App. 607; *Mann v. Roberts*, 126 Wis. 142; *McDaniel v. Upton*, 45 Ill. App. 151; *Illinois Cent. Co. v. Cole*, 62 id. 480; *Noble v. Fagnant*, 162 Mass. 275, 286; *Giboney v. German Ins. Co.*, 48 Mo. App. 185; *Taylor v. Brooklyn E. R. Co.*, 119 N. Y. 561; *Voss v. McGuire*, 26 Mo. App. 452; *Kansas City T. Co. v. Neiswanger*, 27 id. 356; *Schnur v. Hickox*, 45 Wis. 200; *Monroe v. Chaldeck*, 78 Ill. 429; *Roosevelt v. New York & H. R. Co.*, 30 How. Pr. 226; *Currier v. Jordan*, 117 Mass. 260; *Ruble v. Murray*, 4 Hayw. 27; *Huntington v. American Bank*, 6 Pick. 340; 2 Pars. on Cont. 638, note. But see *Clarke v. Lyon County*, 7 Nev. 75.

³⁸ *Chapman v. Hicks*, 2 Dowl. P. C. 641; *Monroe v. Chaldeck*, 78 Ill.

the contract or duty sued upon and the right of the plaintiff to the sum paid in, except that it is ground for doubling the damage under a statute.³⁹ The defendant may contest the plaintiff's right to anything beyond that sum upon any ground consistent with an admission of the original contract or transaction. He may insist upon the statute of limitations, payment beyond the sum tendered or other defense.⁴⁰ He cannot claim in a motion for arrest of judgment that the complaint is so defective as not to authorize the recovery of any sum.⁴¹ It has been held that an answer under the code must allege that the money has been brought into court, and if it omits this allegation it does not state facts sufficient to constitute a defense and the plaintiff may avail himself of the objection on the trial;⁴² it must also be alleged that the money is brought into court for the other party's use and benefit; it is not enough to say for his use.⁴³ And if issue be joined on the plea of tender, where the money has not been brought into court, it has been held that judgment should be given for the plaintiff notwithstanding a verdict in favor of the defendant on that issue.⁴⁴ But in other cases the omission to pay the money into court has been treated as an irregularity; and if the plaintiff accept the plea and reply there-to without receiving notice that the money has been paid in he waives the irregularity.⁴⁵ The technical rules governing pleas

429. See *Knox v. Light*, 12 Ill. 86; *Sloan v. Petrie*, 16 Ill. 262; *Marine Bank v. Rushmore*, 28 Ill. 463; *Webster v. Pierce*, 35 Ill. 158; *Stow v. Russell*, 36 Ill. 35; *Reed v. Woodman*, 17 Me. 43.

³⁹ *Black v. Minneapolis, etc. R. Co.*, 122 Iowa 32.

⁴⁰ *Peters v. McPherson*, 62 Wash. 496; *Cox v. Parry*, 1 T. R. 464; *Reid v. Dickons*, 5 B. & Ad. 499; *Meager v. Smith*, 4 id. 673; *Spalding v. Vandercook*, 2 Wend. 431; *Wilson v. Doran*, 110 N. Y. 101; *Griffin v. Harriman*, 74 Iowa 436; *Young v. Borzone*, 26 Wash. 4, 20.

A tender by an officer is not an admission that he is or was the official custodian of the money ten-

dered; it admits his liability for it as bailee without hire. *Craw v. Abrams*, 68 Neb. 546, 553.

⁴¹ *Wilson v. Chicago, etc. R. Co.*, 68 Iowa 673.

⁴² *Becker v. Boon*, 61 N. Y. 417. See last section.

The notice of payment into court after suit which is required by the code is not waived by failing to return an answer pleading tender before suit or to otherwise raise the question before trial. *Wilson v. Doran*, 110 N. Y. 101.

⁴³ *Phoenix Ins. Co. v. Overman*, 21 Ind. App. 516.

⁴⁴ *Claffin v. Hawes*, 8 Mass. 261.

⁴⁵ *Woodruff v. Trapnall*, 12 Ark. 640; *Sheriden v. Smith*, 2 Hill 538;

of tender in actions at law do not apply in equity. Upon a bill to enforce specific performance of an agreement to accept a named sum of money in satisfaction of a debt secured by pledged property a tender is well pleaded by alleging readiness, willingness and ability to pay the amount due or to bring it into court to be paid upon transfer of the collateral.⁴⁶

The plaintiff is entitled to the money paid into a court of law, with a plea of tender, in any event.⁴⁷ He may take it out, though he replies that the tender was not made before action brought.⁴⁸ The fact that more is paid than is due or that no payment was necessary for the protection of the rights of the

Shepherd v. Wyson, 3 W. Va. 46; Roosevelt v. New York & H. R. Co., 30 How. Pr. 226.

In the last case the defendant set up in the answer a tender without paying the money into court. This answer was accepted, and the plaintiff afterwards applied to the court for an order requiring the defendant to pay to the plaintiff the sum tendered, under a provision of the code that "when the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy." The tender was held to be such an admission. The court say: "The money tendered in this case was not paid into court, and it is to be inferred from the fact that the answer is treated as part of the pleadings that it is accepted without the money being paid in. On the facts before me I must treat the plea of tender as sufficient, although the money has not been paid into court. But if the tender was irregular for the reason stated, the admission of the justice of the plaintiff's claim would be none the less distinct and

unequivocal." See also Merritt v. Thompson, 10 How. Pr. 428; Thurston v. Marsh, 5 Abb. Pr. 389.

⁴⁶ Chicora F. Co. v. Duman, 91 Md. 144, 50 L.R.A. 401; Zebble v. Farmers' L. & T. Co., 139 N. Y. 461.

⁴⁷ Palatine Ins. Co. v. O'Brien, 109 Md. 100; Mann v. Sprout, 185 N. Y. 109, 5 L.R.A. (N.S.) 561; Dechenbach v. Rima, 50 Ore. 540; Sanders v. Mosbarger, 159 Mo. App. 488; Foster v. Napier, 74 Ala. 393; Taylor v. Brooklyn E. R. Co., 119 N. Y. 561; Kansas City T. Co. v. Neiswanger, 27 Mo. App. 356; Dillenbach v. The Rossend Castle, 30 Fed. 462; Supply D. Co. v. Elliott, 10 Colo. 327; Sweetland v. Tuthill, 54 Ill. 215; Munk v. Kanzler, 26 Ind. App. 105; Martin v. Bott, 17 Ind. App. 444; Beil v. Supreme Council American Legion of Honor, 42 App. Div. (N. Y.) 168. See Ruble v. Murray, 4 Hayw. 27.

If money paid into court in a suit for unliquidated damages is taken out in good faith by the plaintiff's solicitor and paid to his client the solicitor cannot be compelled to repay it after his client's death. Davys v. Richardson, 21 Q. B. Div. 202.

⁴⁸ Le Grew v. Cooke, 1 Bos. & Pul. 332.

party who paid does not give him the right to withdraw the money or any part of it.⁴⁹ But the rule that the plaintiff is entitled absolutely to the amount tendered and paid into court has been held not to apply to an action brought to recover a penalty or other fixed amount where, unless the plaintiff recovers the amount of the penalty or fixed sum, he is not entitled to judgment.⁵⁰ Nor is it applicable to money paid into court by the plaintiff on a bill in equity to redeem, where the defendant for whom such money is paid successfully contests the right to redeem.⁵¹ In such an action the plaintiff paid in, under order of the court, a sum previously tendered; in the

⁴⁹ Fox v. Williams, 92 Wis. 320.

⁵⁰ Canastota & M. P. R. Co. v. Parkill, 50 Barb. 601.

⁵¹ Putnam v. Putnam, 13 Pick. 129. In this case Shaw, C. J., said: "There is no analogy between the payment of money into court in a common-law action of debt or *assumpsit* and a like payment upon a bill in equity to redeem under our statute, and hence the authorities applicable to the former case afford no rule governing the present. By payment into court, in an action claiming debt or damages, the defendant admits, in the most formal manner, his absolute liability to that sum, and by the form of the rule or plea offers it in satisfaction and discharge of such admitted liability. If not accepted it is paid into court for the plaintiff's use, and the defendant derives the full benefit of it as if paid to and accepted by the plaintiff himself, because it operates as a bar *pro tanto* to all claims in respect to such sum. It is therefore upon the strongest reason held that such payment shall be deemed absolute, and the party shall not be permitted to draw it in question on the ground of equity or mistake, or any ground except fraud or imposition.

"But character of a payment of money into court on a bill in equity to redeem a mortgage is entirely different. It is in its nature entirely provisional; it is an offer to pay in discharge of a debt secured by mortgage on real estate, the purpose of which is to release such real estate from the incumbrance. But the defendant contests the right to redeem; alleges that, by force of law and the lapse of time, the mortgage is foreclosed, that she has become the absolute owner of the estate, and of course that there is no longer any debt secured by mortgage, and, consequently, that she has no claim to the money offered in satisfaction of such debt. This defense prevails, and the conclusion of law is that the defendant was right in rejecting the money tendered and not releasing the estate. She cannot now be allowed to claim this money against her own formal act showing that she has no title to it. Nor ought the plaintiffs to be bound by a provisional offer of money to redeem an estate, where it appears that they cannot redeem, and the payment cannot avail them for the only purpose for which the money was offered."

meantime he had failed to keep his tender good and judgment was given for the defendant for that reason. The plaintiff was then entitled to withdraw the money except so much as might pay the defendant's costs.⁵² By withdrawing money paid into court the plaintiff accepts it for the purposes for which it was paid; he cannot claim that it was merely payment on account.⁵³

§ 276. Effect of tender when money paid into court. A mere tender of a sufficient sum only has the effect to stop interest and protect the debtor against subsequent costs. It does not discharge the debt,⁵⁴ nor preclude the plaintiff from maintaining a counterclaim on an independent cause of action.⁵⁵ But when the debtor has kept the tender good, and, on being sued, regularly pleads it and brings the money into court it accomplishes such discharge whether the action proceeds to judgment or not. If the action abate or be withdrawn the defendant in a subsequent action may plead the tender and payment into court in the first action; and if these facts are established he will be entitled to judgment.⁵⁶ A tender is equivalent to an admission of liability *pro tanto*.⁵⁷

⁵² Dunn v. Hunt, 76 Minn. 196.

⁵³ Haeussler v. Duross, 14 Mo. App. 103; Turner v. Lee G. & M. Co., 98 Tenn. 604, 38 L.R.A. 549; Gardner v. Black, 98 Ala. 638; Hanson v. Todd, 95 Ala. 328; Cline v. Rudesill, 126 N. C. 523. Compare Spaulding v. Vandercreek, 2 Wend. 431; Sleght v. Rhinelander, 1 Johns. 192; Johnston v. Columbian Ins. Co., 7 Johns. 315. The opinion in the Tennessee case cited contains a summary of the practice under the old procedure.

⁵⁴ Glos v. Stern, 213 Ill. 325; Ferreira v. Tubbs, 125 Cal. 687; Ruppel v. Missouri Guarantee S. & B. Ass'n, 158 Mo. 613; Wright v. Robinson, 84 Hun 172; Law v. Jackson, 9 Cow. 641; Carley v. Vance, 17 Mass. 389; Haynes v. Thom, 28 N. H. 386, 400; Barnard v. Cushman, 35 Ill.

451; Raymond v. Bearnard, 12 Johns. 274, 7 Am. Dec. 317; Coit v. Houston, 3 Johns. Cas. 243; Jackson v. Law, 5 Cow. 248; Cornell v. Green, 10 S. & R. 14. See Jeter v. Littlejohn, 3 Murph. 186; Staat v. Evans, 35 Ill. 455; Teass v. Boyd, 29 Mo. 131; Wheeler v. Woodward, 66 Pa. 158; Pennsylvania Co. v. Dovey, 64 id. 260; Dixon v. Clark, 5 C. B. 365; Waistell v. Atkinson, 3 Bing. 289; Johnson v. Triggs, 4 G. Greene 97; Freeman v. Fleming, 5 Iowa 460; Shant v. Southern, 10 id. 415; Mohn v. Stoner, 11 id. 30; Hayward v. Munger, 14 id. 516.

⁵⁵ Ahrens v. Fenton, 138 Iowa 559.

⁵⁶ Robinson v. Gaines, 3 Call, 243. See Warder v. Arell, 2 Wash. (Va.) 282, 1 Am. Dec. 488.

Keys v. Roder, 1 Head 19, was

⁵⁷ Browning, King & Co. v. Chamberlain, 210 N. Y. 270; Lasoya Oil

Co. v. Zulkey, 40 Okla. 690; Newman v. Levi, 74 W. Va. 223.

§ 277. **Effect of tender on collateral securities.** A sufficient tender, however, will discharge all liens and collateral securities; and for this effect it need not be kept good nor be brought into court.⁵⁸ Thus, where a mortgage of real estate is a mere security for the debt and the legal title remains in the mortgagor precisely the same after as before the debt is due and until there is a foreclosure, the tender of the amount due after the law day and before foreclosure will discharge the mortgage; and if the mortgagee is in possession the mortgagor may recover in ejectment.⁵⁹ But to establish a tender and refusal, such as will discharge the lien of a mortgage without the tender being kept good, the proof must be clear that the tender was fairly made and deliberately and intentionally refused by the owner of the mortgage, and that sufficient opportunity was afforded

an action of debt commenced in a justice's court. It was held that a mere offer by the defendant to the plaintiff of the sum claimed before the issuance of the warrant could not be pleaded as a valid tender in bar of the action. The money should have been produced and offered also at the time of the trial before the justice; and upon appeal to the circuit court, it should have been brought into that court at the time of filing the papers, and still held ready and produced as a continuous offer. A mere offer of the amount to the plaintiff by the defendant's counsel, in the progress of the argument in the circuit court, was not sufficient.

⁵⁸ *Pittsburg P. G. Co. v. Leary*, 25 S. D. 256, 31 L.R.A.(N.S.) 746; *Thomas v. Seattle B. & M. Co.*, 48 Wash. 560, 125 Am. St. 945, 15 L.R.A.(N.S.) 1164; *Schayer v. Commonwealth L. Co.*, 163 Mass. 322; *Mitchell v. Roberts*, 17 Fed. 776; *Wright v. Robinson*, 84 Hun 172; *Willard v. Harvey*, 5 N. H. 252; *Sweet v. Horn*, 1 id. 332; *Maynard v. Hunt*, 5 Pick. 240.

⁵⁹ *Smith v. Mould*, 87 Misc. (N. Y.) 199; *Security State Bank v. Waterloo Lodge*, 85 Neb. 255; *Kortright v. Cady*, 21 N. Y. 343, 5 Abb. Pr. 358; *Jackson v. Crafts*, 18 Johns. 110; *Edwards v. Farmers' F. Ins. & L. Co.*, 21 Wend. 467; *Farmers' F. Ins. & L. Co. v. Edwards*, 26 id. 541; *Arnot v. Post*, 6 Hill 65; *Post v. Arnot*, 2 Denio 344; *Tiffany v. St. John*, 5 Laus. 153, 65 N. Y. 314; *Hartley v. Tatham*, 1 Robert. 246, 1 Keyes 222; *Trimm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623; *McDaniels v. Reed*, 17 Vt. 674; *Eslow v. Mitchell*, 26 Mich. 500; *Caruthers v. Humphrey*, 12 id. 270; *Van Husin v. Kanouse*, 13 id. 303; *Saltus v. Everett*, 20 Wend. 267; *Salinas v. Ellis*, 26 S. C. 337; *Thornton v. National Exch. Bank*, 71 Mo. 221. See *Harris v. Jex*, 66 Barb. 232; *Merritt v. Lambert*, 7 Paige 344; *Ketchum v. Crippen*, 37 Cal. 223; *Bryan v. Maume*, 28 Cal. 238; *Wilson v. Keeling*, 1 Wash. (Va.) 194; *Werner v. Tuck*, 52 Hun 269.

to ascertain the amount due; at least it should appear that a sum was absolutely and unconditionally tendered sufficient to cover the whole amount due.⁶⁰ Though the tender be sufficient, yet if the mortgagor asks for affirmative relief, even for extinguishment of the lien, he must do equity; this obliges him to keep the tender good; he must pay the amount equitably due the mortgagee.⁶¹ Where the incidents attached to a mortgage of real estate are those which prevailed at the common law, the mortgagee having an estate on condition which becomes absolute by reason of non-payment on the day named, a tender will not discharge the lien unless it is made punctually and is kept good.⁶² A tender will discharge a mechanic's lien for the repair of personal property;⁶³ an attorney's lien;⁶⁴ a pledge or mortgage of personal property;⁶⁵ the right to distrain for rent;⁶⁶ and will release a surety.⁶⁷ But a tender of the sum due on a

⁶⁰ *Smith v. Mould*, 87 Misc. (N. Y.) 199; *Tuthill v. Morris*, 81 N. Y. 94; *Parks v. Allen*, 42 Mich. 82; *Jewett v. Earle*, 53 N. Y. Super. Ct. 349; *Waldron v. Murphy*, 40 Mich. 668.

⁶¹ *Tuthill v. Morris*, 81 N. Y. 94; *Landis v. Saxton*, 89 Mo. 375. See *Salinas v. Ellis*, 26 S. C. 337.

⁶² *Crain v. McGoon*, 86 Ill. 431; *Matthews v. Lindsay*, 20 Fla. 962; *Shearff v. Dodge*, 33 Ark. 340; *Alexander v. Caldwell*, 61 Ala. 543; *Greer v. Turner*, 36 Ark. 17; *Currier v. Gale*, 9 Allen 522; *Holman v. Bayley*, 3 Mete. (Mass.) 55; *Phelps v. Sage*, 2 Day 151; *Shields v. Lozeau*, 34 N. J. L. 496, 3 Am. Rep. 256; *Rowell v. Mitchell*, 68 Me. 21; *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668; *Collins v. Robinson*, 33 Ala. 91; *Slaughter v. Swift*, 67 id. 494; *Frank v. Pickens*, 69 id. 369; *Tompkins v. Batie*, 11 Neb. 147, 38 Am. Rep. 361; *Hudson v. Glencoe S. & G. Co.*, 140 Mo. 103, 62 Am. St. 722; *Himmelman v. Fitzpatrick*, 50 Cal. 650; *Mitchell v. Roberts*, 17 Fed. 776.

⁶³ *Pittsburg P. G. Co. v. Leary*, 25 S. D. 256, 31 L.R.A. (N.S.) 746; *Moynahan v. Moore*, 9 Mich. 9; *Ball v. Stanley*, 5 Yerg. 199, 26 Am. Dec. 263.

⁶⁴ *Stokes on Lien of Att'ys*, §1, 172; *Jones v. Tarleton*, 9 M. & W. 675; *Searfe v. Morgan*, 4 id. 280; *Irving v. Viana*, 2 Y. & Jer. 71.

⁶⁵ *Hyams v. Bamberger*, 10 Utah, 3, citing the text; *Norton v. Baxter*, 41 Minn. 146, 4 L.R.A. 305; *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. 435; *McCalla v. Clark*, 55 Ga. 53; *Wildman v. Radenaker*, 20 Cal. 615; *Ball v. Stanley*, *supra*; *Cooley v. Weeks*, 10 Yerg. 141; *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Am. Neg. Cas. 948; *Comyn's Dig.*, tit. Mortgage, A. But not after the day it is due. *Tompkins v. Batie*, *supra*. *Contra*, *Hyams v. Bamberger*, *supra*. See *Frank v. Pickens*, 69 Ala. 369.

⁶⁶ *Hunter v. Le Conte*, 6 Cow. 728; *Davis v. Henry*, 63 Miss. 110.

⁶⁷ *Smith v. Old Dominion B. & L. Ass'n*, 119 N. C. 257; *Mitchell v. Roberts*, 17 Fed. 776; *Brandt on*

contract for the purchase of land, the legal title being in the vendor, does not discharge his lien; he can be divested of his title only by payment of the purchase-money.⁶⁸ A landlord's statutory lien for rent is not discharged by a tender of the rent due.⁶⁹

Whether a judgment which is a lien on land, or under which an execution has been levied, will be discharged by a tender is not very clearly settled. It has been held that to make a tender effectual for this purpose the money should be brought into court and the judgment satisfied of record. Being a debt of record, and a tender not discharging it, the lien, being a legal consequence, must subsist while the debt continues in that form.⁷⁰ But the weight of reason, if not authority, is in favor of holding an execution lien discharged by a tender the same as a conventional lien would be. In each case the lien exists as a collateral advantage to the creditor. It is incidental to the debt. In each case, if the lien is not satisfied, there is a power to sell. Payment will extinguish one as well as the other.⁷¹ But it will

Suretyship, §§ 21, 22; *Appleton v. Donaldson*, 3 Pa. 381; *Spurgeon v. Smitha*, 114 Ind. 453; *Joslyn v. Eastman*, 46 Vt. 258; *White v. Life Ass'n of America*, 63 Ala. 419, 35 Am. Rep. 45; *McQuesten v. Noyes*, 6 N. H. 19; *Sailly v. Elmore*, 2 Paige 497; *Fisher v. Stockebrand*, 26 Kan. 565; *Hayes v. Josephi*, 26 Cal. 535; *Solomon v. Reese*, 34 id. 28. Compare *Clark v. Sickler*, 64 N. Y. 231, 21 Am. Rep. 606; *Second Nat. Bank v. Poucher*, 56 N. Y. 348.

⁶⁸ *Schearff v. Dodge*, 33 Ark. 346.

⁶⁹ *Hamlett v. Tallman*, 30 Ark. 505; *Bloom v. McGehee*, 38 Ark. 329.

⁷⁰ *Jackson v. Law*, 5 Cow. 248; *Law v. Jackson*, 9 id. 641; *Halsey v. Flint*, 15 Abb. Pr. 367. See *Schumaker v. Nichols*, 6 Gratt. 592; *Flower v. Elwood*, 66 Ill. 447, 449; *Redington v. Chase*, 34 Cal. 666. But see also *Mason v. Sudam*, 2 Johns. Ch. 172; *Tiffany v. St.*

John, 5 Lans. 153, 65 N. Y. 314, 23 Am. Rep. 55.

⁷¹ *Tiffany v. St. John*, 65 N. Y. 314, 23 Am. Rep. 55. In this case *Dwight, C.*, said: "There is, undoubtedly, a stage in a proceeding in an action where property is in the custody of the law, that a tender will not destroy the lien, as that might interfere with the proper disposition of the case. After the action is over, and judgment obtained, and execution levied, the case becomes clearly assimilated to that of an ordinary lien; and if tender is made and not accepted the lien will be extinguished. This distinction was settled as far back as the time of Lord Coke, and is clearly stated in the *Six Carpenters' Case* (8 Coke, 146a). The point there discussed was the effect of a tender in the case of a distress for rent, or of cattle doing damage—an instance of a lien created by the act of the law.

not discharge a lien to secure the payment of special assessments

Coke considers the distinction between a tender made upon the land before distress, after the distress and before impounding, after impounding and before the determination of the litigation, and contrasts these with a tender made after the law has determined the rights of the parties. He says: 'Note, reader, this difference: that tender upon the land before the distress makes the distress tortious; tender after the distress and before the impounding makes the detainer, and not the taking, wrongful; tender after the impounding makes neither one nor the other wrongful, for then it comes too late, because then the cause is put to the trial of the law, to be there determined. But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender he may have an action of detinue for the detainer after, or he may, upon satisfaction made in court, have a writ for the redelivery of his goods.' He adds: 'And therewith agree all the books, and Pelkington's Case, in the fifth part of my reports (fol. 76), and so all the books which, prima facie, seem to disagree, are, upon full and pregnant reason, well reconciled and agreed.'

"There is here a clear statement of the principle applicable to the case at bar. Here the law has already determined the right which has become final in analogy to the 'return irreplevisable' of Lord Coke, and the tender having been made and refused, if it were sufficient in amount, an action of replevin in the *detinct* will lie in analogy to the action of *detinue* referred to by

him. It should also be observed that Lord Coke's rule provides that the owner of goods has his election to make an application to the court for relief.

"The defendant cites in opposition to these views the case of *Jackson v. Law*, 5 Cow. 248, 9 id. 641. That case, however, has no bearing upon the present controversy. The point there decided was that a tender of money due upon a judgment by a junior judgment creditor did not discharge it, nor take away the lien of the senior judgment creditor upon lands, but that the latter might still redeem upon his judgment within the terms of the statute applicable to that subject. The ground of this decision briefly was that a judgment, being a debt of record, is not discharged by a tender, and it is, in no case, the effect of a tender to discharge the debt. The judgment could only be extinguished by actual satisfaction. As long as it remained in force, it must, by its very nature, as prescribed by statute, be a lien on the land. If its existence continued it could not be deprived of its ordinary and usual characteristics. The case is very different with a pledge or mortgage, or lien of any kind collateral to the debt. To this class of collateral liens an execution belongs, and on general principles a tender destroys it. Even in the case of a judgment a tender may have such an effect as to make it inequitable to enforce the lien; and a court of equity may set aside a sale under it as irregular and void. *Mason v. Sudam*, 2 Johns. Ch. 172." See *Crozer v. Pilling*, 6 D. & R. 129.

for street improvements, no personal liability therefor existing.⁷²

A plea of tender should conclude by praying judgment whether the plaintiff ought to recover any damages by reason of the non-payment of the sum alleged to have been tendered.⁷³ If upon the trial the sum tendered and brought into court is found by the jury to be less than was due at the time of the tender the verdict and judgment should be for the whole amount of the plaintiff's demand without any deduction on account of the money brought into court. The defendant, however, is entitled to the benefit of the payment by indorsement upon the judgment or execution.⁷⁴

§ 278. **Paying money into court.** A practice was introduced into England in the time of Charles II. of paying money into court where no previous tender had been made.⁷⁵ This is supposed to have been adopted to avoid the hazard and difficulty of pleading a tender.⁷⁶ The money was paid in on a rule of court, and thereafter the plaintiff proceeded for more at the hazard of paying subsequent costs. The amount paid in was stricken from the declaration and no evidence given of that part of the claim.⁷⁷ It was at first required to be paid in before plea, but was afterwards allowed by withdrawing the plea. The rule allowing the defendant to pay money into court was granted generally on condition of paying costs, directing that sum to be stricken out of the declaration, if refused by the plaintiff, and concerning it no evidence to be received on the trial. This reduced the controversy to the *quantum* of damages; and the consequence was that, if the plaintiff did not prove a greater sum due than that paid in, a verdict passed for the defendant and he had judgment for subsequent costs.⁷⁸ If the plaintiff proved

⁷² McGuire v. Brockman, 58 Mo. App. 307.

⁷³ Karthaus v. Owings, 6 Har. & J. 134.

⁷⁴ Dakin v. Dunning, 7 Hill 30 42 Am. Dec. 33; Huntington v. Zeigler, 2 Ohio St. 10; Bennett v. Odom, 30 Ga. 940; Baker v. Gasque, 3 Strobl. 25; Reed v. Woodman, 17 Me. 43; 1 Tidd's Pr. 569.

⁷⁵ Payment into court without a rule may be disregarded. Levan v. Sternfeld, *infra*.

⁷⁶ Levan v. Sternfeld, 55 N. J. L. 41; Arch. Pr. 199; Boyden v. Moore, 5 Mass. 365; Reed v. Woodman, 17 Me. 43.

⁷⁷ *Id.*

⁷⁸ But the judgment should not require the payment of costs by the

that more was due he had a verdict and judgment for the balance and subsequent costs.⁷⁹ The payment of money into court was proved by production of the rule.⁸⁰ But when the tender is found sufficient and the money has been brought into court the verdict should be for the defendant.⁸¹ A debtor may relieve himself from his obligation, interest and costs by paying money into court after an assignment of the debt.⁸² Where payment into court is unauthorized by law, money deposited by the defendant with the clerk to be paid to the plaintiff on condition of his discontinuing the suit cannot on the latter's failure to comply with such condition be recovered by him from the clerk.⁸³ Money paid into court becomes the property of the plaintiff and his attorney's lien for services attaches at once.⁸⁴

SECTION 6.

STIPULATED DAMAGES.

§ 279. **Contracts to liquidate damages valid.** After damages have been sustained an agreement to pay such sum therefor as shall be ascertained in a particular way is binding.⁸⁵ And parties in making contracts are at liberty to stipulate the amount which shall be paid by either to the other as compensation for the anticipated actual loss or injury which they foresee or con-

plaintiff as a condition precedent to his right to receive the amount paid into court. *Kelley v. Fielding*, 180 Ill. App. 705.

⁷⁹ 1 Bac. Abr. 473c. See *Ruble v. Murray*, 4 Hayw. 27.

⁸⁰ *Id.*

⁸¹ *Pennypacker v. Umberger*, 22 Pa. 492; *Levan v. Sternfeld*, *supra*.

In *Hill v. Smith*, 34 Vt. 535, the defendant, before the new counts, upon which alone the plaintiff recovered, were filed, paid into court a sum of money sufficient to satisfy all the damages the plaintiff could have recovered under the original declaration and costs to the time of

such payment, and the plaintiff took the money; it was held that in the absence of proof that the plaintiff took it in satisfaction of his claim he was not thereby precluded from filing new counts and recovering an additional sum thereon.

⁸² *McGaughey v. McGaughey*, 44 Pa. Super. Ct. 29.

⁸³ *Browning, King & Co. v. Chamberlain*, 210 N. Y. 270.

⁸⁴ *Bernstein v. Traverso*, 82 Misc. (N. Y.) 411.

⁸⁵ *Longridge v. Dorville*, 5 B. & Ald. 117. See *Hosmer v. True*, 19 Barb. 106.

cede will result from a breach if it should occur.⁸⁸ No doubt the consideration which supports the contract will support such a stipulation as an incidental part of it. The cases all seem to proceed on the theory that no independent consideration is necessary.⁸⁷ The stipulation need not be reciprocal.⁸⁸ Without express statutory authority officers who are authorized by law to make contracts for a state or municipality have power to fix a sum as liquidated damages for their violation.⁸⁹ The sum designated in the contract or subsequently agreed upon becomes, on the happening of the event on which its payment depends, the precise sum to be recovered and the jury are confined to it.⁹⁰ Nor will equity relieve from the payment of it.⁹¹

⁸⁸ *Catterlin v. Voney*, 177 Fed. 527; *District of Columbia v. Harlan*, 30 App. D. C. 270; *Wilson v. Godkin*, 136 Mich. 106; *Blunt v. Egeland*, 104 Minn. 351; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331; *Conreid Met. O. Co. v. Brin*, 66 N. Y. Misc. 282; *Krausse v. Greenfield*, 61 Ore. 502; *Sun P. & P. Ass'n v. Moore*, 183 U. S. 642, 46 L. ed. 366; *Guerin v. Stacy*, 175 Mass. 595; *Holmes v. Holmes*, 12 Barb. 137; *Fasler v. Beard*, 39 Minn. 32.

⁸⁷ *Harris v. Theus*, 149 Ala. 133, 123 Am. St. 17, 10 L.R.A.(N.S.) 204.

It is immaterial that the contract relates to property which is not to be used for commercial purposes—as a vessel of war. *Clydebank E. & S. Co. v. Yzquierdo y Castaneda*, [1905] App. Cas. 6.

⁹¹ *Pogue v. Kaweah P. & W. Co.*, 138 Cal. 664; *Hull v. Angus*, 60 Ore. 95; *Harper v. Tidholm*, 155 Ill. 370; *Ewing v. Litchfield*, 91 Va. 575; *Sanford v. First Nat. Bank*, 94 Iowa 680; *Wood v. Niagara Falls P. Co.*, 121 Fed. 818, 58 C. C. A. 256; *Wibaux v. Grinnell L. S. Co.*, 9 Mont. 154, 162; 2 Story's Eq. § 1318; 3 Lead. Cas. in Eq. 671 *et seq.*; *Westerman v. Means*, 12 Pa.

⁸⁸ *Shubert v. Sonheim*, 138 App. Div. (N. Y.) 800.

⁸⁹ *State T. Co. v. Duluth*, 70 Minn. 257; *Brooks v. Wichita*, 114 Fed. 297, 52 C. C. A. 209; *Little v. Banks*, 86 N. Y. 258; *Parr v. Greenbush*, 42 Hun 232; *Nelson v. Jonesboro*, 57 Ark. 168; *Salem v. Anson*, 40 Ore. 339, 56 L.R.A. 169; *Barber A. P. Co. v. Wabash*, 43 Ind. App. 167. See *Springwells v. Detroit*, etc. R., 140 Mich. 277.

The court may, after sustaining a demurrer to the answer, enter judgment for the stipulated amount. *Bieber v. Gans*, 24 App. D. C. 517, or direct the return of a verdict for it. *Camp v. Pollock*, 45 Neb. 771.

⁹⁰ *Catterlin v. Voney*, 177 Fed. 527; *United States v. United States F. & G. Co.*, 151 Fed. 534; *United States v. Alcorn*, 145 Fed. 995;

97; *Downey v. Beach*, 78 Ill. 53; *Brooks v. Wichita*, 114 Fed. 297, 52 C. C. A. 209; *Sun P. & P. Ass'n v. Moore*, 183 U. S. 642, 46 L. ed. 366; *Young v. Gaut*, 69 Ark. 114.

If further damages accrue after the date of the trial in which the payment of the stipulated damages for daily delay is adjudged, they may be recovered. *De Soysa v. De Pless Pol*, [1912] App. Cas. 194.

As will more fully appear hereafter, there are limitations on the power thus to contract. As a general rule where the injury resulting from the breach of a contract is susceptible of definite measurement, as where the breach consists in the non-payment of money, the parties will not be sustained in the enforcement of stipulations for a further sum, whether in the form of a penalty or liquidated damages; but where the damages sustained are uncertain and are not readily susceptible of being reduced to a certainty by a legal computation they may be determined before a breach occurs.⁹² The validity of an agreement to stipulate what the damages shall be is to be determined by the situation of the parties and their apprehension of the effect of a

Stephenson v. Essex County P. Com., 143 Fed. 844, 75 C. C. A. 60; District of Columbia v. Harlan, 30 App. D. C. 270; Mercantile T. Co. v. Hensey, 27 App. D. C. 210; Howard v. Adkins, 167 Ind. 184; Long v. Furnas, 130 Iowa 504 (specific injury need not be alleged nor proved); Louisville & N. R. Co. v. Mason, 126 Ky. 844; Beveridge v. West Side C. Co., 130 App. Div. (N. Y.) 139; Gann v. Ball, 26 Okla. 26; Yoder v. Strong, 227 Pa. 432; Li-chetti v. Conway, 44 Pa. Super. 71; Anerum v. Camden W., L. & I. Co., 82 S. C. 284, 21 L.R.A.(N.S.) 1029; Donovan v. Hanauer, 32 Utah 317; K. P. Min. Co. v. Jacobson, 30 Utah 115, 4 L.R.A.(N.S.) 755; Crawford v. Heatwole, 110 Va. 358, 34 L.R.A.(N.S.) 587, quoting the text; Schlumpf v. Sasake, 38 Wash. 278; Charleston L. Co. v. Friedman, 64 W. Va. 151; Woodford v. Kelley, 18 S. D. 615; Eilers Music House v. Oriental Co., 69 Wash. 618; Smith v. Newell, 37 Fla. 147; American C. B. & I. Works v. Galland-B. B. & M. Co., 30 Wash. 178; Kelso v. Reid, 145 Pa. 606, 27 Am. St. 716; Welch v. McDonald, 85 Va. 500; Stanley v. Montgomery, 102 Ind. 102; Lowe v. Peers, 4 Burr. 2225;

Beale v. Hayes, 5 Sandf. 640; Tardevean v. Smith, Hardin, 175, 13 Am. Dec. 727. See Bradshaw v. Craycraft, 3 J. J. Marsh. 79; Keeble v. Keeble, 85 Ala. 552; West Coast M.'s Agency v. Oregon C. M. Co., 54 Wash. 247; Selby v. Matson, 137 Iowa 97, 14 L.R.A.(N.S.) 1210.

In Louisiana the sum agreed to be paid by way of liquidated damages is subject to reduction under certain circumstances; when the reduction is permissible and suit is brought for the whole amount, the onus is upon the party claiming the reduction to establish the extent to which it should be made. Goldman v. Goldman, 51 La. Ann. 761.

Under the Ontario Judicature Act of 1895 equity will award actual damages, estimated on a liberal scale, in lieu of the damages stipulated for. Townsend v. Toronto, etc. R. Co., 28 Ont. 195.

A tender of partial performance of the contract does not relieve the party in default from liability for the full amount stipulated. Frost v. Foote (Tex. Civ. App.), 44 S. W. 1071.

⁹² Deming L. Co. v. Baird, 32 Okla. 393; Goldman v. Goldman, 51 La. Ann. 761; Kunkel v. Wherry,

breach of the contract at the time of making it. The fact that it is subsequently ascertained that the damages caused by the breach were capable of ascertainment does not change the legal effect of their stipulation.⁹³ There is an implied condition in every judicial sale that if the purchaser does not pay the price he offered he will pay the difference between that price and the price realized on a subsequent sale duly made after proper notice, and also pay the expense of such sale. This condition has the same effect as if there was a formal contract stipulating the damages for such default.⁹⁴ The payment of stipulated damages will not be enforced if no damage has been sustained though there was a breach of the contract.⁹⁵

§ 280. Damages can be liquidated only by a valid contract.

A valid contract must exist on which damages could be recovered.⁹⁶ If void for not being in writing,⁹⁷ or if impeached for fraud,⁹⁸ or as against public policy⁹⁹ the stipulation for dam-

189 Pa. 198, 69 Am. St. 802; *Tohler v. Austin*, 22 Tex. Civ. App. 99; *Palmer v. Toms*, 96 Wis. 367; *Fasler v. Beard*, 39 Minn. 32; *Sum P. & P. Ass'n v. Moore*, 183 U. S. 642, 46 L. ed. 366; *Brooks v. Wiehita*, *supra*; *Whitfield v. Levy*, 35 N. J. L. 149.

⁹³ *Kimbrow v. Wells*, 112 Ark. 126; *Vaulx v. Buntin*, 127 Tenn. 118, citing the text; *Blackwood v. Liebke*, 87 Ark. 545; *Wilson v. Jonesboro*, 57 Ark. 168; *Dunn v. Morgensthan*, 73 App. Div. (N. Y.) 147.

⁹⁴ *Howison v. Oakley*, 118 Ala. 215, 238.

Subsequent events are immaterial as to the effect of the contract. *Clydebank E. & S. Co. v. Yzquierdo y Castranda*, [1905] App. Cas. 6.

⁹⁵ *The Colombia*, 197 Fed. 661; *Northwest F. Co. v. Kilbourne*, 128 id. 261, 62 C. C. A. 638; *Ward v. Haren*, 183 Mo. App. 569.

⁹⁶ *Bates v. White*, 138 Ill. App. 112.

The ordinary terms of an application for life insurance, stipulating

that insurer should not be liable until it received the first premium, does not constitute the amount of such premium liquidated damages upon its nonpayment. *Royal Victoria L. Ins. Co. v. Richards*, 31 Ont. 483.

⁹⁷ *Newman v. Perrill*, 73 Ind. 153; *Scott v. Bush*, 26 Mich. 418, 12 Am. Rep. 311.

⁹⁸ *Darrow v. Cornell*, 12 App. Div. (N. Y.) 604; *Wambaugh v. Bimer*, 25 Ind. 368. See *Fruin v. Crystal R. Co.*, 89 Mo. 397; *Ahlens v. Harrison*, 131 Iowa 289.

⁹⁹ *Watson v. Watson*, 37 Ind. App. 548; *Edgerton v. Edgerton*, 153 N. C. 167; *Menzies v. Fairburn*, 113 App. Div. (N. Y.) 119; *Dittrich v. Gobey*, 119 Cal. 599; *Cowdrey v. Carpenter*, 1 Robert. 429; *Freeman v. Miller*, 9 Ohio N. P. (N. S.) 26.

A party to an action for the foreclosure of a mortgage of real estate on assigning a junior mortgage of only a part of the premises stipulated with its assignee that the order of sale should direct the prop-

ages will share the fate of the contract. A contract is not void so as to bar the recovery of the sum stipulated as damages for the violation of its condition as to the sale of a good-will because it includes more territory than the statute allows. Though the contract is void as to the excess of such territory the defendant, by breaching it within the territory as to which it was valid, became liable for the entire sum stipulated to be paid.¹ A provision in a contract for liquidating the damages which may result from its breach will not be extended by construction to other provisions or conditions in it than are within its obvious scope and purpose.² Thus, a stipulation as to the damages for delay in the performance of a contract does not govern the contractor's liability for abandoning the work undertaken.³ A doubtful or indefinite clause concerning stipulated damages will not be enforced.⁴

§ 281. Modes of liquidating damages; computation of time. The stipulation for the adjustment of the amount of damages is usually embraced in the contract for the violation of which they are to be paid; but not always so. A deposit may be made with a third person or with the party of money, a note or something else of value to be paid, delivered over or retained on the happening of the breach.⁵ Agreements are of this nature and

erty not covered by the junior mortgage to be first sold for the payment of the mortgage being foreclosed. It was held that, the stipulation being void, the assignee could not recover the liquidated damages specified upon its breach by the making of an order without the designated provision. See *Voorhees v. Reed*, 17 Ill. App. 21.

¹ *Trentman v. Wahrenburg*, 30 Ind. App. 304; *Franz v. Bieler*, 126 Cal. 176; *Price v. Green*, 16 M. & W. 346.

² *Curnam v. Delaware & O. R. Co.*, 138 N. Y. 480; *Hattersly v. Waterville*, 26 Ohio C. C. 227; *Athwood v. Fagan*, — Tex. Civ. App. —, 134 S. W. 765; *Schlumpf v. Sasake*,

38 Wash. 278; *Sprague v. Booth*, 21 Ont. L. R. 637.

³ *Murphy v. United States F. & G. Co.*, 100 App. Div. (N. Y.) 93.

⁴ *Robertson v. Grand Rapids*, 96 Minn. 69.

⁵ *Gleaton v. Fulton B. & C. Mills*, 5 Ga. App. 420; *Moyses v. Schendorf*, 238 Ill. 232; *Detroit v. People's Tel. Co.*, 135 Mich. 696; *Davin v. Syracuse*, 62 N. Y. Misc. 285; *Beveridge v. West Side C. Co.*, 130 App. Div. (N. Y.) 139; *Moore v. Durnam*, 63 N. J. Eq. 96; *Wallis v. Smith*, 21 Ch. Div. 243; *Lea v. Whitaker*, L. R. 8 C. P. 70; *Magee v. Lavell*, 9 id. 107; *Swift v. Powell*, 44 Ga. 123; *Kellogg v. Curtis*, 9 Pick. 634; *Stillwell v. Temple*, 28 Mo. 156; *Reilly v. Jones*, 1 Bing. 302; *Betts*

valid which provide a particular method of proof; as that property covered by insurance, if destroyed by fire, shall be estimated by a particular standard,⁶ or by a designated person.⁷ An agree-

v. Burch, 4 H. & N. 506; Hinton v. Sparkes, L. R. 3 C. P. 160; Leslie v. Macmichal, 2 New South Wales, 250; Sanders v. Carter, 91 Ga. 450; Caesar v. Robinson, 71 App. Div. (N. Y.) 180; Fessman v. Seeley (Tex. Civ. App.), 30 S. W. 268; Donahue v. Parkman, 161 Mass. 412, 42 Am. St. 415.

In *White v. Dingley*, 4 Mass. 433, the plaintiff had given the defendant a license for two years, and covenanted not to sue him within that time, and that if he should sue him he should be wholly discharged from the claim. The creditor brought suit in violation of the covenant, and the debtor was imprisoned upon the writ, whereupon he brought suit upon the covenant for damages. It was held that the action could not be maintained; the forfeiture was a liquidation of the damages. *Upham v. Smith*, 7 Mass. 265.

In an action to recover damages for breaking up a highway the defendant gave the plaintiff a *cognovit* to confess judgment for £200, with a defeasance that no execution should issue if the defendant, within a limited time, should reinstate the road according to certain specifications. The road not being completely reinstated within the time prescribed, the plaintiff sued on execution and levied the £200 and costs. Held, that the £200 was in the nature of a penalty, and not of stipulated damages; and the court referred it to a prothonotary to ascertain what damages the plaintiff had actually sustained, and what sum he was entitled to recover from the defendant for his failure to re-

instate the road. *Charrington v. Laing*, 3 M. & P. 587.

Where the intention of the parties is potential, the circumstance that the sum is deposited with a stakeholder to be paid over, or in the hands of the opposite party, with a stipulation that it is to be forfeited in the event of a breach, is pointed out as stronger evidence of an intention to make it liquidated damages than the words or nature of the contract otherwise would. *Magee v. Lavell*, L. R. 9 C. P. 107; *Betts v. Burch*, 4 H. & N. 506; *Hinton v. Sparkes*, L. R. 3 C. P. 160; *Wallis v. Smith*, 21 Ch. Div. 243.

A contract which provides that if it shall be broken by either of the parties to it the party who commits the breach shall pay such sum as the other party would have received if it had been observed, and that the average yearly receipts shall be the basis on which the sum to be paid shall be determined, does not provide for liquidated damages, but fixes the basis on which the actual damages shall be ascertained. *Tufts v. Atlantic Tel. Co.*, 151 Mass. 269.

⁶ *Ætna Ins. Co. v. Johnson*, 11 Bush 587, 21 Am. Rep. 223; *Commonwealth Ins. Co. v. Sennett*, 37 Pa. 208, 78 Am. Dec. 418; *Lycoming Ins. Co. v. Mitchell*, 48 Pa. 367; *Bodine v. Glading*, 21 id. 50, 59 Am. Dec. 749; *Irving v. Manning*, 6 C. B. 391; *C. H. Brown B. Co. v. Baker*, 99 Mo. App. 660.

⁷ *Faunce v. Burke*, 16 Pa. 479; *Robinson v. Cropsey*, 2 Edw. Ch. 138; *Wells v. Smith*, id. 78; *Barnet*

ment between a broker and a farmer, the former having advanced money to the latter to raise a crop, for the repayment of such money, with interest, and to ship to the broker a certain number of bales of cotton to be sold by him, or, in default, to pay the customary broker's commission on such bales as he failed to ship, is for liquidated damages, it not being shown to be a cover for usury.⁸ Where a part of the work required to be done under a contract which provided for stipulated damages in consequence of delay was sublet and both the contractor and the subcontractor were in default, the clause providing for such damages was binding on the latter, and each was responsible for the proportion of the damages his delay caused.⁹ A condition in a contract extending municipal aid to a railroad company that if it should cease to remain independent for a stated time the money paid should be returned provides for liquidated damages.¹⁰

Where the stipulation was to pay five dollars per day for every car delayed beyond the specified date the court refused to exclude Sunday from the computation. This general rule was laid down: In the computation of rents, interest, damages, or any other amounts in which the day, the week, the month, or any other fixed period of time is the agreed standard of measurement every intervening Sunday, as well as every secular day, must be included and counted in the reckoning.¹¹

§ 282. **Alternative contracts.** These are such as by their terms may be executed by doing either of several acts at the election of the party from whom performance is due. Completion in one of the modes is a performance of the entire contract, and no question of damages arises. Such a contract, therefore, is not one for liquidated damages.¹² Where by the condition of a

v. Passumpsic T. Co., 15 Vt. 757;
City Bank v. Smith, 3 G. & J. 265.

⁸ Blackburn v. Hayes, 59 Ark. 366. See Pogue v. Kaweah P. & W. Co., 138 Cal. 664.

⁹ Chicago B. & I. Co. v. Olson, 80 Minn. 523.

¹⁰ Hamilton County v. Grand Trunk R. Co., 19 Ont. App. 252.

¹¹ Pressed Steel Car Co. v. Eastern R. Co., 121 Fed. 609, 619, 57 C. C. A. 635. Compare Go Fun v. Fidalgo Isl. C. Co., 37 Wash. 238. *Contra*, Davis v. La Crosse H. Ass'n, 121 Wis. 579.

¹² Strickland v. Williams, [1899] 1 Q. B. 382; Salem v. Anson, 40 Ore. 339, 345, 56 L.R.A. 169; Smith

bond the obligor might, by paying \$600 in twelve, or \$400 in six, months, become the owner of a patent right for a specified district or otherwise should account for a certain share of the profits, he had a choice of those alternatives for those periods.¹³ Stipulating the damages and promising to pay them in case of a default in the performance of an otherwise absolute undertaking do not constitute an alternative contract.¹⁴ The promisor is bound to perform his contract, though there is generally a practical option to violate it and take the consequences; but he is not entitled to an election to pay the liquidated damages and thus discharge himself. A contract stipulating that drainage works shall be completed in all respects and cleared of all implements, tackle, impediments, and rubbish on or before a date fixed, and that in default of such completion the contractor shall forfeit and pay 100*l.* and 5*l.* for every seven days during which the works shall be incomplete after the said time as and for liquidated damages, provides for such payment only in a single event, the non-completion of the works.¹⁵ A bond conditioned for the defendant's obedience to a perpetual injunction restraining him from trespassing on the lands of the plaintiff or the walls, gates or fences thereof, or inclosing the same, and from pulling down or removing or otherwise injuring the same, or inciting others to

v. Bergengren, 153 Mass. 236, 10 L.R.A. 768; Beck v. Indianapolis L. & P. Co., 36 Ind. App. 600. Compare Steel v. People's O. & G. Co., 147 Ill. App. 133.

¹³ McNitt v. Clark, 7 Johns. 465; Fisher v. Shaw, 42 Me. 32; Slosson v. Beadle, 7 Johns. 72; Mercer v. Irving, 1 E. B. & E. 563; Reynolds v. Bridge, 6 E. & B. 528; Choice v. Moseley, 1 Bailey, 136, 19 Am. Dec. 661.

¹⁴ Stewart v. Bedell, 79 Pa. 336; People v. Central Pac. R. Co., 76 Cal. 29, 34; Crane v. Peer, 43 N. J. Eq. 553, quoting the text and examining a large number of cases. Compare Hahn v. Concordia Soc., 42 Md. 460. And see *Indianola v. Gulf*, etc. R. Co., 56 Tex. 594.

¹⁵ *Law v. Local Board of Redditch*, [1892] 1 Q. B. Div. 127; *Townsend v. Toronto*, etc. R. Co., 28 Ont. 195.

A physician who goes to a specialist in his profession for treatment and is told that, in the event of a cure, he would require either a certificate of his skill and proficiency as a specialist or \$5,000 in cash, is liable for the latter sum, having refused to give the certificate after assenting to the terms proposed. The court considered the question as depending upon whether the contract provided for a penalty or liquidated damages. *Burgoon v. Johnson*, 194 Pa. 61.

commit any such trespasses, depends upon one condition only—a breach of the injunction—and the sum designated in it was liquidated.¹⁶ A party agreed to pay \$350 for certain real estate, and paid down a small part. On full performance the promisee was to procure for the promisor, as purchaser, a deed from a third person; it was also agreed that if the purchaser should fail to perform the contract or any part of it, he should pay the other party \$25 as liquidated damages and immediately surrender possession. A tender of that sum and of possession was made before suit brought for the remainder of the purchase-money, and it was unsuccessfully contended in behalf of the purchaser that he was entitled by the terms of the contract to relieve himself by those acts from its obligation.¹⁷ On entering the service of a bank the defendant executed a bond in the penal sum of 1,000*l.*, its condition being that it should be void if he discharged his duties in the manner stipulated, and if he should pay the plaintiffs a like sum in case he should at any time within two years after leaving their service accept employment in any other bank within a distance of two miles. This condition was violated. It was held that the obligation could not be satisfied by paying the sum mentioned; there was an agreement implied from the bond that the defendant should not enter the service of a rival bank, which agreement would be enforced by a court of equity.¹⁸ Such courts may enforce performance, or enjoin those acts that would be a violation,¹⁹ but in such cases the equitable is an elective, not a cumulative, remedy. Before

¹⁶ *Strickland v. Williams*, [1899] 1 Q. B. 382.

¹⁷ *Ayres v. Pease*, 12 Wend. 393; *Phoenix Ins. Co. v. Continental Ins. Co.*, 14 Abb. Pr. (N. S.) 266; *Long v. Bowring*, 33 Beav. 585; *Howard v. Hopkyns*, 2 Atk. 371; *Dike v. Greene*, 4 R. I. 285; *Dooley v. Watson*, 1 Gray, 414; *Gray v. Crosby*, 18 Johns. 219; *Sainter v. Ferguson*, 7 C. B. 716; *Hobson v. Trevor*, 2 P. Wms. 191; *Chilliner v. Chilliner*, 2 Ves. Sr. 528; *Ingledeu v. Cripps*,

2 Ld. Raym. 814; *Preble v. Boghurst*, 1 Swanst. 580; *Shoman v. Walter*, 1 Brown Ch. 418; *Lampman v. Cochran*, 16 N. Y. 275; *Ward v. Jewett*, 4 Robert. 714; *Robeson v. Whitesides*, 16 S. & R. 320; *Robinson v. Bakewell*, 25 Pa. 424; *Cartwright v. Gardner*, 5 Cush. 273.

¹⁸ *National Provincial Bank v. Marshall*, 40 Ch. Div. 112.

¹⁹ Cases cited in the two preceding notes.

granting such relief equity will require the plaintiff to forego the legal claim to the stipulated damages.²⁰

§ 283. Liquidated damages contradistinguished from penalty.

The most important and difficult question in respect to a sum stated in connection with a breach of contract is whether it is liquidated damages or penalty. If the latter, it is not an actual debt; it cannot be recovered, but only the real damages, which have to be proved; and the statement of the agreement in the contract is of very little consequence. If the former, it is the precise sum to be recovered on proof of a breach of the undertaking to which it refers, and no evidence of the manner and extent of the real injury is necessary.²¹ Subsequent fluctuations in the value of the property concerning which the stipulation is

²⁰ Howard v. Hopkins, 2 Atk. 371; 1 Story's Eq., §§ 717a, 793f; 3 Par. on Cont. 356, note *q*; Gordon v. Brown, 4 Ired. Eq. 399; Dooley v. Watson, 1 Gray 414; French v. Macale, 2 Drury & W. 269; Long v. Bowring, 33 Beav. 585. See § 298.

²¹ Moore v. Kline, 26 Colo. App. 334; Quigley v. C. S. Brackett Co., 124 Minn. 366; Nakagawa v. Okamoto, 164 Cal. 718, citing the text; Barrett v. Monro, 69 Wash. 229, 40 L.R.A.(N.S.) 763; New Haven v. National S. E. Co., 79 Conn. 482, citing this section; Barber A. P. Co. v. Wabash, 43 Ind. App. 167; Wolcott v. Friek, 40 Ind. App. 236; Selby v. Matson, 137 Iowa 97, 14 L.R.A.(N.S.) 1210; Coen v. Birchard, 124 Iowa 394; Blunt v. Ege-land, 114 Minn. 113; Case T. M. Co. v. Fronk, 105 Minn. 39; Salem v. Anson, 40 Ore. 339, 56 L.R.A. 169; Hennessy v. Metzger, 152 Ill. 505, 43 Am. St. 267; McCann v. Albany, 158 N. Y. 634; O'Keefe v. Dyer, 20 Mont. 477; Kelley v. Seay, 3 Okla. 527; St. Louis, etc. R. Co. v. Shoemaker, 27 Kan. 677; Hathaway v. Lynn, 75 Wis. 186, 6 L.R.A. 551; Spicer v. Hoop, 51 Ind. 365;

Wood v. Niagara Falls P. Co., 121 Fed. 818, 58 C. C. A. 256. See § 279 for other cases.

In some of the cases the qualification is added that the damages must be beyond nominal. That theory probably originated in Hathaway v. Lynn, *supra*. Doubt as to its being sound was expressed in the second edition of this work. Since its publication that doubt has been approved by several courts. The contrary rule was held prior to that time in Kelso v. Reid, 145 Pa. 606, 27 Am. St. 716, and in Spicer v. Hoop, 51 Ind. 365. If the money deposited is to be treated as liquidated damages proof of damage because of the breach of contract need not be made. "The case of Hathaway v. Lynn, 75 Wis. 186, 6 L.R.A. 551, announcing a contrary rule, does not commend itself to our judgment." Sanford v. First Nat. Bank, 94 Iowa 680; Smith v. Newell, 37 Fla. 147. But see McCann v. Albany, 158 N. Y. 634.

The parties may stipulate what the evidence of the nonperformance of the contract shall be. Swift v. Dolle, 39 Ind. App. 653.

made do not affect the rights of the parties.²² The decision of this question is often intrinsically difficult, for judicial opinions, in the numerous cases on the subject, are very inharmonious; they furnish no universal test or guide. But, as was said by Christiancy, J.: "While no one can fail to discover a very great amount of apparent conflict, still it will be found on examination that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case."²³ "The question whether a sum named in a contract to be paid for a failure to perform," said Earl, J., "shall be regarded as stipulated damages or a penalty, has been frequently before the courts and has given them much trouble. The cases cannot all be harmonized, and they furnish conspicuous examples of judicial efforts to make for parties wiser and more prudent contracts than they have made for themselves. Courts of law have, in some cases, assumed the functions of courts of equity, and have relieved parties by forced and unnatural constructions from stipulations highly penal. Where an amount stipulated as liquidated damages would be grossly in excess of the actual damages, they have learned to hold it a penalty. Where the actual damages were uncertain and difficult of ascertainment they have learned to hold the stipulated amount to have been intended as liquidated damages. No form of words has been regarded as controlling. But the fundamental rule, so often announced, is that the construction of these stipulations depends, in each case, upon the intent of the parties as evidenced by the entire agreement construed in the light of the circumstances under which it was made."²⁴

²² *Atwood v. Fagan* (Tex. Civ. App.), 134 S. W. 765.

²³ *Jaquith v. Hudson*, 5 Mich. 123.

²⁴ *Kemp v. Knickerbocker I. Co.*, 69 N. Y. 145; *Cæsar v. Robinson*, 174 N. Y. 492; *Butler v. Wallbaum S. & M. Co.*, 47 Ill. App. 153; *Sanders v. Carter*, 91 Ga. 450; *Allison v. Dunwody*, 100 Ga. 51; *Salem v. Anson*, 40 Ore. 339, 56 L.R.A. 169, citing the text; *Taylor v. Times N.*

Co., 83 Minn. 523; *Lennon v. Smith*, 14 Daly, 520; *Fessman v. Seeley* (Tex. Civ. App.), 30 S. W. 268; *Gougar v. Buffalo Specialty Co.*, 26 Colo. App. 8; *Weber v. Moy*, 183 Ill. App. 200; *Parker-Washington Co. v. City of Chicago*, 185 Ill. App. 237; *Dopp v. Richards*, 43 Utah 332; *Nakagawa v. Okamoto*, 164 Cal. 718, quoting the text; *Berger v. Nants*, 172 Ill. App. 623; *Van Kannel v. Higley*, id. 88; *Strode v. Smith*, 66

The general tendency toward "judicial expansion," which has been a marked characteristic of recent years, has increased the uncertainty involved in this branch of the law. That uncertainty was never absent; but it has become so great that it is practically, if not actually, impossible to formulate a rule which will be recognized in any considerable number of cases. While the judicial tendency to paternalism is marked, there is abundant evidence to warrant the conclusion that business men are much more inclined than formerly to stipulate their liability if there shall be failure to perform their contracts. Why the courts are more than ever disposed to deny the same freedom of contract in this respect that is unhesitatingly recognized in other departments of law and business it is difficult to say. Notwithstanding the deplorable state of the decisions it may be assumed, first, that if, by the terms of the contract, a greater sum is to be paid

Ore. 163; *Orenbaum v. Sowell* (Tex. Civ. App.), 153 S. W. 905; *Hughes v. United States*, 45 Ct. of Cls. 517; *Henderson-B. L. Co. v. Cook*, 149 Ala. 226; *District of Columbia v. Harlan*, 30 App. D. C. 270; *Florence W. Works v. Salmon*, 8 Ga. App. 197, quoting the text; *Mayor v. Ætna Ind. Co.*, 4 Ga. App. 722; *Steel v. People's O. & G. Co.*, 147 Ill. App. 133; *Barber A. P. Co. v. Wabash*, 43 Ind. App. 167; *United S. Co. v. Summers*, 110 Md. 95; *Wheaton B. & L. Co. v. Boston*, 204 Mass. 218; *Womack v. Coleman*, 89 Minn. 17; *Robinson v. Centenary Fund*, 68 N. J. L. 723; *Harris v. Snyder*, 55 N. Y. Misc. 306; *York v. York R. Co.*, 229 Pa. 236; *Yoder v. Strong*, 227 Pa. 432; *Levy v. Goldsoll* (Tex. Civ. App.), 131 S. W. 420; *Clemons v. Grays Harbor, etc. R. Co.*, 63 Wash. 38; *Pye v. British Auto Com. Syndicate*, [1906] 1 K. B. 425; *Cerero v. American S. Co.*, 59 N. Y. Misc. 548.

The question whether the amount

stated in a conditional bond or contract is to be taken as a penalty or a liquidation of damages arising from a breach of the condition is to be determined by the intention of the parties, drawn from the words of the whole contract, examined in the light of its subject-matter and its surroundings; and in this examination will be considered the relation which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach of damages, and such other matters as are legally or necessarily inherent in the transaction. The concurrent declarations of the parties are inadmissible except to show mistake or fraud. *March v. Allabough*, 103 Pa. 335.

A practical construction given a contract containing several stipulations long after all but one of them had been performed, has been given weight. *Berghuis v. Schultz*, 119 Minn. 87.

upon default in the payment of a lesser sum at a given time, the provision for the payment of the greater sum will be held a penalty; second, where, by the terms of a contract, the damages are not difficult of ascertainment according to such terms and the stipulated damages are unconscionable, the latter will be regarded as a penalty; third, within these two rules parties may agree upon any sum as compensation for the breach of a contract.²⁵

It has been often declared judicially that a stipulation in a contract for the payment of a stated sum, in the event of a breach, should be interpreted, like all its other provisions, with a view to carrying into effect the intention of the parties. Referring to this subject Nelson, C. J., said: "A court of law possesses no dispensing power; it cannot inquire whether the parties have acted wisely or rashly in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract, within the prudential rules the law has fixed as to parties, and there has been no fraud, circumvention or illegality, in the case, the court is bound to enforce the agreement."²⁶ Best, C. J., said at *nisi prius*: "The law relative to liquidated damages has always been in a state of great uncertainty. This has been occasioned by judges endeavoring to make better contracts for parties than they have made for themselves. I think that parties to contracts, from knowing exactly their own situations and objects, can better appreciate the consequences of their failing to obtain those objects than either judges or juries. Whether the contract be under seal or not if it states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in the action for the breach of it should be for the stipulated sum. A court of justice has no more authority to put a different construction on the part of the instrument ascertaining the amount of damages than it has to decide contrary to any other of its

²⁵ Blackwood v. Liebke, 87 Ark. 545, quoting the text and saying it is a fair deduction from the authorities; Poppers v. Meagher, 148

Ill. 192; Law v. Local Board of Red-ditch, [1892] 1 Q. B. 127.

²⁶ Dakin v. Williams, 17 Wend. 447.

clauses.”²⁷ Equally emphatic language is to be found in other cases.²⁸

In this connection language employed by the supreme court of the United States in a case²⁹ ruled in 1902 is pertinent as indicating a larger regard for the contractual rights of parties than is manifested in many of the decisions. The contention made was that where actual damages can be assessed from the testimony the court must disregard any stipulation fixing the amount and require proof of the damage sustained.³⁰ The court said: We think the asserted doctrine is wrong in principle, was unknown to the common law, does not prevail in the courts of England at the present time, and it is not sanctioned by the decisions of this court. * * * The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not, *bona fide*, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract. * * * In the case at bar, aside from the agreement of the parties, the damage which might be sustained by a breach of the covenant to surrender the vessel was uncertain, and the unambiguous intent of the parties was to ascertain and fix the amount of such

²⁷ *Crisdee v. Bolton*, 3 C. & P. 240.

²⁸ *Dwinel v. Brown*, 54 Me. 468; *Brewster v. Edgerly*, 13 N. H. 275; *Clement v. Cash*, 21 N. Y. 253; *Yetter v. Hudson*, 57 Tex. 604; *May v. Crawford*, 142 Mo. 390; *Emack v. Campbell*, 14 D. C. App. Cas. 186;

Knox R. B. Co. v. Grafton S. Co., 64 Ohio St. 361.

²⁹ *Sun P. & P. Ass'n v. Moore*, 183 U. S. 642, 46 L. ed. 366.

³⁰ *Chicago H. W. Co. v. United States*, 106 Fed. 385, 389, 45 C. C. A. 343, and *Gay Mfg. Co. v. Camp*, 65 Fed. 794, 68 id. 67, 15 C. C. A. 226, were relied upon.

damage. In effect, however, the effort of the petitioner on the trial was to nullify the stipulation in question by mere proof, not that the parties did not intend to fix the value of the yacht for all purposes, but that it was improvident and unwise for its agent to make such an agreement. Substantially, the petitioner claimed a greater right than it would have had if it had made application to a court of equity for relief, for it tendered in its answer no issue concerning a disproportion between the agreed and actual value, averred no fraud, surprise or mistake, and stated no facts claimed to warrant a reformation of the agreement. * * * The law does not limit an owner of property, in his dealings with private individuals respecting such property, from affixing his own estimate of its value upon a sale thereof, or on being solicited to place the property at hazard by delivering it into the custody of another for employment in a perilous adventure. If the would-be buyer or lessee is of the opinion that the value affixed to the property is exorbitant, he is at liberty to refuse to enter into a contract for its acquisition. But if he does contract and has induced the owner to part with his property on the faith of stipulations as to value, the purchaser or hirer, in the absence of fraud, should not have the aid of a court of equity or of law to reduce the agreed value to a sum which others may deem is the actual value.³¹

Heretofore such views have been given but a limited practical application; and cases abound in which strong language of a different tenor is employed. "They mistake," says Scott, J., "the object and temper of our system of jurisprudence, who, while maintaining that men in making all contracts have a right to stipulate for liquidated damages regardless of the disproportion to the sum resulting from a breach of the contract, insist that it would be hard if men were not permitted to make their own bargains. No system of laws would demand our respect or secure our willing obedience, which did not to some ex-

³¹ The general doctrine of this case has been approved. *United States v. Bethlehem S. Co.*, 205 U. S. 105, 51 L. ed. 731. See *Wood v. Niagara Falls P. Co.*, 121 Fed. 818,

58 C. C. A. 256; *Hull v. Angus*, 60 Ore. 95; *Conried Met. O. Co. v. Brin*, 66 N. Y. Misc. 282; *Fenisot v. Burstein*, 82 N. Y. Misc. 429; *Stoner v. Shultz*, 69 Wash. 687.

tent provide against the mischiefs resulting from improvidence, carelessness, inexperience and undue expectations on one side, and skill, avarice and a gross violation of the principles of honesty and fair dealing on the other. The folly of one making a wild and reckless stipulation will not justify gross oppression in another. A just man, when he sees one in a situation in which he is prepared to make a contract which must grind and oppress him, will not take advantage of his state of mind and enrich himself by his folly and want of experience. It has been remarked that in reason, in conscience, in natural equity, there is no ground to say because a man has stipulated for a penalty in case of his omission to do a particular act—the real object of the parties being the performance of the act—that if he omits to do the act he shall suffer an enormous loss, wholly disproportionate to the injury to the other party.”³²

The trend of judicial thought and action on the subject is well and frankly expressed by Justice Marshall of the Wisconsin court: The law is too well settled to permit any reasonable controversy in regard to it at this time, that where parties stipulate in their contract for damages in the event of a breach of it, using appropriate language to indicate that the damages are agreed upon in advance, and such damages are unreasonable considered as liquidated damages, the stipulated account will be considered to be a mere forfeiture or penalty and the recoverable damages be limited to those actually sustained. While courts adhere to the doctrine that the intention of the parties must govern in regard to whether damages mentioned in their contract are liquidated, they uniformly take such liberties in regard to the matter, based on arbitrary rules of construction, so called, as may be necessary to effect judicial notions of equity between parties, guided of course by precedents that are considered to have the force of law, sometimes calling that a penalty which the parties call stipulated damages, where otherwise an unconscionable advantage would be obtained by one person over another. The judicial power thus exercised cannot properly be

³² *Basye v. Ambrose*, 28 Mo. 39; *Tenn.* 219, 6 Am. St. 832; *Mount Jaquith v. Hudson*, 5 Mich. 123; *Airy M. & G. Co. v. Runkles*, 118 Schrimpf v. Tennessee Mfg. Co., 86 Md. 371.

justified under any ordinary rules of judicial construction. Such rules permit courts to go as far as possible to effect the intent of the parties where it is left obscure by their language so long as such intent can be read out of the contract without violating the rules of language or law. But in determining whether an amount agreed upon as damages was intended as liquidated damages or as a penalty, rules of language are ignored and the express intent of the parties is made to give way to the equity of the particular case, having due regard to precedents.³³

As is remarked in the last paragraph, the intention of parties on this subject, under the artificial rules that have been adopted, is determined by very latitudinarian construction.³⁴ To

³³ *Seeman v. Biemann*, 108 Wis. 365, 373; *Hardie-T. F. & Mach. Co. v. Glen Allen O. Co.*, 84 Miss. 259, citing this section; *Gann v. Ball*, 26 Okla. 26; *Case T. Co. v. Souders*, 48 Ind. App. 503, quoting much of the foregoing extract.

³⁴ In each case we must look to the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and all its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case. *Clements v. Schuykill*, etc. R. Co., 132 Pa. 445.

Where the damages resulting from a breach of the agreement were evidently the subject of calculation and adjustment between the parties and a certain sum was agreed on and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages; but though the intention of the parties seems clear and manifest that a breach shall operate as a complete forfeiture of the entire sum named in the agreement, the court will decline to ren-

der its assistance to enforce the payment of an amount which is grossly excessive, unreasonable and unjust, and will treat the stipulation as in the nature of a penalty and will award only such damages as the injured party may have actually sustained. *Sanders v. Carter*, 91 Ga. 450.

In determining whether an amount named in a contract is to be taken as penalty or liquidated damages, courts are influenced largely by the reasonableness of the transaction and are not restrained by the form of the agreement nor by the terms used by the parties, nor even by their manifest intent. Where the contract has expressly designated the amount named as liquidated damages, courts have held that it was a penalty; and conversely, where the contract has called it a penalty, it has been held to be liquidated damages; and again, where the parties have manifestly supposed and intended that an exorbitant and unconscionable amount should be forfeited, the courts have carried out the intent only so far as it was right and reasonable. *Davis v. United States*, 17

be potential and controlling that a stated sum is liquidated damage, that sum must be fixed as the basis of compensation and

Ct. of Cls. 201, 215. See *Beeman v. Hexter*, 98 Iowa, 378.

The term "estimated damages" is equivalent to "liquidated damages." *Gallo v. McAndrews*, 29 Fed. 715.

The words "shall act as a forfeiture and shall be forfeited" have been construed to provide for liquidated damages. *Eakin v. Scott*, 70 Tex. 442.

"To forfeit" is equivalent to "to pay." *Streep v. Williams*, 48 Pa. 450.

"Forfeiture" is synonymous with "penalty." *Muldoon v. Lynch*, 66 Cal. 536. But it will be presumed, in order to effectuate the intention of the parties, that the word "forfeit" was used in a conversational sense. *Maxwell v. Allen*, 78 Me. 32, 57 Am. Rep. 783; *Lynde v. Thompson*, 2 Allen 456.

A penalty is not necessarily to be understood from the use of the word "forfeit;" the circumstances must be considered. *Claude v. Shepard*, 122 N. Y. 397, 400; *Womack v. Coleman*, 92 Minn. 328 (the language was "shall be absolute forfeiture and indemnity"); *Chatterton v. Crothers*, 9 Ont. 683; *Tinkham v. Satori*, 44 Mo. App. 659. Nor is an instrument using the words "penalty" or "forfeit" to be always construed as providing for a penalty. *Lipscomb v. Seegers*, 19 S. C. 425, 434.

In other cases "penalty" and "forfeit" have been given their usual signification. *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713; *Laurea v. Bernauer*, 33 Hun, 307.

A penalty is implied from the language "and each party is hereby held and fully bound in the sum of \$300 for the faithful fulfillment of

the above contract." *Moore v. Colt*, 127 Pa. 289, 14 Am. St. 845.

A clause in a charter-party by which the parties bind themselves "in the penal sum of estimated amount of freight" is a penalty. *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406. But if the sum is mentioned as a penalty and the instrument uses the words "which sum is hereby named as stipulated damages," the latter expression will control. *Tode v. Gross*, 22 N. Y. St. Rep. 818; *Ward v. Hudson River B. Co.*, 24 N. Y. St. Rep. 347. And so where the language is that the parties "bind themselves in the penal sum" of "as fixed and settled damages to be paid by the failing party." *Parr v. Greenbush*, 43 Hun 232.

The use of the words "liquidated damages" will not control the construction if the court can find in the whole instrument reason to doubt that it was the intention of the parties to so contract. *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713; *Wolf v. Des Moines R. Co.*, 64 Iowa 380; *Ex parte Pollard*, 2 Low 411; *Condon v. Kemper*, 47 Kan. 126, 13 L.R.A. 671. See § 284.

An agreement to pay \$500, besides all damages sustained, provides for a penalty. *Foote & D. Co. v. Malony*, 115 Ga. 985. See *Dwinel v. Brown*, p. 726n.

In *Pierce v. Jung*, 10 Wis. 30, *Paine, J.*, said: "The opinions on this subject are conflicting. On the one hand, they lean towards treating such provisions as in the nature of penalties, and to do so have sometimes disregarded the positive and implicit language of the parties. On the other, they go for up-

substantially limited to it; for just compensation is recognized as the universal measure of damages not punitive. Parties may

holding contracts as made, treating the parties as equally competent to provide for the amount of damages to be paid in case of a failure to perform as to determine any other matter contained in them. The case of *Astley v. Weldon*, 2 Bos. & Pul. 346, and *Kemble v. Farrel*, 6 Bing. 141, are strong illustrations of the first class; and in *Crisdee v. Bolton*, 3 C. & P. 240, the opposite doctrine is very clearly stated. But even the first class of cases concede the power of the parties to liquidate the damages by their agreement in case of a non-performance. And they profess also to go upon the intention of the parties. And perhaps the only real difference between the two is that the former takes greater liberties than the latter with the words of the parties in determining what the intention is. They pay more attention to the whole nature and object of the agreement than to the precise words in determining whether the intent was to create a penalty or provide for liquidated damages."

In *Beale v. Hayes*, 5 Sandf. 640, Duer, J., said: "It is not always, however, that damages are to be construed as liquidated because the parties have declared them to be so. The language of the parties (to the agreement in question) is clear and emphatic that the sum of £3,000 shall be recoverable from the party making default as and for liquidated damages; yet no court of justice, without an entire disregard of prior decisions, can give effect to the apparent intention of the parties by adopting that construction of their agreement which the terms they have used so forcibly suggest.

Suth. Dam. Vol. I.—54.

* * * When consequences so unreasonable would follow, the law presumes that they must have been overlooked by the parties, and therefore mercifully gives to their language an interpretation which excludes them. When it would be plainly unconscionable to exact a large sum for a trivial breach, even a court of law, acting upon a principle of equity, will release the parties from the literal obligation which their language imports."

In *Jaquith v. Hudson*, 5 Mich. 123, Christiancy, J., said: "It is true the courts in nearly all these cases profess to be construing the contract with reference to the intention of the parties, as if for the purpose of ascertaining and giving effect to that intention; yet it is obvious from these cases that wherever it has appeared to the court from the face of the contract and the subject-matter that the sum was clearly too large for just compensation, here, while they will allow any form of words, even those expressing the direct contrary, to indicate the intent to make it a penalty, yet no form of words, no force of language, is competent to the expression of the opposite intent. Here, then, is an intention incapable of expression in words; and as all written contracts must be expressed in words, it would seem to be a mere waste of time and effort to look for such an intention in such a contract. And as the question is between two opposite intents only, and the *negation* of one necessarily implies the *existence* of the *other*, there would seem to be no room left for construction with reference to the intent. It must, then, be mani-

liquidate the amount by previous agreement. But when a stipulated sum is evidently not based on that principle, the inten-

fest that the intention of the parties in such cases is not the governing consideration.

"But some of the cases attempt to justify this mode of construing the contract with reference to the intent, by declaring in substance that though the language is the strongest which could be used to evince the intention in favor of stipulated damages, still, if it appear clearly by reference to the subject-matter that the parties have made the stipulation without reference to the principle of just compensation, and so excessive as to be out of all proportion to the actual damage, the court must hold that they could not have intended it as stipulated damages though they have so expressly declared. See, as an example of this class of cases, *Kemble v. Farren*, 6 Bing. 141.

"Now this, it is true, may lead to the same result in the particular case as to have placed the decision upon the true ground, viz.: that though the parties actually intended the sum to be paid as the damages agreed between them, yet it being clearly unconscionable, the court would disregard the intention and refuse to enforce the stipulation. But, as a rule of construction or interpretation of contracts, it is radically vicious and tends to a confusion of ideas in the construction of contracts generally. It is this, more than anything else, which has produced so much apparent conflict in the decisions upon this whole subject of penalty and stipulated damages. It sets at defiance all rules of interpretation, by denying the intention of the parties to be what they in the most unambiguous terms

have declared it to be, and finds an intention directly opposite to that which is clearly expressed—'*divinatio, non interpretatio est, quæ omnino recedit a litera.*'

"Again, the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that if the intention to make the sum stipulated damages should clearly appear the court would enforce the contract according to that intention. To test this, let it be asked whether in such a case if it were admitted that the parties actually *intended* the sum to be considered as *stipulated damages* and *not* as penalty, would a court of law enforce it for the amount stipulated? Clearly, they could not, without going back to the technical and long-exploded doctrine which gave the whole penalty of the bond, without reference to the damages actually sustained. They would thus be simply changing the *names* of things, and enforcing *under the name of stipulated damages* what in its *own nature* is but a *penalty*.

"The real question in this class of cases will be found to be, not what the parties *intended*, but whether the sum is *in fact in the nature* of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages; it must therefore, we think, be

tion to liquidate will either be found not to exist or will be disregarded and the stated sum treated as a penalty. Contracts

very obvious that the actual intention of the parties in this class of cases and relating to this point is wholly immaterial; and though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is *not* and *cannot be made the real basis of these decisions*. In endeavoring to reconcile these decisions with the actual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say 'that the parties must be considered as not meaning exactly what they say.' *Horner v. Flintoff*, 9 M. & W. 678, per Parke, B. May it not be said, with at least equal propriety, that courts have sometimes *said* what they *did not exactly mean*? The foregoing remarks are all to be confined to that class of cases where it was clear from the sum mentioned and the subject-matter that the principle of compensation had been disregarded."

In *Dwinel v. Brown*, 54 Me. 468, the defendant had bound himself, in the event of a failure to perform each and every condition and stipulation represented in a certain license and agreement for carrying on a lumbering operation upon the plaintiff's land, "in the full and liquidated sum of \$1,000 well and truly to be paid," on demand, "over and above the actual damages" which should be sustained by the nonperformance. *Dickerson, J.*, said: "The question presented for our determination is whether the sum named in the contract to be paid by the defendant on his failure to fulfill its conditions is penalty or

liquidated damages. It is competent for the parties in making a contract to leave the damages arising from a breach of its provisions to be determined in a court of law, or to specify the amount of such damages in the contract itself. If the contract is silent in respect to damages, the law will allow only the actual or proximate damages. In order, however, to provide for consequential damages or secure the profits which are expected to arise from business, or contracts that depend upon the performance of the principal contract, or to save expense, or to render certain what would otherwise be difficult if not impossible to ascertain, it is sometimes desirable that the contract should fix the amount of damages. If, for instance, a party has a contract for building a ship at a large profit, conditioned upon his having her completed at a specified time, it would be competent for him in contracting for the material to make the damages, in case of breach, sufficient to cover his prospective profits in building the ship. While to persons unacquainted with the circumstances the damages stipulated in such a contract might seem greatly disproportionate to the loss sustained by a breach of it, they might, in fact, be insufficient to indemnify the party against the loss he might sustain by being prevented from completing the ship according to his contract. The parties themselves best know what their expectations are in regard to the advantages of their undertaking, and the damages attendant on its failure, and when they have mutually agreed upon the amount of such damages in good

are not made to be broken; and hence, when parties provide for the consequences of a breach, they proceed with less caution

faith and without illegality, it is as much the duty of the court to enforce the agreement as it is the other provisions of the contract. As in construing the other parts of the contract, so in giving construction to the stipulation concerning damages, the intention of the parties governs. The inquiry is, what was the understanding of the parties; and when it is said in judicial parlance that certain language of the parties is held to mean liquidated damages and certain other language a penalty, this is affirmed of the intention of the parties, and not of the construction of the court, in contradistinction from such intention. It is the province of the court to uphold existing contracts, not to make new ones. It is not for the court to sit in judgment upon the wisdom or folly of the parties in making a contract when their intention is clearly expressed, and there is no fraud or illegality. No judges, however eminent, can place themselves in the place or position of the parties when the contract is made, scan the motives and weigh the considerations which influenced them in the transaction so as to determine what would have been best for them to do; who was least sagacious, or who drove the best bargain. Courts of common law cannot, like courts where the civil law prevails, award such damages as they may deem reasonable, but must allow the damages, whether actual or estimated, as agreed upon by the parties. The bargain may be an unfortunate one for the delinquent party, but it is not the duty of courts of common law to relieve parties from the consequences of

their own improvidence, where these contracts are free from fraud and illegality.

"The controversy in the courts, whether the particular language of a contract in regard to damages is to be construed as a penalty or liquidated damages, arises mainly from a desire to relieve parties from what, under a different construction, is assumed to be an imprudent and absurd agreement. When, however, it is considered how little courts know of the modifying circumstances of the case, how far the particular provision was framed with reference to the personal feelings of the parties, what fluctuations in the market were anticipated at the time and what effect the contract in question was expected to have upon other business engagements or negotiations, there is perhaps less cause for departing from the literal construction of the language used than might at first view be supposed. These considerations should at least admonish us that in straining the language of a contract to prevent a seeming disadvantage to one of the parties, we *may* impose upon the other party the very hardships which both intended to protect him against by the terms of their agreement. The interests of the public are quite as likely to be subverted in maintaining the inviolability of contracts as they are in contriving ways and means to make a contract mean what is not apparent upon the face of it to save a party from some conjectural iniquity growing out of his supposed inadvertence or improvidence." The judge stated three rules upon which he said the

than if that event was certain and they were fixing a sum to be paid absolutely. The intention in all such cases is material; but

courts are substantially agreed, and the *third* he stated as follows: "If the instrument provides for the payment of a larger sum in future to pay a less sum, the larger will be regarded as penalty in respect to the excess over the legal interest whatever the language used; and if the contract consist of several stipulations, the damages for the breach of which independently of the sum named in the instrument are uncertain and cannot well be ascertained, the sum agreed upon is to be treated as liquidated damages. *Orr v. Churchill*, 1 H. Bl. 227; *Astley v. Weldon*, 2 B. & P. 346; *Mead v. Wheeler*, 13 N. H. 351; *Atkins v. Kinnier*, 4 Ex. 776. * * *

"In the case at bar the defendant bound himself 'in the full and liquidated sum of \$1,000 over and above the actual damages' in the event of his failure to do and perform each and every condition and stipulation in his contract. Language can scarcely make the intention of the parties to fix the amount of the damages more clear and emphatic. The sum is not only 'liquidated,' but, as if to exclude all possibility of its being a penalty, it is declared to be 'over and above the actual damages.' Whether it was to afford an additional stimulus to secure the fulfillment of the contract, or to provide against all other losses, or compensate for other advantages contingent upon this contract, or from the difficulty of ascertaining the actual damages, or for some other reason, it is manifest that other damages than the legal damages were taken into the account by the parties when they incorporated this provision in their agreement. Be-

sides, the contract contains several distinct conditions and requirements for the fulfillment of which, respectively, no sum is specified; and it is impossible to ascertain such damages from the very nature of these stipulations. What actual damages would result to the plaintiff solely from the defendant's omission to land the logs at a suitable place, or to notify the scaler seasonably, or to mark the logs, or drive them as early as practicable, or to cut clear without waste, or to perform the dozen other stipulations of the contract, is practically beyond the power of a judicial tribunal to ascertain with anything like accuracy. The case clearly comes within the second clause of the third rule of interpretation, that when parties incorporate several distinct stipulations in a contract, the breach of which cannot be respectively measured, they must be taken to have meant that the sum agreed upon was to be liquidated damages and not a penalty. That such was the intention of the parties, moreover, as drawn from the particular language of the contract upon this point, cannot admit of a doubt."

The stipulation in this case is so expressed that it would seem not to have been intended to provide the fixed sum, in lieu of actual damages difficult of proof, but a comminatory sum in addition. The dissenting opinion of Appleton, C. J., is believed to contain a sounder exposition of the contract and the law applicable to it: "In case of a contract damages are the pecuniary satisfaction to which the injured party is entitled by way of compensation for its breach. *Liquidat-*

to prevent a stated sum from being treated as a penalty the intention should be apparent to liquidate damages in the sense of

ed damages are damages agreed upon by the parties, as and for a compensation for and in lieu of the actual damages arising from such breach. They may exceed or fall short of the actual damages—but the sum thus fixed and determined binds the parties to such agreement. When this sum is paid all damages are paid. In the case at bar the sum of \$1,000 was not liquidated damages. It was not for damages at all. The contract so expressly and unqualifiedly states it. It was a sum 'over and above the actual damages.' The plaintiff, by its terms was further entitled to recover the 'actual damage' which he might sustain by 'the non-performance of any agreement hereinafter contained.' Suppose the actual damages were \$5,000, would not the plaintiff be entitled to recover that sum? Most assuredly. The actual damages are therefore excluded from the sum of \$1,000, and yet remain to be assessed. * * * Liquidated damages are fixed, settled and agreed upon in advance, to avoid all litigation as to those actually sustained. They are a compensation for and in lieu of actual damages, never in addition thereto. The language of the agreement leaves no room for any other conclusion than that the sum fixed is a penalty. It is not for damages by the terms of the contract. It is not, therefore, a sum agreed upon in liquidation of damages, but is a penalty and so must be regarded." *Gowen v. Gerrish*, 15 Me. 273; *Gammon v. Howe*, 14 Me. 250.

In *Chamberlain v. Bagley*, 11 N. H. 234, *Upham, J.*, said: "Courts, from a desire to avoid cases of seem-

ing hardship, have in many instances made decisions disregarding the evident intent and design of the parties to contracts; and a variety of reasons have been assigned for this course. * * * We see no reason why contracts of this kind should not be judged of by the rules of construction as other contracts; or why a technical, restricted meaning should be given to particular phrases without reference to other portions of the instrument to learn the design of the parties. The modern decisions upon this subject have turned on the construction of the agreement according to the general intent. In *Reilly v. Jones*, 8 Moore 244, it is said that where it may be fairly collected that the intent of the parties was that the damages stipulated for, as between themselves, were to be considered as liquidated they cannot be treated as a penalty although they might operate as such in a popular sense. * * * The words forfeit or forfeiture, penal sum or penalty, have in some instances been regarded as furnishing a very strong, if not conclusive, indication of the intention of the parties in an instrument of this description; but the weight to be given to such phraseology will depend entirely on its connection with other parts of the instrument. If an individual promises to pay the damage which may be incurred *under* a given penalty, or *under* a forfeiture, the *damage* only in such case is agreed to be paid. On the other hand, the penalty may be expressly agreed to be paid in such terms as to admit of no doubt that such was the intent of the parties; and where such is the case, notwith-

making just compensation; it is not enough that the parties express the intention that the stated sum shall be paid in case of a

standing it may be named as a forfeiture, or the parties are spoken of as bound in a certain sum, if it was clearly the design of the parties that such sum should be paid, it is holden in the more modern decisions as liquidated damages."

In *Brewster v. Edgerly*, 13 N. H. 275, the same doctrine is affirmed. Gilchrist, J., said: "Many of the decisions of the judicial tribunals heretofore have been based upon what is now admitted to be an insecure foundation; for the judgments have often proceeded not upon the plainly expressed intention of the parties in a case free from fraud or illegality, but upon the view which the court entertained of what would have been on the whole just, considering such circumstances as were proved to exist. The dangerous uncertainty of such a mode is manifest when the impossibility of placing any other person in the exact condition of the parties at the time the contract was made is considered. Many motives influence them, many considerations weigh with them which no other person could understand and appreciate unless he could thoroughly identify himself with the parties; and when the contract, reasonably construed, has a plain meaning that one party shall, in a certain contingency, pay the other party a definite sum, thus relieving him from that liability and making the contract mean something which on its face is not apparent, by assuming that we can place ourselves in the position of the parties, and can then know precisely what would have been equitable for them to do, is nothing else than a rescission of their contract, and

a substitution for it of one made by the court. This result the cautious policy of the common law has never recognized as within its powers, nor have the courts ever in terms claimed the right to produce it; still it has sometimes been effected by the anxious desire of the tribunals that the law should not be made the instrument of injustice; forgetting sometimes, perhaps, in this laudable zeal that one of the greatest evils in the administration of justice, and one which brings numberless others in its train, is that feeling of social insecurity which will exist whenever the inviolability of contracts is trenched upon, however pure might have been the motive for so doing." The court seem inclined to think *Kemble v. Farren*, 6 Bing. 141, a case of liquidated damages by reason of the obvious intent of the parties as expressed in the contract. *Mead v. Wheeler*, 13 N. H. 351.

But in *Davis v. Gillett*, 52 N. H. 126, Foster, J., said: "The substance of these principles (laid down by Sedgwick in his treatise on the Measure of Damages) is that the language of the agreement is not conclusive; and that the effort of the tribunal called to put a construction upon it will be to ascertain the true intent of the parties and to effectuate that intent. In order to do this courts will not be absolutely controlled by terms that may seem to be quite definite in their meaning, but will be at liberty to consider and declare a sum mentioned in the bond to be a penalty, even although it may be denominated liquidated damages, and *vice versa*, if manifest justice requires

violation of the contract. A penalty is not converted into liquidated damages by the intention that it shall be paid; it is

that a construction opposite to the expressed language of the instrument should be adopted. In such cases the court do not assume (as they certainly could not) to make a new contract for the parties; but they conclude that the parties have incorrectly and inconsiderately expressed their intention. The court, therefore, ascertain the intention and then give effect to it."

In *Williams v. Dakin* (court of errors), 22 Wend. 201, Walworth, J., said: "There is undoubtedly a class of cases in which courts have been in the habit of considering a certain specified sum as penalty, whatever may be the language of the agreement. Such is the case wherever such specified sum is evidently intended as a mere collateral security for the payment of a different sum which is the real debt; or where it was evidently intended to be in the nature of a mere penalty; and there is another class where from the language of the agreement it was difficult to ascertain what the parties really intended, in which the courts have taken the reasonableness of the provision as liquidated damages into consideration for the purpose of determining whether it was intended as such or only as a comminatory sum."

In *Cotheal v. Talmage*, 9 N. Y. 551, the court recognize it as a general rule that courts in acting upon these stipulations should carry into effect the intent of the parties; but there is an intimation that this rule may be departed from when the party might be made responsible for the whole amount of damages supposed to be stipulated for breach of

an unimportant part of his contract; "and so be made to pay a sum by way of damages grossly disproportionate to the injury sustained."

In *Lampman v. Cochran*, 16 N. Y. 275, 61 Am. Dec. 716, a sum specially named in an agreement as "liquidated damages," in case either party shall fail to perform the contract, was nevertheless held a penalty, because on the face of the instrument it appeared that such sum would necessarily be an inadequate compensation for the breach of some of the provisions, and more than enough for the breach of others. The court say: "The parties to this contract must be regarded as having given a wrong name to the sum of \$500, and that it is in substance a penalty and not liquidated damages."

In *Colwell v. Lawrence*, 38 N. Y. 71, Miller, J., said: "One of the rules of construction established is that the courts are to be governed by the intention of the parties to be gathered from the language of the contract itself and from the nature of the circumstances of the case. And in all the cases the courts have treated it as a question as to the intention of the parties." In that case a contract had been made to build and place in a steamboat two steam-engines of a particular description on or before a day specified for \$8,000, and to have the same ready for steam on or before that day "under a forfeiture of \$100 per day for each and every day after the above date until the same is completed as above." Held, the amount being large and grossly disproportionate to the actual damage,

intrinsically a different thing, and the intention that it shall be paid cannot alter its nature. A bond, literally construed, imports an intention that its penalty shall be paid if there be default in the performance of the condition; and formerly that was the legal effect. Courts of law now, however, administer the same equity to relieve from penalties in other forms of contract as from those in bonds. The evidence of an intention to measure the damage, therefore, is seldom satisfactory when the amount stated varies materially from a just estimate of the

it was not a reasonable inference that it was agreed on as liquidated damages.

In *Clement v. Cash*, 21 N. Y. 253, Wright, J., said: "When the sum fixed is greatly disproportionate to the presumed actual damage, probably a court of equity may relieve; but a court of law has no right to erroneously construe the intention of parties when clearly expressed, in the endeavor to make better contracts for them than they have made for themselves. In these, as in all other cases, the courts are bound to ascertain and carry into effect the true intent of the parties. I am not disposed to deny that a case may arise in which it is doubtful, from the language employed in the instrument, whether the parties meant to agree upon the measure of compensation to the injured party in case of a breach. In such cases there would be room for construction, but certainly none where the meaning of the parties was evident and unmistakable. When they declare, in distinct and unequivocal terms, that they have settled and ascertained the damages to be \$500, or any other sum, to be paid by the party failing to perform, it seems absurd for a court to tell them that it has looked into the contract and reached the conclusion that no such thing was intended, but that the in-

tention was to name a sum as a penalty to cover any damages that might be proved to have been sustained by a breach of the agreement; still, certain rules have crept into the law that are supposed to control the construction of contracts of this character, until in the view of some it has become difficult, if not impossible, to support an agreement for liquidated damages in cases where the amount ascertained by the parties seems disproportionate to the conjectured actual damage." *Rolf v. Peterson*, 2 Brown, P. C. 470.

If the sum would be very enormous and excessive, considered as liquidated damages, it should be taken to be a penalty though agreed to be paid. Lord Eldon, C. J., laments, in *Astley v. Weldon*, 2 B. & P. 346, the adoption of such a principle. *Hoag v. McGinnis*, 22 Wend. 163, per Cowen, J.; *Spencer v. Tilden*, 5 Cow. 144 and note; *Bagley v. Peddie*, 5 Sandf. 192; *Berry v. Wisdom*, 3 Ohio St. 241; *Esmond v. Van Benschoten*, 12 Barb. 366; *Nash v. Hermosilla*, 9 Cal. 585, 70 Am. Dec. 676; *Bright v. Rowland*, 3 How. (Miss.) 398; *Shreve v. Brereton*, 51 Pa. 175; *Streeper v. Williams*, 48 id. 450; *Powell v. Burroughs*, 54 id. 329; *Moore v. Anderson*, 30 Tex. 224; *Chase v. Allen*, 13 Gray 42; *Gowen v. Ger-*

actual loss finally sustained.³⁵ If a contract provides for a penalty for the breach of some of its provisions it must be regarded as so providing if there is a breach of them all; as where the damages resulting from the breach of some of its stipulations are capable of being ascertained. It cannot provide for a penalty as to those and for liquidated damages as to the other

rish, 15 Me. 273; *Leggett v. Mutual L. Ins. Co.*, 53 N. Y. 394; *Dennis v. Cummins*, 3 Johns. Cas. 297; *Hamilton v. Overton*, 6 Blackf. 206, 38 Am. Dec. 136; *Lea v. Whitaker*, L. R. 8 C. P. 70; *Streeter v. Rush*, 25 Cal. 67.

If the sum agreed upon was suggested by the defendant he cannot claim it was unconscionable. *Clydebank E. & S. Co. v. Yzquierdo y Castandra*, [1906] App. Cas. 6.

³⁵ *Graham v. Lebanon*, 240 Pa. 337; *Ward v. Hareen*, 183 Mo. App. 569, quoting the text; *Van Kannel v. Higley*, 172 Ill. App. 88; *Elgin, etc. R. Co. v. Northwestern Nat. Bank*, 165 Ill. App. 35; *Buchanan v. Louisiana P. Exp. Co.*, 245 Mo. 337, quoting the text and saying it is a clear statement of the doctrine; *Stoner v. Shultz*, 69 Wash. 687; *Sherburne v. Hirst*, 121 Fed. 998; *Bethlehem S. Co. v. United States*, 41 Ct. of Cls. 19; *Florence W. Works v. Salmon*, 8 Ga. App. 197; *Case T. M. Co. v. Fronk*, 105 Minn. 39; *Blunt v. Egeland*, 104 Minn. 351; *Boulware v. Crohn*, 122 Mo. App. 571; *Lee v. Carroll N. S. Co.*, 1 Neb. (Unof.) 681; *Kunkel v. Roberts*, 16 Pa. Dist. 179; *Davis v. La Crosse H. Ass'n*, 121 Wis. 579; *Commissioner of P. Works v. Hills*, [1906] App. Cas. 368; *Seofield v. Tompkins*, 95 Ill. 190, 35 Am. Rep. 160; *Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553; *Muldoon v. Lynch*, 66 Cal. 536, quoting the text and pronouncing it a clear statement of the result of the decisions; *Glass-*

cock v. Rosengrant, 55 Ark. 376; *Condon v. Kemper*, 47 Kan. 126, 13 L.R.A. 671, quoting the text; *Doane v. Chicago City R. Co.*, 51 Ill. App. 353; *Iroquois F. Co. v. Wilkin Mfg. Co.*, 181 Ill. 582; *Willson v. Baltimore*, 83 Md. 203, 55 Am. St. 339; *Cochran v. People's R. Co.*, 113 Mo. 359; *Cowart v. Connally* (Tex. Civ. App.), 108 S. W. 913; *Schmieder v. Kingsley*, 6 N. Y. Misc. 107; *Lindsay v. Rockwall County*, 10 Tex. Civ. App. 225; *Haliday v. United States*, 33 Ct. of Cls. 453; *Quinn v. Same*, 99 U. S. 30, 25 L. ed. 269; *Mundy v. Same*, 35 Ct. of Cls. 265; *Cesar v. Rubinson*, 174 N. Y. 292; *Raynor v. Rederiaktiebolaget Condor*, [1895] 2 Q. B. 289; *Radloff v. Haase*, 96 Ill. App. 74; *Denver L. & S. Co. v. Rosenfeld C. Co.*, 19 Colo. 539; *Gillilan v. Rollins*, 41 Neb. 540; *New Britain v. New Britain Tel. Co.*, 74 Conn. 326, 332; *Zimmerman v. Conrad* (Mo. App.), 74 S. W. 139; *Hahn v. Horstman*, 12 Bush. (Ky.) 249.

Occasionally there has been a very wide departure from the rule. In *Eakin v. Scott*, 70 Tex. 445, a stipulation for the forfeit of \$8,000 was enforced though no actual damages was sustained. The doctrine of this case has been limited by *Collier v. Betterton*, 87 Tex. 442. See, as more fully in accord with the cases generally, *Cowart v. Connally* (Tex. Civ. App.), 108 S. W. 973.

clauses, though the consequences of their breach are uncertain.³⁶ What has been said concerning the intention of the parties has no application to bonds given under a statute which declares what their effect shall be.³⁷ The questions which arise under stipulations such as have been considered are foreclosed by the action of the parties where a deposit is made by one of them with or for the benefit of the other. "When a purchaser expressly stipulates that a payment on account, actually made by him, is to be forfeited if by his own fault the purchase shall not go into effect, he may reasonably be understood to mean that it shall not be reclaimed in whole or in part. The distinction between a penalty and liquidated damages does not apply to a case of that description."³⁸

§ 284. **The evidence and effect of intention to liquidate.** A bond is *prima facie* a penal obligation; but the sum stated where a penalty is usually inserted has sometimes been held liquidated damages.³⁹ This has seldom been done, however, unless words were employed in connection with that sum to counter-

³⁶ Stillwell v. Paepeke-L. L. Co., 73 Ark. 432, citing the text; Lansing v. Dodd, 45 N. J. L. 525; Whitfield v. Levy, 39 id. 149; Laurea v. Bernauer, 33 Hun, 307; Case T. Co. v. Souders, 48 Ind. App. 503.

A stipulation providing for the payment of damages for the delay of the original contractor is not binding upon him when the employer exercises the contract right either to have the performance completed by another contractor or to carry it to completion itself. In other words, the contractor stipulates for liability only where he causes the delay. Shields v. Shields C. Co., 81 N. J. Eq. 286.

³⁷ United States v. United States F. & G. Co., 151 Fed. 534. See note to § 284.

³⁸ Kelly v. Thompson, 101 Mass. 299; Donahue v. Parkman, 161 Mass. 412, 42 Am. St. 415.

³⁹ McCullough v. Moore, 111 Ill.

App. 545; Guerin v. Stacy, 175 Mass. 595; Shelton v. Jackson, 20 Tex. Civ. App. 443; De Graff v. Wickham, 89 Iowa, 720; Wilkinson v. Colley, 6 Kulp, 401; Studabaker v. White, 21 Ind. 212; Fisk v. Fowler, 10 Cal. 512; Duffy v. Shockey, 11 Ind. 70, 71 Am. Dec. 348.

It is not to be regarded as a universal rule that contracts in the ordinary form of penal bonds, designed as an indemnity between private persons for the nonperformance of collateral agreements, are to be regarded as a penalty. It cannot correctly be said to be true in all such cases that the intention to treat the sum named in the bond as a penalty to secure the performance of the condition and to be discharged on payment of damages arising from nonperformance can be inferred as a rule of law or a conclusive presumption from the

vail the implication of penalty.⁴⁰ And where the parties in any other form of contract designate the stated sum a penalty or characterize it by other equivalent words, it is an indication that a penalty, in a strict or technical sense, is intended;⁴¹ but the

mere form of the obligation. *Clark v. Barnard*, 108 U. S. 436, 453, 27 L. ed. 780, 786. See n. to § 283.

The weight to be given the words "forfeit," "forfeiture," "paid sum" or "penalty" will depend on their connection with other parts of the instrument in which they are used, the nature of the agreement, the intention of the parties, and other facts and circumstances. *De Graff v. Wickham*, *supra*; *Dobbs v. Turner*.

⁴⁰ *Coker v. Brevard*, 90 Miss. 64; *Small v. Burke*, 92 App. Div. (N. Y.) 338; *Cothcal v. Tahnage*, 9 N. Y. 551, 61 Am. Dec. 716; *Shiell v. McNitt*, 9 Paige 101; *Leary v. Laflin*, 101 Mass. 334; *Smith v. Wedgwood*, 74 Me. 457.

If a bond which stipulates that the obligor shall abide by the determination of arbitrators contains no express agreement that the sum named in it is to be regarded as liquidated damages, and there is no evidence of an intention that it should be so stated, such sum will be regarded as a penalty. *Henry v. Davis*, 123 Mass. 345.

A stipulation for "a penalty as liquidated damages," held to be the latter. *Toomey v. Murphy*, [1897] 2 Irish 601.

⁴¹ *Van Kannel v. Higley*, 172 Ill. App. 88; *Hughes v. United States*, 45 Ct. of Cls. 517; *Bethlehem S. Co. v. Same*, 41 id. 19; *Evans v. Moseley*, 84 Kan. 322; *Buckhout v. Witter*, 157 Mich. 406, 23 L.R.A. (N.S.) 506; *Norman v. Vickery* (Tex. Civ. App.), 128 S. W. 452; *Wilkes v. Bierne*, 68 W. Va. 82, 31 L.R.A.

(N.S.) 937; *Madison v. American S. E. Co.*, 118 Wis. 480; *Iroquois F. Co. v. Wilkin Mfg. Co.*, 181 Ill. 582; *Meyer v. Estes*, 164 Mass. 457, 32 L.R.A. 283; *McCann v. Albany*, 11 App. Div. (N. Y.) 378; *Edgar & T. Works v. United States*, 34 Ct. of Cls. 205; *Bignall v. Gould*, 119 U. S. 495, 30 L. ed. 491; *L. P. & J. A. Smith Co. v. United States*, 34 Ct. of Cls. 472; *Moore v. Colt*, 127 Pa. 289; *Wilkinson v. Colley*, 164 Pa. 35, 26 L.R.A. 114; *Dill v. Lawrence*, 109 Ind. 564; *March v. Allabough*, 103 Pa. 335; *Whitfield v. Levy*, 35 N. J. L. 149; *Yenner v. Hammond*, 36 Wis. 277; *Tayloe v. Sandiford*, 7 Wheat. 13, 5 L. ed. 384; *White v. Arleth*, 1 Bond, 319; *Smith v. Dickenson*, 3 B. & P. 630; *Davies v. Penton*, 6 B. & C. 216; *Harrison v. Wright*, 13 East 343; *Brown v. Belkows*, 4 Pick. 179; *Burr v. Todd*, 41 Pa. 206; *Robinson v. Cathcart*, 2 Cranch C. C. 590; *Bigony v. Tyson*, 75 Pa. 157; *Esmond v. Van Benschoten*, 12 Barb. 366; *Clement v. Cash*, 21 N. Y. 253; *Cheddick v. Marsh*, 21 N. J. L. 463; *Hodges v. King*, 7 Mete. (Mass.) 583; *Salters v. Ralph*, 15 Abb. Pr. 273; *Bearden v. Smith*, 11 Rich. 554; *Heatwole v. Gorrell*, 35 Kan. 692. Compare the last case with *Streeter v. Rush*, 25 Cal. 67; *Moore v. Kline*, 26 Colo. App. 334, where the instrument was termed a "guarantee."

Even if the use of the word "penalty" is not conclusive, very strong evidence is required to authorize a court to say that the parties' own words do not express their intention; the use of that word prevents

inference is not so strong because the obligation is in the form of a bond as may be inferred from the greater number of instances in which a sum called a penalty or forfeiture by the parties in contracts has been held, nevertheless, liquidated damages. The tendency and preference of the law is to regard a stated sum as a penalty because actual damages can then be recovered, and the recovery be limited thereto.⁴² This tendency and preference, however, do not exist where the actual damages cannot be ascertained by any standard. A stipulation to liquidate in such

a court from holding that the parties stipulated the damages. *Smith v. Brown*, 164 Mass. 584; *Kelley v. Seay*, 3 Okla. 527; *Reno v. Culinane*, 4 Okla. 457.

⁴² *Gougar v. Buffalo Specialty Co.*, 26 Colo. App. 8; *Moore v. Kline*, 26 Colo. App. 334; *Wilson v. Agnew*, 25 Colo. App. 109; *Weber v. Moy*, 183 Ill. App. 200; *Poppenburg v. R. M. Owen & Co.*, 84 N. Y. Misc. 126; *Wright v. Bott*, — Tex. Civ. App. —, 163 S. W. 360; *Sherman v. Gray*, 11 Cal. App. 348; *Disosway v. Edwards*, 134 N. C. 254; *Schmid v. Eppers*, 17 Pa. Dist. 1064; *Stidham v. Laurie* (Tex. Civ. App.), 133 S. W. 1082; *Hennesy v. Metzger*, 152 Ill. 505; *Willson v. Baltimore*, 83 Md. 203, 55 Am. St. 339; *Wiliston v. Mathews*, 55 Minn. 422; *Haliday v. United States*, 33 Ct. of Cls. 453; *O'Keefe v. Dyer*, 20 Mont. 471 quoting the text; *Iroquois F. Co. v. Wilkin Mfg. Co.*, 181 Ill. 582; *Monmouth Park Ass'n v. Wallis I. Works*, 55 N. J. L. 132, 19 L.R.A. 456, 39 Am. St. 626; *Fisk v. Gray*, 11 Allen, 132; *Lausing v. Dodd*, 45 N. J. L. 525; *Whitfield v. Levy*, 35 id. 149; *Burrill v. Daggett*, 77 Me. 545; *Smith v. Wedgwood*, 74 id. 458; *Henry v. Davis*, 123 Mass. 345; *Shute v. Taylor*, 5 Mete. (Mass.) 61; *Wallis v. Carpenter*, 13 Allen 19; *Cheddick v. Marsh*, 21 N. J. L. 463; *Baird v. Tolliver*, 6

Humph. 186, 44 Am. Dec. 298; *Spear v. Smith*, 1 Denio 464.

It is provided by sec. 961. R. S. of the U. S., that in all suits brought to recover for forfeiture annexed to any articles of agreement, covenant bond or other specialty, where the forfeiture, breach or nonperformance appears by the default or confession of the defendant or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain it shall, if either of the parties request it, be assessed by a jury. This has, apparently, been considered applicable to a contract expressly providing for stipulated damages in a case where no material damage to the government was shown to have resulted from the breach of the contract. *Chicago H. W. Co. v. United States*, 53 L.R.A. 122, 45 C. C. A. 343, 106 Fed. 385. The doctrine of this case, aside from the statute, has been disapproved. *Sam P. & P. Ass'n v. Moore*, 183 U. S. 642, 660, 46 L. ed. 366, 377.

In *Brofeld v. Schlanger* (N. Y. Misc.), 104 N. Y. Supp. 369, the writing neither used the term liquidated damages nor penalty. It was assumed to have been given as security for the actual damages.

cases is considered favorably.⁴³ If the amount is not so large as to raise a doubt that it is proportionate to the injury, other circumstances being equal, the tendency of the judicial mind is to treat a fixed sum as liquidated damages by whatever name it may be mentioned in the contract.⁴⁴ Another statement of the rule is that if the language of the parties is clear and explicit to the effect that the sum named is to be deemed liquidated damages and the actual damages contemplated when the contract

See *Weinberg v. Greenburg*, 47 N. Y. Misc. 117.

⁴³ *Moyses v. Schendorf*, 238 Ill. 232; *Western G. C. Co. v. Dowagiac G. & F. Co.*, 146 Mich. 119; *Lamson v. Marshall*, 133 Mich. 250; *Atwood v. Fagan* (Tex. Civ. App.) 134 S. W. 765; *Kellam v. Hampton* (Tex. Civ. App.), 124 S. W. 970; *Barthelotte v. Melanson*, 35 New Bruns. 652; *Posner v. Rosenberg*, 149 App. Div. (N. Y.) 272; *Kelly v. Fejervary*, 111 Iowa 693; *Sanders v. Carter*, 91 Ga. 450; *Monmouth Park Ass'n v. Wallis I. Works*, *supra*; *Everett L. Co. v. Maney*, 16 Wash. 552; *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 30 Am. St. 865, 15 L.R.A. 211, quoting the text; *Jaquith v. Hudson*, 5 Mich. 123; *Duffy v. Shoekey*, 11 Ind. 70; *Sparrow v. Paris*, 7 H. & N. 594; *Pierce v. Jung*, 10 Wis. 30; *Cothcal v. Talmage*, 9 N. Y. 551; *Boys v. Ancell*, 5 Bing. N. C. 390; *Richards v. Edick*, 17 Barb. 260; *Noyes v. Phillips*, 60 N. Y. 408; *Harris v. Miller*, 6 Sawyer 319; *Knowlton v. Mackay*, 29 Up. Can. C. P. 601; *Iverson v. Althrop*, 1 Wyo. 71; *Williams v. Vance*, 9 S. C. 344; *Birdsall v. Twenty-third St. Ry. Co.*, 8 Daly 419; *Salem v. Anson*, 40 Ore. 339, 56 L.R.A. 169.

⁴⁴ *Axe v. Tolbert*, 179 Mich. 556; *Chapman v. Propp*, 125 Minn. 447; *Hennessy v. Metzger*, 152 Ill. 505, 43 Am. St. 267; *Gates v. Parnly*, 93 Wis. 294; *Manistee I. Works Co. v. Shores L. Co.*, 92 Wis. 21; *Half*

v. O'Connor, 14 Tex. Civ. App. 191; *Standard B. F. Co. v. Breed*, 163 Mass. 10; *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. 177; *Boyce v. Watson*, 52 Ill. App. 361; *Pastor v. Solomon*, 26 N. Y. Misc. 125; *Railroad v. Cabinet Co.*, 104 Tenn. 568, 78 Am. St. 933, 50 L.R.A. 729; *Jaqua v. Headington*, 114 Ind. 309; *Bird v. St. John's Episcopal Church*, 154 Ind. 138; *Maxwell v. Allen*, 78 Me. 32, 57 Am. Rep. 783; *Holbrook v. Tobey*, 66 Me. 410, 22 Am. Rep. 581; *Lynde v. Thompson*, 2 Allen, 456; *Colby v. Bailey*, 5 Hawaii, 152; *Diestal v. Stevenson*, [1906] 2 K. B. 345 (especially if the stipulation was drawn by a layman); *United States v. Bethlehem S. Co.*, 205 U. S. 105, 51 L. ed. 731, reversing 41 Ct. of Cls. 19; *Westbay v. Terry*, 83 Ark. 144; *Pinkney v. Weaver*, 216 Ill. 185; *Barber A. P. Co. v. Wabash*, 43 Ind. App. 167; *Davidson v. Hughes*, 76 Kan. 247; *Ross v. Loescher*, 152 Mich. 386, 125 Am. St. 418; *Womack v. Coleman*, 89 Minn. 17; *Coonan v. Cape Girardeau*, 149 Mo. App. 609; *Werner v. Finley*, 144 Mo. App. 554; *Yoder v. Strong*, 227 Pa. 432; *Santa Fe St. R. Co. v. Schutz*, 37 Tex. Civ. App. 14; *Erickson v. Green*, 47 Wash. 613. See *Mallory v. Globe-B. C. M. Co.*, 11 Ariz. 296; *Fish v. Robinson*, 14 Ohio C. C. (N.S.) 414; *Vaulx v. Huntin*, 127 Tenn. 118.

was made "are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, on the face of the contract, out of all proportion to the probable loss," effect will be given the contract.⁴⁵ But wherever there is doubt as to the justice of the stipulation if the sum be called a "penalty" in the contract that circumstance is frequently referred to as a reason for holding it to be a penalty on the ground of intention. The purpose in such cases, however, is commonly a deduction from the general effect of the contract, and the word "penalty" is added to to conform a foregone conclusion.⁴⁶ On the other hand, if the general effect of the contract otherwise leads to the conclusion that the stipulated sum should be held to be a penalty the circumstance that the parties have called it "liquidated damages," and said they do not mean it as penalty, and even use very clear language that it is to be actually paid, will not control the interpretation; it will, notwithstanding, be considered a penalty.⁴⁷ Bonds given to secure the erection of public works pursuant

⁴⁵ *Burley T. Soc. v. Gillaspay*, 51 Ind. App. 583; *Northwestern S. B. & Mfg. Co. v. Great Lakes E. Works*, 181 Fed. 38, 104 C. C. A. 52; *D'Olier E. Co. v. United States*, 45 Ct. of Cls. 471; *Cleveland C. & C. Co. v. American C. I. P. Co.*, 168 Ala. 250; *Mondamin Meadows D. Co. v. Brudi*, 163 Ind. 642; *Benner v. Magee*, 34 Ind. App. 176; *Selby v. Matson*, 137 Iowa, 97, 14 L.R.A.(N.S.) 1210 *prima facie* the parties are supposed to intend what they have said); *Morrison v. Richardson*, 194 Mass. 370; *Clydebank E. & S. Co. v. Yzquierdo y Castaneda* [1905] App. Cas. 6; *Marsh v. Phillips* (Tex. Civ. App.), 144 S. W. 1160; *Curtis v. Van Bergh*, 161 N. Y. 47; *Pressed Steel C. Co. v. Eastern R. Co.*, 121 Fed. 609, 57 C. C. A. 635, citing this and the preceding section.

⁴⁶ *Wolcott v. Frick*, 40 Ind. App.

236; *Commissioner of P. Works v. Hills*, [1906] App. Cas. 368; *Allison v. Dunwody*, 100 Ga. 51; *Poppers v. Meagher*, 148 Ill. 192; *Gates v. Parmly*, 93 Wis. 294; *Edgar & T. Works v. United States*, 34 Ct. of Cls. 205; *Willson v. Love*, [1896] 1 Q. B. 626; *Houghton v. Pattee*, 58 N. H. 326; *Mathews v. Sharp*, 99 Pa. 560; *Colwell v. Lawrence*, 38 N. Y. 75.

⁴⁷ *Greenblatt v. McCall & Co.*, 67 Fla. 165; *Sanders v. McKim*, 138 Iowa 122; *Coen v. Birchard*, 124 Iowa 394; *Cesar v. Robinson*, 174 N. Y. 492; *Townsend v. Rumball*, 19 Ont. L. R. 433; *Onld v. Spartanburg R. Co.*, 94 S. C. 184; *Chicago H. W. Co. v. United States*, 53 L.R.A. 122, 45 C. C. A. 343, 106 Fed. 385 (disapproved in *Sun P. & P. Ass'n v. Moore*, 183 U. S. 642, 666, 46 L. ed. 366, 377, as is *Gay Mfg. Co. v. Camp* *infra*); *Radloff v. Haase*, 96 Ill. App. 74; *Gay Mfg.*

to statutes are to be regarded as penal because it cannot be supposed that it was the intention of the legislature to fix the damages in every case for each and every breach of the contracts the bonds were given to secure the performance of, regardless of the resulting injury.⁴⁸ The penalty of a druggist's bond given to assure his observance of the law is not to be considered as liquidated damages.⁴⁹ And so of bonds usually given to secure the performance of statutory duties,⁵⁰ and the bonds required of retail liquor dealers,⁵¹ though a bond given under the liquor tax law of New York to secure on the part of the principal therein the observance of that law and also good behavior in other particulars essential to the orderly and proper conduct of his business, is for stipulated damages, and the liability of the surety thereon is not affected because a judgment has been rendered against the principal for a sum equal to the penalty of the bond.⁵² The rule in Connecticut and Kentucky is to the same effect.⁵³

It is apparent from this consideration of the cases that in determining whether the sum named in a contract is to be taken

Co. v. Camp, 13 C. C. A. 137, 65 Fed. 794; Lowman v. Foley, 14 New Zeal. 699; Wheedon v. American B. & T. Co., 128 N. C. 69; Seeman v. Biemann, 108 Wis. 365; Higbie v. Farr, 28 Minn. 439; Horner v. Flintoff, 9 M. & W. 678; Dennis v. Cummins, 3 Johns. Cas. 297, 2 Am. Dec. 160; Lindsay v. Anesley, 6 Ired. 188; Baird v. Tolliver, 6 Humph. 186, 44 Am. Dec. 298; Yenner v. Hammond, 36 Wis. 277; Lapman v. Cochran, 16 N. Y. 275.

If the parties use the term "liquidated damages" the usual technical meaning will be given it if no reason appears for doing otherwise, and the party objecting to such construction has the burden of showing that something else was really intended. Kelley v. Fejer-vary, 111 Iowa, 693.

⁴⁸ Nevada County v. Hicks, 38 Ark. 557; Pigeon v. United States,

27 Ct. of Cls. 167. But see the last paragraph of this section.

⁴⁹ State v. Estabrook, 29 Kan. 739.

⁵⁰ Clark v. Barnard, 108 U. S. 436, 27 L. ed. 780; United States v. Montell, Taney, 47. See People v. Central Pac. R. Co., 76 Cal. 29.

⁵¹ State v. Larson, 83 Minn. 124, 54 L.R.A. 487. See Jenkins v. Danville, 79 Ill. App. 339.

⁵² Lyman v. Shenandoah S. Club, 39 App. Div. (N. Y.) 459.

⁵³ Quintard v. Corcoran, 50 Conn. 34.

A bond given to secure the observance of the law by a licensee carries liability for the sum stipulated in it. "The question of the amount of damages caused by the violation of the law by the principal does not, and cannot enter into the question. It is not contemplated that the recovery should be for any less sum than that fixed.

as a penalty or liquidated damages courts are influenced largely by the reasonableness of the transaction, and are not restrained by the form of the agreement, nor by the terms used by the parties, nor even by their manifest intent. Where the sum named has been expressly designated as stipulated damages it has been held to be a penalty; and, conversely, where the sum has been denominated a penalty, it has been declared to be stipulated damages. And where the intent of the parties has been manifest it has been disregarded if the sum was an unconscionable one.⁵⁴ The better rule is that declared in a recent case decided by the supreme court of the United States, the doctrine of which puts agreements for the liquidation of damages upon substantially the same footing as other contracts in which fraud, surprise or mistake has not entered.⁵⁵

A condition in an ordinance governing the rights and duties of a water company in its relations to the municipality may be sustained as providing for stipulated damages though it would be considered as providing for a penalty if it was part of a contract between individuals. It was said in a case involving this

It would be totally impracticable, if not impossible, in an action by the city on the bond to arrive at any measure of damages except the amount stipulated." *Paducah v. Jones*, 126 Ky. 809.

⁵⁴ *McCall v. Deuchler*, 174 Fed. 133; 89 C. C. A. 169; *Hicks v. Monarch C. Mfg. Co.*, 176 N. Y. 111; *Crown O. Co. v. Probert*, 28 Ohio C. C. 739; *Diestal v. Stevenson*, [1906] 2 K. B. 345 (the language used is only presumptive of the intent of the parties; all the circumstances will be looked at to ascertain the nature of the transaction); *Davis v. United States*, 17 Ct. of Cls. 201; *L. P. & J. A. Smith Co. v. United States*, 34 id. 472; *Sanford v. First Nat. Bank*, 94 Iowa 683; *De Graff v. Wickham*, 89 Iowa 720; *O'Keefe v. Dyer*, 20 Mont. 477; *Gillilan v. Rollins*, 41 Neb. 540; *Cæsar* *Suth. Dam. Vol. I.—55.*

v. Robinson, 71 App. Div. (N. Y.) 180; *Dobbs v. Turner-Feinsat v. Burstein*, 78 N. Y. Misc. 259. See *Mount Airy M. & G. Co. v. Runkles*, 118 Md. 371.

The intention of the parties is to be ascertained solely from the contract, and its determination is a question of law for the court. *Geiger v. Cawley*, 146 Mich. 550.

"Each case must, to a large extent, be determined in the light of the subject-matter of the contract, the stipulations contained therein, and the particular circumstances surrounding the parties at the time of entering into the contract and during its continuance." *Dopp v. Richards*, 43 Utah 332.

⁵⁵ *Sun P. & P. Co. v. Moore*, 183 U. S. 642, 46 L. ed. 366, stated and quoted from in § 283.

question: In granting the franchise to the water company the city was exercising a public and governmental function. It could impose such conditions and enforceable penalties as it deemed necessary and proper to secure the object sought to be attained. It had the right to provide what rates or rentals the company might charge for water, and when and under what circumstances it should have the right to charge them. The business in which the water company was about to engage was one affected with a public interest, and hence subject to regulation in the exercise of the police power of the state. In accepting the ordinance the water company accepted it with all its terms and conditions. Hence, we do not think the ordinary rules which apply to a contract between private parties with reference to business not affected with a public interest have any application in determining whether this provision is or is not a non-enforceable penalty. Even if it is to be considered as a penalty we think it is enforceable, although the same provision, if contained in a private contract, might be non-enforceable. There is no reason why the city, in exercising a governmental function with reference to a business affected with a public interest, might not incorporate into the very ordinance granting the franchise an enforceable condition or penalty in the nature of a public regulation to insure performance of its public duty on part of the grantee of the franchise.⁵⁶ This view is in accordance with the general rule regardless of the form of the contract between the parties for the prosecution of a public undertaking. The difficulty of ascertaining the damages for the failure to complete the work within the agreed time is ground for holding that it was the intention of the parties to stipulate the sum payable on default.⁵⁷

⁵⁶ *State T. Co. v. Duluth*, 70 Minn. 257; *Springwells v. Detroit, etc. R. Co.*, 140 Mich. 277; *Hattersly v. Waterville*, 4 Ohio C. C. (N. S.) 242; *Whitecomb v. Houston* (Tex. Civ. App.), 130 S. W. 215; *Marshall v. Atkins* (Tex. Civ. App.), 127 S. W. 1148; *Grayson v. Marshall* (Tex. Civ. App.), 145 S.

W. 1034; *Whiting v. New Baltimore*, 127 Mich. 66; *Detroit v. People's Tel. Co.*, 135 Mich. 696. See *Nilson v. Jonesboro*, 57 Ark. 168; *Brooks v. Wichita*, 114 Fed. 297, 52 C. C. A. 209; *Salem v. Anson*, 40 Ore. 339, 56 L.R.A. 169.

⁵⁷ *Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780; *York v. York R.*

§ 285. Stipulated sum where damages otherwise certain or uncertain. There is a marked difference between contracts which relate to subjects within established rules for measuring damages and those for infraction of which the damages are uncertain and difficult to be proved. A stipulated sum in a contract of the former class is generally unnecessary unless to restrict damages below the legal standard or extend them beyond it. The parties have the right to do either; and when the intention is clearly manifested to do so, it will be enforced in cases clear of fraud, oppression or unconscionable extravagance.⁵⁸ But in such cases the disparity between the agreed sum and the actual injury is readily seen, and may be supposed to have been equally apparent to the parties; and courts, proceeding upon the rational theory, which all experience confirms, that large damages for small injury are never willingly stipulated to be actually paid, nor a small and disproportionate compensation accepted for a great injury, are seldom convinced that such unequal contracts are voluntarily entered into to liquidate damages. Of this nature are contracts for the pay-

Co., 229 Pa. 236; *Marshall v. Atkins* (Tex. Civ. App.), 127 S. W. 1148; *Springwell v. Detroit, etc. R. Co.*, 140 Mich. 277; *Turner v. Fremont*, 159 Fed. 221, 95 C. C. A. 455; *Coonan v. Cape Girardeau*, 149 Mo. App. 609. But compare *Willson v. Baltimore*, 83 Md. 202, stated in the text of § 295. See *Lindsey v. Rockwall County*, 10 Tex. Civ. App. 225.

⁵⁸ *Chapman v. Propp*, 125 Minn. 447; *Dopp v. Richards*, 43 Utah 332; *Lincoln v. Little Rock G. Co.*, 56 Ark. 405; *Nielson v. Read*, 15 Phila. 450, 12 Fed. 441; *Gallo v. McAndrews*, 29 Fed. 715; *Lipsecomb v. Seegers*, 19 S. C. 425; *Sun P. & P. Ass'n v. Moore*, 183 U. S. 642.

In *Cutler v. How*, 8 Mass. 257, a party being liable to have his property taken to satisfy an execution, gave an obligation to pay the debt and a certain amount for costs not

incurred, in oats at twenty cents per bushel, when they were worth thirty-seven cents. It was held that the jury might disregard the contract because unconscionable and oppressive as to the sum added for costs; but otherwise valid, because within a specified time the debtor had the option to pay money at the rate of \$1 for five bushels. *Cutler v. Johnson*, 8 Mass. 266; *Baxter v. Wales*, 12 id. 365; *Leland v. Stone*, 10 id. 459; *James v. Morgan*, 1 Levinz, 111; *Earl of Chesterfield v. Jansen*, 1 Wils. 287; *Russell v. Roberts*, 3 E. D. Smith, 318.

In an action brought on a promise of £1,000 if the plaintiff should find the defendant's owl, the court declared, though the promise was proved, the jury might mitigate the damages. *Bac. Abr., Damages, D.* See *Thornborow v. Whitacre*, 2 Ld. Raym. 1164.

ment of money, and all others for the violation of which market values furnish the *data* ordinarily adequate for the ascertainment of due compensation. When such contracts provide for damages, either more or less than those due by the legal standard, they must be drawn with great clearness to express the intention; and in general there should appear on their face or otherwise some ground for departing from that standard, for the leaning of the court in case of doubt will be towards the construction that the provision is a penalty.⁵⁹ On the other hand, where a contract is of such a character that the damages which must result from a breach of it are uncertain in their nature and not susceptible of proof by reference to any pecuniary standard, it is deemed especially fit that the parties should liquidate them, and any stipulation they make ostensibly for that purpose receives favorable consideration.⁶⁰

⁵⁹ *Wilson v. Agnew*, 25 Colo. App. 109; *Union Pac. R. Co. v. Mitchell-C. T. Co.*, 190 Fed. 544, 111 C. C. A. 396; *McCall v. Deuchler*, 174 Fed. 133, 98 C. C. A. 169; *Home L. & C. Co. v. McNamara*, 145 Fed. 17, 76 C. C. A. 47; *Mansur & T. Imp. Co. v. Tissier A. & H. Co.*, 136 Ala. 597; *Stillwell v. Paepeke-L. L. Co.*, 73 Ark. 432; *Sherman v. Gray*, 11 Cal. App. 348; *Florence W. Works v. Salmon*, 8 Ga. App. 866; *Evans v. Moseley*, 84 Kan. 322; *Case T. M. Co. v. Fronk*, 105 Minn. 39; *Cæsar v. Robinson*, 174 N. Y. 492; *Haier v. McDonald*, 21 Okla. 470; *Kellam v. Hampton* (Tex. Civ. App.), 124 S. W. 970; *Muehlbach v. Missouri, etc. R. Co.*, 166 Mo. App. 305; *Williston v. Mathews*, 55 Minn. 422; *State T. Co. v. Duluth*, 70 Minn. 257; *Lowman v. Foley*, 14 New Zeal. 699; *Parlin v. Boatman*, 84 Mo. App. 67; *Seeman v. Bieman*, 108 Wis. 365; *Tilley v. American B. & L. Ass'n*, 52 Fed. 618; *Lansing v. Dodd*, 45 N. J. L. 525; *Tinkham v. Satori*, 44 Mo. App. 659; *Fisk v. Gray*, 11 Allen 132; *Baird v. Tol-*

liver, 6 *Humph.* 186, 44 *Am. Dec.* 298; *Foot v. Sprague*, 13 *Kan.* 155; *Tholen v. Duffy*, 7 *id.* 405; *Kurtz v. Sponable*, 6 *id.* 395; *Wilmington T. Co. v. O'Neil*, 98 *Cal.* 1; *Easton v. Cressey*, 100 *Cal.* 75; *Jack v. Sinsheimer*, 125 *Cal.* 563; *North & South R. S. Co. v. O'Hara*, 73 *Ill. App.* 691; *O'Keefe v. Dyer*, 20 *Mont.* 477; *Squires v. Elwood*, 33 *Neb.* 126; *McIntosh v. Johnson*, 8 *Utah*, 359; *Maudin v. American Sav. & L. Ass'n*, 63 *Minn.* 258; *Radloff v. Haase*, 196 *Ill.* 365, and local cases cited; *Nilson v. Jonesboro*, 57 *Ark.* 168, 175, citing the text; *Johnson v. Cook*, 24 *Wash.* 474, citing the preceding section; *Home L. & C. Co. v. McNamara*, 111 *Fed.* 822, 49 *C. C. A.* 642, applying the *Montana* code and citing the text; *Cæsar v. Robinson*, 174 *N. Y.* 492.

⁶⁰ *Westbay v. Terry*, 83 *Ark.* 144; *Chickasaw R. Co. v. Crigger*, 83 *Ark.* 364; *Howard v. Adkins*, 167 *Ind.* 184; *America v. Burgett*, 36 *Ind. App.* 453; *K. P. Min. Co. v. Jacobson*, 30 *Utah* 115, 4 *L.R.A. (N.S.)* 755; *Clydebank E. & S. Co.*

§ 286. **Contracts for the payment of money.** These are contracts of the highest degree of certainty. Interest is the almost universal measure of damages for mere delay of payment.⁶¹ But some latitude is allowed for modifying the rate by contract. Stipulations as to rate before maturity, not exceeding any statutory limit, are uniformly enforced in cases free from fraud or oppression. There is no reason why a party may not stipulate the rate after maturity as freely and effectually as before except that such stipulations are made with less caution, for they are made only to be operative in case of default, an event not then anticipated to occur. When, therefore, the rate is made very much higher immediately after maturity than that reserved before there is a departure from the standard of compensation fixed by the parties for the period of credit, and it has been held in some cases that such increased rate as damages is in the nature of a penalty;⁶² and in other cases that anything

v. Yzquierdo y Castaneda, [1905] App. Cas. 6; Franceschini v. Chaucer (N. Y. Misc.), 110 N. Y. Supp. 775; Whitson v. Sheffield Farms-S.-D. Co., 76 N. Y. Misc. 180; Strode v. Smith, 66 Ore. 163; Consolidated C. Co. v. Peers, 150 Ill. 344; Hennessy v. Metzger, 152 Ill. 505, 43 Am. St. 267; Heisen v. Westfall, 86 Ill. App. 576; Louisville W. Co. v. Youngstown B. Co., 16 Ky. L. Rep. 350; Woodbury v. Turner, etc. Mfg. Co., 96 Ky. 459; Monmouth Park Ass'n v. Wallis I. Works, 55 N. J. L. 132, 39 Am. St. 626; 19 L.R.A. 456; Goldman v. Goldman, 51 La. Ann. 761; Willson v. Baltimore, 83 Md. 203, 55 Am. St. 339; Mawson v. Leavitt, 16 N. Y. Misc. 289; Nilson v. Jonesboro, 57 Ark. 168, citing the text; Waggoner v. Cox, 40 Ohio St. 539; Berrinkott v. Traphagen, 39 Wis. 219; Wooster v. Kisch, 26 Hun, 61; Jones v. Binford, 74 Me. 439; Geiger v. Western Maryland R. Co., 41 Md. 4; Pennsylvania R. Co. v. Reichert, 58 id. 261, 277; Wolf Creek D. C. Co. v.

Schultz, 71 Pa. 180; Kemble v. Faren, 6 Bing. 141; Sainter v. Ferguson, 7 C. B. 716; Fletcher v. Dyche, 2 T. R. 32; Sparrow v. Paris, 7 H. & N. 594; Mundy v. Culver, 18 Barb. 336; Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713; Dakin v. Williams, 17 Wend. 447; Knapp v. Maltby, 13 Wend. 587; Price v. Green, 16 M. & W. 346; Jaquith v. Hudson, 5 Mich. 123; Cotheal v. Talmage, 9 N. Y. 551; Dennis v. Cummins, 3 Johns. Cas. 297, 2 Am. Dec. 160; Whiting v. New Baltimore, 127 Mich. 66, citing the text; Peach v. Jewish Cong. of Johannesburg, 1 So. African Rep. 345 (1894).

⁶¹ United S. Mach. Co. v. Abbott, 158 Fed. 762, 86 C. C. A. 118; Potomac P. Co. v. Burchell, 109 Va. 676; Colonna D. Co. v. Coleman, 108 Va. 230; Morrill v. Weeks, 70 N. H. 178; Orr v. Churchill, 1 H. Black. 227; Fisk v. Gray, 11 Allen 132; Watkins v. Morgan, 6 C. & P. 661; Hughes v. Fisher, Walk. (Miss.) 516.

⁶² Union Estates Co. v. Adlon

above the legal rate is a penalty, even though parties are by law at liberty to stipulate for any rate of interest proper without restriction.⁶³ But the general current of authority is that any rate which parties may lawfully agree to pay before maturity may be fixed as the rate afterwards, though the debt, before it becomes due, bears no interest or a lower rate.⁶⁴ If, however, a rate is fixed for interest as damages which is above the highest that may be reserved by agreement to be paid during the period of credit it is not usurious, because the debtor can at any time relieve himself by payment.⁶⁵ But such excessive rate will be

Const. Co., 84 Misc. (N. Y.) 599; Manhattan L. Ins. Co. v. Wright, 126 Fed. 82, 61 C. C. A. 138; Waller v. Long, 6 Munf. 71; Upton v. O'Donahue, 32 Neb. 565; Hallam v. Telleren, 55 Neb. 255.

In *Astley v. Weldon*, 2 B. & P. 346, Heath, J., said: "It is a well-known rule in equity that if a mortgage covenant be to pay 5*l* per cent., and if the interest be paid on certain days then to be reduced to 4*l* per cent., the court will not relieve if the early days be suffered to pass without payment; but if the covenant be to pay 4*l*. per cent., and the party do not pay at a certain time it shall be raised to 5*l*. per cent., there the court of chancery will relieve." See *Gully v. Remy*, 1 Blackf. 69; *Herbert v. Salisbury*, etc. R. Co., L. R. 2 Eq. 221; *Aylet v. Dodd*, 2 Atk. 238; *Watts v. Watts*, 11 Mo. 547.

⁶³ *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102; *Talcott v. Marston*, 3 Minn. 339; *Daniels v. Ward*, 4 id. 168; *Robinson v. Kinney*, 2 Kan. 184; *Watkins v. Morgan*, 6 C. & P. 661.

⁶⁴ *Palmer v. Leffler*, 18 Iowa, 125; *Phinney v. Baldwin*, 16 Ill. 108, 61 Am. Dec. 62; *Fisher v. Bidwell*, 27 Conn. 363; *Downey v. Beach*, 78 Ill. 53; *Funk v. Buck*, 91 Ill. 575;

Wernwag v. Mothershead, 3 Blackf. 401; *Latbam v. Darling*, 2 Ill. 203; *Young v. Fluke*, 15 Up. Can. C. P. 360; *Witherow v. Briggs*, 67 Ill. 96; *Davis v. Rider*, 53 Ill. 416; *Brewster v. Wakefield*, 22 How. 118, 16 L. ed. 301; *Wyman v. Cochrane*, 35 Ill. 152; *Gould v. Bishop Hill Colony*, 35 Ill. 334; *Lawrence v. Cowles*, 13 Ill. 577; *Smith v. Whitaker*, 23 Ill. 367; *Young v. Thompson*, 2 Kan. 83; *Dudley v. Reynolds*, 1 Kan. 285; *Wilkinson v. Daniels*, 1 Greene 179; *Taylor v. Meek*, 4 Blackf. 388. See ch. 8.

⁶⁵ *Lawrence v. Cowles*, 13 Ill. 577; *Gould v. Bishop Hill Colony*, 35 Ill. 324; *Davis v. Rider*, 53 Ill. 416; *Witherow v. Briggs*, 67 Ill. 96; *Wildey v. Morrison*, 66 Ill. 532; *Cutler v. How*, 8 Mass. 257; *Call v. Scott*, 4 Call, 402; *Wilson v. Dean*, 10 Iowa 432; *Gower v. Carter*, 3 Iowa 244, 66 Am. Dec. 71; *Moore v. Hylton*, 1 Dev. Eq. 433; *Campbell v. Shields*, 6 Leigh, 517; *Gambril v. Doe*, 8 Blackf. 140, 44 Am. Dec. 760; *Fisher v. Otis*, 3 Pin. 78; *Shuck v. Wight*, 1 G. Greene, 128; *Wight v. Shuck*, Morris, 425; *Fisher v. Anderson*, 25 Iowa 28, 95 Am. Dec. 761; *Jones v. Berryhill*, 25 Iowa 289; *Rogers v. Sample*, 33 Miss. 310, 69 Am. Dec. 349; *Roberts v. Tremayne*, Croke's James 507;

held a penalty if it exceeds any which the law recognizes as compensation.⁶⁶ In Illinois even a rate above that allowed by law to be contracted for before maturity may be fixed as liquidated damages after maturity, if not intended as an evasion of the statute against usury.⁶⁷ No damages for the mere non-payment of money can be so liquidated between the parties as to evade that statute.⁶⁸ An agreement in a note and mortgage to pay an increased rate of interest in case of default in payment of any instalment of interest, insurance premium, taxes or the principal, is in the nature of a penalty, and will not be enforced in a foreclosure suit.⁶⁹

Where there are special circumstances which require punctuality in the payment of moneys when due or which cause special loss, or necessitate a particular outlay in consequence of default, a stipulated forfeiture on that default equity has refused to relieve against, and stipulated compensations therefor have been sanctioned. Thus costs and expenses of making collection, including attorney's fees, are sometimes imposed on the debtor by the terms of the contract and when reasonable in amount have been sustained as valid in some states⁷⁰ but held void as against

Floyer v. Edwards, 1 Cowp. 112; Wells v. Girling, 1 Brod. & Bing. 447; Caton v. Shaw, 2 H. & G. 13; Bac. Abr., title Usury.

⁶⁶ Gower v. Carter, Shuck v. Wight, *supra*; Wilson v. Dean, 10 Iowa 432; Wight v. Shuck, Morris, 425.

⁶⁷ Smith v. Whitaker, 23 Ill. 367; Downey v. Beach, 78 Ill. 53; Funk v. Buck, 91 Ill. 575.

⁶⁸ Orr v. Churchill, 1 H. Black. 227; Gray v. Crosby, 18 Johns. 219.

⁶⁹ Krutz v. Robbins, 12 Wash. 7, 50 Am. St. 871. So of a lump sum in excess of interest due. Hocksprung v. Young, 27 N. D. 322.

⁷⁰ Peyser v. Cole, 11 Ore. 39, 50 Am. Rep. 451; Imler v. Imler, 94 Pa. 372; Darly v. Maitland, 88 id. 384, 32 Am. Rep. 457 (the amount provided as attorney's fee in a mort-

gage is rather in the nature of a penalty than stipulated damages, and may be reduced); Miner v. Paris Exch. Bank, 53 Tex. 559; Parham v. Pulliam, 5 Cold. 497; Smith v. Silvers, 32 Ind. 321; First Nat. Bank v. Larsen, 60 Wis. 206, 50 Am. Rep. 365 (the stipulation is not conclusive as to the amount to be recovered); Robinson v. Loomis, 51 Pa. 78; Huling v. Drexell, 7 Watts, 126; Fitzsimons v. Baum, 44 Pa. 32; McAllister's App. 59 Pa. 204; Tallman v. Truesdell, 3 Wis. 443; Mosher v. Chapin, 12 id. 453; Billingsley v. Dean, 11 Ind. 331; Kuhn v. Meyers, 37 Iowa 351; Nelson v. Everett, 29 id. 184; Williams v. Meeker, id. 292; Wilson S. M. Co. v. Moreno, 6 Sawyer, 35; Bank of British North America v. Ellis, id. 96; Merck v. American Freehold

public policy or as providing for a penalty or forfeiture, in others.⁷¹

§ 287. **Same subject.** Where there is a stipulation in public undertakings that shareholders, on non-payment of calls, shall forfeit their shares, equity, upon grounds of public policy and from the necessity of punctuality in payment in such cases will

L. M. Co., 79 Ga. 213, 233; *Reed v. Miller*, 1 Wash. 426. See § 564.

⁷¹ *State v. Taylor*, 10 Ohio, 368; *Shelton v. Gill*, 11 id. 417; *Witherspoon v. Musselman*, 14 Bush, 214; *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356; *Dow v. Updike*, 11 Neb. 95. See § 564.

In *Foot v. Sprague*, 13 Kan. 155, a stipulation in a mortgage for \$50 as liquidated damages for its foreclosure was held void. *Valentine, J.*, said: "The stipulation in the mortgage in this case * * * is for a certain sum to be paid by the debtor as liquidated damages over and above the debt and interest and all legitimate costs. Now what was the term 'liquidated damages' in this mortgage designed to cover? If it was designed to cover attorney fees, why did not the parties say so in the mortgage? If it was designed to cover any legitimate charge or expense, why did they not say so? * * * If the damages were for usurious interest they could not be allowed. And would it be proper to allow an issue to be framed and a trial had to determine whether these 'liquidated damages' were intended to cover some legitimate charge or expense, or to cover usurious interest?"

In *Johnsons v. Anderson*, 3 N. J. L. 983, the defendant was indebted to the plaintiff in the sum of \$500; and the plaintiff was indebted to two other persons in the sum of \$100, which would come due May 1,

1810. In consequence of plaintiff being in danger of suit and costs for these debts, the defendant promised that he would pay the debt due from him to the plaintiff to enable him to discharge in time these debts, and in case of failure to do so, and the plaintiff should be sued and put to costs and expenses, the defendant would pay them. The defendant failed to pay the money at the time, whereupon the plaintiff was sued in two actions and put to \$80 costs, for recovery of which from the defendant this suit was brought. It was held that the plaintiff was not entitled to recover. The court say, "there is no legal consideration on which the promise can attach. If this was law, usury and oppression would take a wide range. The creditor in most cases suffers an inconvenience in the ease of a want of punctuality in his debtor; he cannot, however, recover more than the debt, interest and costs; nor will a promise to pay more help his case."

A. being indebted to B. and not being able to raise the money himself directed B. to raise it and promised to pay him whatever he had to pay for it. B. raised it at an exorbitant interest for three years; held, that B. was the mere agent of A. in raising the loan and was entitled to recover the whole amount paid by B. for the use of the money. *Shirley v. Spencer*, 9 Ill. 583

refuse to interfere and grant relief from forfeiture.⁷² Sir William Grant, M. R.,⁷³ refused to relieve against a forfeiture under a by-law of an incorporated company which provided that the members receiving notice of default in paying a call should incur a forfeiture by non-payment ten days after, although the non-payment arose from ignorance of the call, absence from the town where the notice was sent and other accidental circumstances. He said: "This bill is founded on forfeiture and upon the ground that the plaintiff did not consider himself as a partner, and offering compensation, and praying to be relieved from the forfeiture. The parties might contract upon any terms they thought fit, and might impose terms as arbitrary as they pleased. It is essential to such transactions. This struck me as not like the case of individuals. If this species of equity is open to parties engaged in those undertakings, they could not be carried on. It is essential that the money should be paid, and that they should know what is their situation. Interest is not an adequate compensation, even among individuals, much less in these undertakings. In particular cases interest might be a compensation, but in a majority of cases it is no compensation from the uncertainty in which they may be left. The effect is the same whether the money has been paid or not. They know the consequence; the party making default is no longer a member; but if a party can, in equity, enter into a discussion of the circumstances each may bring his suit. They must remain a considerable time to see whether a suit will be begun, and before the suit can be decided. They do not know when any member will sue. If a bill is to be permitted there cannot be any certainty that every member who has made default may not file a bill. Can the court impose a limitation of the period when bills may be filed? If the court ever began to deal with these cases the number must be infinite. This is the mode which a party has to withdraw from a losing concern. Why is not this equity open to contracts for the government loans? Why may not they come here to be relieved, when they have failed in making their deposit? And if they could have

⁷² Lead. Cas. in Eq. 917.

⁷³ Sparks v. Liverpool W. Works,
13 Ves. 428.

their relief, how could the government go on? It would be just as difficult for these undertakings to go on. If compensation cannot be effectually made it ought not to be attempted. It would be hazardous to entertain such a bill. Accident here is only the want of precaution." ⁷⁴

A sum greater than interest may be fixed by the parties as compensation for paying a debt at an earlier time or at a different place.⁷⁵ It is obvious that the omission to pay money pursuant to agreement in particular situations, or for specific purposes which would otherwise miscarry, followed by loss or injury of uncertain amount and for which interest would be no adequate compensation, may be the subject of a different measure of reparation by agreement, as it often is without such

⁷⁴ See *Georgia L. & C. Co. v. Flint*, 35 Ga. 226; *Hughes v. Fisher, Walk.* (Miss.) 516; *Fowler v. Word, Harp.* 372.

Equity, says Mr. Cook in vol. 1 of his treatise on Corporations (3d ed.), § 134, will sometimes set aside a forfeiture on purely equitable grounds; as, for example, where a forfeiture was declared for nonpayment of calls, which, it was shown, were not paid because the shareholder had died and no administrator had been appointed before the time for payment had fully elapsed. *Glass v. Hope*, 16 Grant (Up. Can. Ch.) 420. *Cf. Walker v. Ogden*, 1 Biss. 287, 29 Fed. Cas. 41. . . . But it seems that the weight of authority is to the effect that a forfeiture of shares, lawful and regular, for nonpayment of assessments, is one of those forfeitures from which equity will not afford relief except in very exceptional cases. *Sparks v. Liverpool W. Works*, 13 Ves. 428; *Prendergast v. Turner*, 1 Y. & C. 98; *Germantown, etc. R. v. Fitler*, 60 Pa. 124; *Clark v. Barnard*, 108 U. S. 436, 456, 27 L. ed. 780, 787. Equity will not relieve where, on the reorganization of a

company, old stockholders fail to use their options for securing new shares before the expiration of a fixed time limit. *Vatable v. New York, etc. R. Co.*, 96 N. Y. 49, 57. Equity will not relieve from such forfeiture because to do so would, it is said, be in contravention of the direct expression of the legislative will. *Small v. Herkimer Mfg. Co.*, 2 N. Y. 330, 340. Neither can a shareholder have a forfeiture set aside merely because the calls which he refused to pay were for the purpose of paying debts which the company would not have owed but for the previous misappropriation of the corporate funds by the trustees. *Marshall v. Golden Fleece, etc. Co.*, 16 Nev. 156, 179; *Weeks v. Silver Islet, etc. Co.*, 55 N. Y. Sup. Ct. 1; *Taylor v. North Star, etc. Co.*, 79 Cal. 285.

⁷⁵ *United S. Mach. Co. v. Abbott*, 158 Fed. 762, 86 C. C. A. 118; *Plummer v. McKean*, 2 Stew. 423; *Jordan v. Lewis*, id. 426; *Thompson v. Hudson*, L. R. 4 Eng. & Ir. App. 1, rev'g L. R. 2 Eq. 612; *Lord Ashtown v. White*, 11 Irish L. 400. See *United States v. Gurney*, 4 Cranch 333, 2 L. ed. 638.

agreement.⁷⁶ Thus where two persons assumed liability for the payment of a mortgage and agreed that on the default of either to pay the other might do so and hold a lien for half the sum paid, and a "bonus of \$500 for having made such advance," the inconvenience, loss, expense and damage arising from the failure to pay as agreed sustained the sum designated as a bonus as liquidated damages.⁷⁷

A contract between a borrower and a loan association that the gross amount of the stock dues without any rebate or discount for the time they had run might be recovered as liquidated damages in case of default in complying with the terms of the mortgage, is void, because the breach of the mortgage is merely the breach of a contract for the payment of money, the damages for which are easily ascertained.⁷⁸ Where there is a breach of a contract to deliver property in exchange or pay its agreed

⁷⁶ *Jacobs v. Shannon F. Co.*, 13 Ohio C. C. (N. S.) 140; *Woodbridge v. Bropley*, 2 West. L. Monthly, 274; *Hardee v. Howard*, 33 Ga. 533, 83 Am. Dec. 176; *Sutton v. Howard*, 33 Ga. 536. See § 76.

In *Parfitt v. Chambre*, L. R. 15 Eq. 36, an action at law was by consent referred, and the arbitrator awarded and ordered that the defendant should pay to the plaintiff in the action an annuity of £1,200 a year for life, and that in order to secure the annuity the defendant should, within two months, purchase and convey to trustees on behalf of the plaintiff a government annuity of £1,200 a year, and that if for any reason the annuity should not have been legally secured before the last day of the second month from the date of the award, then, in addition to the annuity, a further sum of £100 should become due and payable by the defendant to the plaintiff on the last day of the second month, and a like sum of £100 on the last day of each successive month, until such annuity

should be legally secured; and the award added: "These monthly payments are to be considered as additional to the payments due in respect of the annuity, and as a penalty for delay in the legal settlement of the same." No annuity as directed by the award having been purchased, the plaintiff having been adjudicated a bankrupt, the defendant having died, and the £1,200 a year and £100 a month having been regularly paid to the plaintiff and her assigns up to the defendant's death, but not since, upon claim by the assignees to prove against the defendant's estate for the payment due in respect of the annuity, and of the monthly payments accrued due since his death: Held, that the £100 per month, though called a penalty, was not to be regarded strictly as such, and that the assignees were entitled to prove for the arrears both of the annuity and the £100 a month."

⁷⁷ *Herberger v. Orr*, 62 Wash. 526

⁷⁸ *Maudlin v. American S. & L. Ass'n*, 63 Minn. 358.

value, the obligation becomes one for the payment of money, and no question as between penalty and liquidated damages arises.⁷⁹

The duty of a bank to pay the checks, drafts and orders of a depositor, so long as it has in its possession funds of his sufficient to do so, and which are not incumbered by any earlier lien in its favor, is but a legal obligation to pay money. It is implied from the usual course of business, if it is not express; and it usually is not.⁸⁰ The customer may draw out his funds in such parcels as he may see fit, both as regards number and amount. The rule of law forbidding a creditor to split up his demand does not affect this principle, which is based upon a custom of the banking business.⁸¹ This duty of the bank is of such importance that if it refuses without sufficient justification to pay the check of the customer, he has his action, and may recover substantial damages, though no actual loss or injury be shown, and may recover for such approximate loss or injury as may be proven.⁸²

§ 288. **Large sum to secure payment of a smaller.** Where a large sum, which is not the actual debt, is agreed to be paid in case of a default in the payment of a less sum, which is the real debt, such larger sum is always a penalty.⁸³ This rule has

⁷⁹ *Potomac P. Co. v. Burchell*, 109 Va. 676; *First Nat. Bank v. Lynch*, 6 Tex. Civ. App. 590.

⁸⁰ *Downes v. Phoenix Bank*, 6 Hill, 297; *Marzetti v. Williams*, 1 B. & Ad. 415; *Watson v. Phoenix Bank*, 8 Mete. (Mass.) 217, 41 Am. Dec. 500; *Morse on Banking*, 29.

⁸¹ *Id.*; *Munn v. Burch*, 25 Ill. 35; *Chicago, etc. Ins. Co. v. Stanford*, 28 Ill. 168, 81 Am. Dec. 270.

⁸² *Rollin v. Stewart*, 14 C. B. 595; *Morse on Banking*, 453; § 77.

⁸³ *Cimarron L. Co. v. Barton*, 51 Kan. 554; *Schmieder v. Kingsley*, 6 N. Y. Misc. 107; *Goodyear S. Mach. Co. v. Selz*, 157 Ill. 186; *Kimball v. Doggett*, 62 Ill. App. 528; *Turrell v. Archer*, 1 Mart. Ch. 103; *Pisk v. Gray*, 11 Allen 132; *Walsh*

v. Curtis, 73 Minn. 254; *Kurtz v. Robbins*, 12 Wash. 7, 50 Am. St. 871; *Bradstreet v. Baker*, 14 R. I. 546; *Bryton v. Marston*, 33 Ill. App. 211; *Clements v. Railroad Co.*, 132 Pa. 445; *Astley v. Weldon*, 2 B. & P. 346; *Taul v. Everet*, 4 J. J. Marsh. 10; *Bagley v. Peddie*, 5 Sandf. 192; *Beale v. Hayes*, *id.* 640; *Cairnes v. Knight*, 17 Ohio St. 69; *Morris v. McCoy*, 7 Nev. 399; *Tierman v. Hinman*, 16 Ill. 400; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Haldeman v. Jennings*, 14 Ark. 329; *Mead v. Wheeler*, 13 N. H. 353; *Chamberlain v. Bagley*, 11 *id.* 234; *Kemble v. Farren*, 6 Bing. 141; *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102; *Niver v. Rossman*, 18 Barb. 50; *Kuhn v. Myers*, 37 Iowa

often been loosely stated and its true scope and operation overlooked by following too rigidly the letter. A contract may be framed so as apparently to secure the payment of a less sum by a greater when it is in substance but an alternative or conditional agreement to accept a stipulated part in full satisfaction if paid at a particular time or in a specified manner.⁸⁴ A demise of land was made at a yearly rent of £187, with the usual clauses for distress and entry on non-payment, and an agreement that so long as the lessee performed the covenant the lessor would be content with the yearly rent of £93, payable on the same day as the first reserved rent. It was held that the larger rent was not penal; that ejectment could be maintained on its non-payment.⁸⁵

Such cases must be determined on the true intent of the transaction. If the larger sum is in truth the actual price or debt, and the smaller only agreed upon as a satisfaction if paid under stated conditions, the omission to comply with the terms of payment in the easier mode will preserve to the creditor the right

351; *Davis v. Hendrie*, 1 Mont. 499; *Wallis v. Carpenter*, 13 Allen 19; *Gray v. Crosby*, 18 Johns. 219; *Brockway v. Clark*, 6 Ohio, 45; *Brevar v. Wimberly*, 89 Mo. App. 331; *Morrill v. Weeks*, 70 N. H. 178.

⁸⁴ In *Thompson v. Hudson*, L. R. 2 Eq. 612, a creditor had agreed with his debtor to remit part of his debt upon having a mortgage to secure the payment of the balance in two years, without prejudice to his right to recover the whole debt if such balance was not paid within that time. The debtor executed a mortgage for such balance, containing a proviso that if the mortgage debt be not paid within two years, the whole of the original should be recovered; and it was held that the proviso was of the nature of a penalty from which the mortgagor was entitled to be relieved in equity; that the mortgagee could only recover the smaller sum. But on appeal to the house of lords (L. R. 4

Eng. & Ir. App. 1), this decision was reversed; and it was held if the larger sum is actually due, and the creditor agrees to take a lesser sum, provided that sum is secured in a certain way and paid on a certain day, and that, if these stipulations be not performed, he shall be entitled to recover the whole of the original debt, such remitter to such original debt does not constitute a penalty, and a court of equity will not relieve against it. *Mayne on Dam.* 101, Lord Westbury said that any plain man walking the streets of London would have said that it was in accordance with common sense; and if he were told that it would be requisite to go to three tribunals before getting it accepted, would have held up his hands with astonishment at the state of the law. *Carter v. Corley*, 23 Ala. 612.

⁸⁵ *Lord Ashtown v. White*, 11 Irish L. 400; *McNitt v. Clark*, 7 Johns. 465.

to exact the larger sum.⁸⁶ A case in Wisconsin was correctly decided on this principle. A bond was made in a penalty of \$900, conditioned that if the obligor should pay to the obligee one year after the death of her husband, and annually thereafter during her natural life, the sum of the interest on \$464 at the rate of seven per cent. per annum, the bond should be void, otherwise of force; and it was also provided in the condition that should any default be made in the payment of the said interest or any part thereof on any day wherein the same was made payable by the bond, and the same should remain unpaid and in arrear for thirty days, then and in that case the principal sum of \$464, with arrearages of interest thereon, should, at the option of the obligee, become immediately payable; and that if the payment of said interest were promptly made, then at the obligee's death the debt and the mortgage given to secure the bond should cease and be null. A default occurred in the payment of the annuities of interest; and the obligee gave notice of her option to consider the principal, with the arrears of interest, presently due and payable. The question was what sum was due on the bond which the mortgage in suit was given to secure. A decree had been made adopting the sum of \$464, mentioned in the condition as the principal that became due on its breach, and for that sum, with the delinquent interest, judgment was rendered. The defendant contended that the sum the plaintiff was entitled to recover was not \$464, but only the value of a life annuity of \$32.48 at the time the plaintiff declared her option; at which time she was fifty-two or fifty-three years of age. Such value, computed by the Northampton tables, was then a little less than \$300. Lyon, J., said: "The covenant was voluntarily made by the obligor, and, so far as appears, he received therefor full value for the sum which he agreed to pay at the option of the obligee in case of default. The most that can be said against the justice of it is that the damages would be the same if default were made and the option declared at a much later period in the life of the obligee. But that is a contingency which it may be fairly presumed the obligor took into consideration when

⁸⁶ Waggoner v. Cox, 40 Ohio St. 539, 543, quoting the text.

he made his covenant; and it was always in his power to prevent the happening of such contingency by paying the annuity which he covenanted to pay." The judge added: "It follows that the sum named in the bond is to be regarded as stipulated damages unless the gross value of the life annuity can be ascertained by some exact pecuniary standard." He discusses this question and arrives at the conclusion that the value is uncertain. It may be observed that that method of determining whether the sum mentioned in the condition was penalty or not would be very proper if it be assumed that the annuity was the primary object of the arrangement and that no sum was originally fixed which represented the value of the defendant's undertaking or of the consideration received; and that the gross sum was stipulated as the valuation put by the parties on the annuity; and equally so if the case was that \$464 was a sum arising in the transaction which they agreed might be withheld so long as the interest on it was promptly paid, and with the further benefit that the debt should cease at the creditor's death, otherwise to be paid at once; then the case stands on the principle of *Thompson v. Hudson*,⁸⁷ and the conditional method of discharge not having been strictly followed, the dispensation depending on it failed and the original debt remained unsatisfied and absolute.⁸⁸

⁸⁷ *Thompson v. Hudson*, L. R. 2 Eq. 612, stated *supra*.

⁸⁸ *Berrinkott v. Traphagen*, 39 Wis. 219.

Longworth v. Askren, 15 Ohio St. 370, does not appear to be consistent with these views. An action was brought to foreclose a mortgage made to secure a payment of a note reading: "For value received, I promise to pay N. L., or order, one thousand dollars, with interest yearly till paid, and payable as follows: In two, three, four, five, six, seven, eight, nine and ten years, equal instalments, with interest yearly, as aforesaid, *being the contract price of a lot*. But if each and every payment is made punctually as due, or before due, or within ten days

after each is due, as an inducement to punctuality, two hundred dollars of the amount will be released. And eight hundred dollars and its yearly interest accepted in full payment, but not otherwise." Before the ten years expired, fully \$800 and annual interest on that sum had been paid; but the payments had not been made according to the terms of the contract as to time and amount. The court held that the sum of \$1,000 was penalty, and \$800 the actual debt according to the face of the note. White, J., said: "This case presents the single legal question: whether, upon the true construction of the mortgage note sued on, the one thousand dollars therein mentioned is to be regarded as a pen-

Where a large sum is stipulated to be paid on the non-payment of a less amount made payable by the same instrument,

alty. If that be its character, the judgment of the superior court should be affirmed; otherwise, it should be reversed. This is not the case of an agreement for the composition of a subsisting, independent indebtedness. The instrument in question creates the only debt on which the plaintiff relies for a recovery. Nor can the claim made by the plaintiff's counsel be supported, that the stipulation for the discharge of the obligation by the punctual payment of \$800 in instalments is a privilege given to the payer, and inserted for his exclusive benefit. This claim is based on the assumption that the \$1,000 was the sole consideration for the lot, and consequently is the amount of the actual debt. But it is as fair to presume that the omission of the stipulation in regard to the \$800 would have defeated the sale as that the insertion of the \$1,000 secured it. The transaction was the sale of the lot; and the instrument in question contains the terms upon which it was made. All the stipulations on the part of Ricords are supported by the same identical consideration. It is not to be presumed that the sale would have been concluded had any of the terms actually agreed to been omitted; and, as the terms of the sale were satisfactory to the parties, the presumption is they were acquiesced in, not as a special favor to either, but for the mutual benefit of both. Nor, in our view, does the order in which the sums are stated change their character, or the legal effect of the instrument; for whether the amount to be paid is to be reduced upon com-

pliance with the terms of payment, or to be increased as a default, is only a different mode of expressing the same thing.

"All that the plaintiff, at the time of making the contract, had a right to expect was the payment of \$800, with the interest, in the instalments and at the times stipulated. These payments Ricords had promised to make punctually. A default occurred; and in such a contract, in our opinion, interest is to be regarded as a compensation for the injury caused by the delay. All beyond must be regarded either as penalty or liquidated damages; but under neither form can the plaintiff be allowed to recover more than what the law deems adequate compensation for the breach.

"It is to be noted that the only evidence of the terms of the sale is what appears from the instrument itself. There is nothing to show that the contract for the purchase of the lot, was originally made, in fact, at \$1,000; and that the remission of the contract price to \$800 was the gratuitous act of the vendor. If the abatement stood on this footing, it would devolve on the party seeking its benefit to show that he had complied with the conditions upon which it was offered."

This opinion bases the right of the debtor to discharge the bond by payment of \$800 on its being reserved in the agreement of purchase; it, however, concedes that it was equally a part of the contract of sale that \$1,000 should be paid if all the instalments should not be punctually paid. It would seem to be a reciprocal right to enforce the bond according to its terms;

the former is *prima facie* a penalty. If the question is to be determined by construction of the instrument alone it would be deemed a penalty. May the real transaction be investigated and, upon proper facts, a different interpretation and effect be given to the agreement? No language of the contract can be adopted which will shelter a penalty so that inquiry may not be made into the subject-matter and surroundings to ascertain if it be such. The principle is often declared in terms that permits inquiry to go to the intrinsic nature of the transaction; and a large sum promised as a consequence of the non-payment of a small one will be held a penalty whatever may be the language describing it.⁸⁹ Wright, C. J., said in an Iowa case: "From all, however, we may deduce one point as settled. Whether the sum mentioned shall be considered as a penalty or as liquidated damages is a question of construction, on which the court may be aided by circumstances existing extraneous to the writing. The subject-matter of the contract, the intention of the parties, as well as other facts and circumstances may be inquired into, although the words are to be taken as proved exclusively by the writing."⁹⁰

that there was as ample a consideration for the agreement in either alternative as in the cases of Lord Ashtown v. White, 11 Irish L. 400, and McNitt v. Clark, 7 Johns. 465.

Longworth v. Askren, *supra*, is approved in Goodyear S. Mach. Co. v. Selz, 158 Ill. 186. In the latter case a contract for the monthly rental of certain patented machines, to be computed on the month's manufacture of goods with the machines, stipulated that the rental should be due on the first day of the month next following, and to be paid within one month from that day, and that if the rents due on the first day of any month shall be paid on or before the fifteenth day thereof the lessor will grant a discount of fifty per cent. It was resolved that the sum to be computed, less the

discount, was the actual debt, and that the so-called discount was a penalty.

⁸⁹ Bryton v. Marston, 33 Ill. App. 211; Bagley v. Peddie, 5 Sandf. 192; Niver v. Rossman, 18 Barb. 55; Morris v. McCoy, 7 Nev. 399; Feinsot v. Burstein, 78 N. Y. Misc. 259.

⁹⁰ Foley v. McKeegan, 4 Iowa 1. 66 Am. Dec. 107; Perkins v. Lyman, 11 Mass. 76, 6 Am. Dec. 158; Hodges v. King, 7 Mete. (Mass.) 583; Dennis v. Cummins, 3 Johns. Cas. 297, 2 Am. Dec. 160.

In Morris v. McCoy, 7 Nev. 399, Lewis, C. J., said: "Although, as a general rule, it is acknowledged that the intention of the parties as expressed in the contract should be enforced, still, it is clearly ignored in that class of cases where the parties stipulate for the payment of a large

§ 289. Stipulations where damages certain and easily proved.

On general principles, an agreement to pay a fixed sum as damages for non-performance of a contract, where the loss or injury might without it be easily determined by proof of market values, or by a precise pecuniary standard, is subject to nearly the same criticism as a contract to liquidate damages for non-payment of money. There are no peculiar reasons why a stipulated sum should be treated as a penalty for exceeding just compensation for a default in the payment of money, and not be so treated in case of a different agreement where the excess is capable of being made equally manifest.⁹¹ In money contracts any rate of interest not prohibited by statute may be contracted to be paid as interest proper, that is, during the period of credit; so any sum may be contracted to be paid for property or services in a contract of purchase or hiring. But when parties contract for the same thing in advance as damages for a considerable

sum of money as damages for the non-payment of a smaller sum at a given day. In such cases, it is said, no matter what may be the language of the parties, the large sum will be deemed a penalty, and not liquidated damages." But upon an exception to the exclusion of parol testimony to affect the question where the agreement was apparently of this nature, and such extrinsic evidence was offered to rebut the inference that the larger sum was a penalty, the learned judge said "that was not admissible, because there was no ambiguity; and it must be supposed that the agreement was fully embodied in the written instrument. 1 Greenlf. Ev., § 275."

⁹¹ Fisher v. Bidwell, 27 Conn. 363.

Section 1670 of the Civil Code of California provides that "every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided" in sec.

1671, which says: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." It has been ruled under these provisions that a stipulation by a building contractor to pay the owner a specified sum for each day's delay in completing the building is not of itself sufficient to authorize a recovery. Patent B. Co. v. Moore, 75 Cal. 205; Long Beach City School Dist. v. Dodge, 135 Cal. 401.

There is no difficulty in fixing the actual damage which one sustains by being deprived of the use of land to which he is entitled. Eva v. McMahon, 77 Cal. 467. Nor in ascertaining the damage resulting from the breach of a warranty of the fitness of a harvesting machine. Greenleaf v. Stockton Combined H. & A. Works, 78 Cal. 606.

excess above the customary rate of interest, or the market value of property or other thing, the agreement will raise the inquiry whether such excessive sum was intended to be paid, or whether, even if it was, it is not a penalty. It would be such, according to the preponderance of authority, if not intended to be paid in case of default and if not fixed on the basis of compensation.⁹² In such cases courts generally arrive at harmonious conclusions by diverse modes of reasoning. One will say the sum fixed is so flagrantly excessive it was evidently not the intention of the parties that it should be paid or enforced, and therefore it is a penalty. Another will say the excess, *per se*, makes the stated sum a penalty, and the intention of the parties is simply immaterial. It generally occurs that where there is an agreement to pay a gross sum in the event of the non-performance of a contract, and the case is such that a jury can ascertain with reasonable certainty how much damages the injured party has actually sustained by the non-performance, courts are strongly inclined to regard the gross sum as a penalty, and not as liquidated damages.⁹³ If the intention, however, is

⁹² See *Sun P. & P. Ass'n v. Moore*, 183 U. S. 642, 46 L. ed. 366.

⁹³ *Carson v. Arvantes*, 10 Colo. App. 382; *Smith v. Newell*, 37 Fla. 147; *Simon v. Lanius*, 9 Ky. L. Rep. 59; *Hill v. Wertheimer-S. S. Co.*, 150 Mo. 483; *Connelly v. Priest*, 72 Mo. App. 673; *Knox R. B. Co. v. Grafton S. Co.*, 16 Ohio C. C. 21, 64 Ohio St. 361; *Seim v. Krause*, 13 S. D. 530; *Schroeder v. California Yukon T. Co.*, 95 Fed. 296; *Wilmington T. Co. v. O'Neil*, 98 Cal. 1; *Willson v. Baltimore*, 83 Md. 203, 55 Am. St. 339; *Chaude v. Shepard*, 122 N. Y. 397; *March v. Allabough*, 103 Pa. 335; *Brennan v. Clark*, 29 Neb. 385; *Lansing v. Dodd*, 45 N. J. L. 525; *Bradstreet v. Baker*, 14 R. I. 546; *Davis v. United States*, 17 Ct. of Cls. 201; *Spear v. Smith*, 1 Denio 464; *Dennis v. Cummins*, 3 Johns. Cas. 297, 2 Am. Dec. 160; *Streeter v. Rush*,

25 Cal. 67; *Bright v. Rowland*, 3 How. (Miss.) 398; *Scotfield v. Tompkins*, 95 Ill. 190, 35 Am. Rep. 160; *In re Newman*, 4 Ch. Div. 724; *Mansur & T. I. Co. v. Tissier A. & H. Co.*, 136 Ala. 597; *Feinsot v. Burstein*, 161 App. Div. (N. Y.) 651; *Benfield v. Croson*, 90 Kan. 661; *Golden v. McKim*, — Nev. —, 141 Pac. 676; *Yuen Suey v. Fleshman*, 65 Ore. 606; *Dilley v. Thomas*, 106 Ark. 274; *Nichols & S. Co. v. Beyrer*, 168 Mo. App. 686; *Baerenklau v. Peerless R. Co.*, 80 N. J. Eq. 26; *Dryer v. Kistler*, 118 Minn. 112; *Kay Gee A. Co. v. Cave*, 177 Ill. App. 250; *Brook v. Royal L. Co.*, 17 Manitoba, 351; *Johnson v. Southwestern S. Ins. Co.*, 206 Fed. 486; *Biesear v. Pratt*, 4 Cal. App. 288; *Lytle v. Scottish Am. M. Co.*, 122 Ga. 458; *Westfal v. Albert*, 212 Ill. 68; *Walker v. Bement*, 50 Ind. App. 645; *Haffke v. Coffin*, 89 Neb. 134;

clear to liquidate damages, and the amount is either not greatly above or below the sum which would otherwise be recoverable; or, if above, was fixed specially to cover contemplated consequential losses, not provable under legal rules, and is not an unreasonable provision therefor, the sum fixed may be sustained as liquidated damages.⁹⁴ But if the intention be doubtful, or the amount materially varies from a just estimate of compensation, the stated sum will be considered a penalty.⁹⁵ The

Mosler S. Co. v. Maiden Lane S. D. Co., 199 N. Y. 479, 37 L.R.A.(N.S.) 363, 138 App. Div. (N. Y.) 905; *Stony Creek L. Co. v. Fields*, 102 Va. 1; *McDaniels v. Gowey*, 30 Wash. 412. Compare *Diestal v. Stevenson*, [1906] 2 K. B. 345, in which the word "penalty" was used and the actual damages were easy of ascertainment; notwithstanding, the stipulation was binding.

In *Spencer v. Tilden*, 5 Cow. 144, the defendant had agreed in writing not under seal, for value received, to pay \$360, or twelve cows and calves, to be paid or delivered at a place mentioned, in four years. It was held that the value of the consideration, and of the cows and calves, might be inquired into to see whether the sum expressed was intended by the parties as penalty or liquidated damages; and it appearing that that sum was much beyond the value of either, it was considered in the nature of a penalty, and the plaintiff's recovery was confined to the value of the cows and calves. See note at end of the case.

⁹⁴ *Phœnix I. Co. v. United States*, 39 Ct. of Cls. 526, quoting the text; *Madler v. Silverstone*, 55 Wash. 159, 34 L.R.A.(N.S.) 1 (exchange of realty); *Witherspoon v. Duncan* (Tex. Civ. App.), 131 S. W. 660; *May v. Crawford*, 150 Mo. 504; *Henderson v. Murphree*, 109 Ala. 556; *Burke v. Dunn*, 55 Ill. App. 25; *Bird*

v. St. John's Episcopal Church, 154 Ind. 138; *Jaqua v. Headington*, 114 Ind. 309; *Nielson v. Read*, 12 Fed. 441; *Gallo v. McAndrews*, 29 id. 715; *Books v. Wichita*, 114 id. 297, 52 C. C. A. 209; *Hodges v. King*, 7 Mete. (Mass.) 583; *Manice v. Brady*, 15 Abb. Pr. 173; *Durst v. Swift*, 11 Tex. 273; *Walker v. Engler*, 30 Mo. 130; *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Easton v. Pennsylvania & O. C. Co.*, 13 Ohio 80; *Tardeveau v. Smith*, *Hardin*, 175, 3 Am. Dec. 727; *Bradshaw v. Crayercraft*, 3 J. J. Marsh. 79; *Hodges*, Ex parte, 24 Ark. 197; *Talcott v. Marston*, 3 Minn. 339; *Shreve v. Brereton*, 51 Pa. 175; *Kuapp v. Maltby*, 13 Wend. 587; *Powell v. Burroughs*, 54 Pa. 329; *Johnston v. Cowan*, 59 id. 275; *Keeble v. Keeble*, 85 Ala. 552; *Salem v. Anson*, 40 Ore. 339, 56 L.R.A. 169; *Nilson v. Jonesboro*, 57 Ark. 168; *Indianola v. Gulf, etc. R. Co.*, 59 Tex. 594.

⁹⁵ *Buchanan v. Louisiana P. Exp. Co.*, 245 Mo. 337; *Chicago H. W. Co. v. United States*, 53 L.R.A. 122, 45 C. C. A. 343, 106 Fed. Rep. 385 (disapproved in *Sun P. & P. Ass'n v. Moore*, *supra*); *Dennis v. Cummins*, 3 Johns. Cas. 297, 2 Am. Dec. 160; *Lindsay v. Anesley*, 6 Ired. 188; *Mills v. Fox*, 4 E. D. Smith, 220; *Esmond v. Van Benschoten*, 12

reasonableness of the sum named is to be ascertained from the contract; the continuance of delay in its performance is immaterial.⁹⁶

§ 290. Stipulation when damages uncertain. If a contract does not afford any *data* from which actual damages can be calculated this circumstance affords a reason for regarding the sum designated in it as liquidated damages.⁹⁷ This test would include among those deemed uncertain all contracts which require any intrinsic evidence to ascertain the extent of the actual injury. Expressions may be found in some cases favoring this criterion of uncertain damages.⁹⁸ But where the damages cannot be calculated by market values nor by any precise pecuniary standard, or where, from the peculiar circumstances which the contract contemplates, there must be other uncertainty affecting

Barb. 366; Baird v. Tolliver, 6 Humph. 186, 44 Am. Dec. 298.

The Alabama court looks with more favor upon contracts to stipulate damages than do most courts. It does not apply an exceptional rule of construction to them, nor protect one of the parties from the consequences of his error of judgment or improvidence at the expense of the other who may be, and in the case of any other contract would be, entitled to the rights given him under it. "Whether the sum agreed to be paid is out of proportion to the actual damages, which will probably be sustained by a breach, is a fact into which the court will not enter on inquiry if the intent is otherwise made clear that liquidated damages, and not a penalty, is in contemplation." Keeble v. Keeble, 85 Ala. 552, quoted with approval in Henderson v. Murphree, 109 Ala. 556. This is in harmony with Sun P. & P. Ass'n v. Moore, 183 U. S. 642, 46 L. ed. 366.

⁹⁶ United S. Co. v. Summers, 110 Md. 95.

⁹⁷ Walton v. McKittrick, 141 Ky.

415; Nilson v. Jonesboro, 57 Ark. 168; Garst v. Harris, 177 Mass. 72; Guerin v. Stacy, 175 Mass. 595; Thorn & H. L. & C. Co. v. Citizens' Bank, 158 Mo. 272; Coal Creek, etc. Co. v. Tennessee C. etc. Co., 106 Tenn. 651; Collier v. Betterton, 87 Tex. 440; Barry v. Harris, 49 Vt. 392; Everett L. Co. v. Maney, 16 Wash. 552; Sanders v. Carter, 91 Ga. 450; Fletcher v. Dyche, 2 T. R. 34; Waggoner v. Cox, 40 Ohio St. 539; Wolf v. Des Moines R. Co., 64 Iowa, 380; Ward v. Hudson River B. Co., 125 N. Y. 230; Tode v. Gross, 127 N. Y. 480, 13 L.R.A. 652, 24 Am. St. 475; De Graff v. Wickham, 89 Iowa, 720; Talkin v. Anderson (Texas Sup. Ct.), 19 S. W. 852; Tilton v. McLaughlan, 83 N. J. L. 107; Compania Mexicana De Cemento Portland v. Waite, 196 Fed. 227.

⁹⁸ Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713; Streeter v. Rush, 25 Cal. 67; Esmond v. Van Benschoten, 12 Barb. 366; Craig v. Dillon, 6 Up. Can. App. 116. See Steele-W. Co. v. Shodoc Pond P. Co., 153 Ill. App. 576.

the practical ascertainment of the amount of the actual loss the law favors any fair adjustment of it by stipulation.⁹⁹ The

⁹⁹ *New Britain v. New Britain Tel. Co.*, 74 Conn. 326, 333; *Monmouth Park Ass'n v. Wallis I. Works*, 55 N. J. L. 132, 19 L.R.A. 456; *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 15 L.R.A. 211; *Commonwealth v. Ginn*, 23 Ky. L. Rep. 521; *Kilbourne v. Burt L. Co.*, 23 Ky. L. Rep. 985; *Whiting v. New Baltimore*, 127 Mich. 66; *Taylor v. Times N. Co.*, 83 Minn. 523; *Keeble v. Keeble*, 85 Ala. 552; *St. Louis, etc. R. Co. v. Jefferson S. Co.*, 90 Mo. App. 171; *Emery v. Boyle*, 200 Pa. 249; *Jennings v. McCormick*, 25 Wash. 427; *Reichenbach v. Sage*, 13 Wash. 364, 52 Am. St. 51; *Menges v. Milton P. Co.*, 96 Mo. App. 611; *American C. B. & I. Works v. Galland-B. B. & M. Co.*, 30 Wash. 178; *Wooster v. Kisch*, 26 Hun. 61; *Kemp v. Knickerbocker I. Co.*, 69 N. Y. 45; *Indianola v. Gulf, etc. Co.*, 56 Tex. 594; *Jones v. Binford*, 74 Me. 439; *Lipscomb v. Seegers*, 19 S. C. 425; *Gamon v. Howe*, 14 Me. 250; *Tingley v. Cutler*, 7 Conn. 291; *Cotheal v. Talmage*, 9 N. Y. 551; *Bagley v. Peddie*, 5 Sandf. 192; *Mundy v. Culver*, 18 Barb. 336; *Wolf D. C. Co. v. Schnltz*, 71 Pa. 180; *Bingham v. Richardson*, 1 Winston, 217; *De Groff v. American L. T. Co.* 24 Barb. 375; *Fessman v. Seeley* (Tex. Civ. App.), 36 S. W. 268 (advance payment of tuition); *Kaplan v. Gray*, 215 Mass. 269; *Ludlow Valve Mfg. Co. v. City of Chicago*, 181 Ill. App. 388; *Gile v. Interstate Motor Car Co.*, 27 N. D. 108, L.R.A.1915B, 109; *Los Angeles Olive Growers' Ass'n v. Pacific Surety Co.*, 24 Cal. App. 95; *Feyer v. Reiss*, 154 App.

Div. (N. Y.) 272; *Standard Brewery v. Schmalhausen*, 175 Ill. App. 629; *Scott v. Mayfield*, 153 Ky. 278; *Whitson, Sheffield Farms-S. D. Co.*, 76 N. Y. Misc. 180; *Eilers Music House v. Oriental Co.*, 69 Wash. 618; *Webster v. Bosanquet*, [1912] App. Cas. 394; *McManus v. Rothschild*, 25 Ont. L. R. 138; *In re Van Horn*, 167 Fed. 1021; *Davis v. Alpha P. C. Co.*, 134 Fed. 274; *Moyses v. Schendorf*, 142 Ill. App. 293; *Chicago & S. R. Co. v. McEwan*, 35 Ind. App. 251; *Illinois T. & S. Bank v. Burlington*, 79 Kan. 797; *Walton v. McKittrick*, 141 Ky. 415; *Werner v. Finley*, 144 Mo. App. 554; *Deuninck v. West Gallatin I. Co.*, 28 Mont. 255 (the Code provides that a stipulation shall be valid only when it would be impracticable or extremely difficult to fix the damages); *Gussow v. Beineson*, 76 N. J. L. 209; *Jersey City v. Flynn*, 74 N. J. L. 104; *Mosler S. Co. v. Maiden Lane S. D. Co.*, 199 N. Y. 479, 37 L.R.A.(N.S.) 363, 138 App. Div. (N. Y.) 905; *Peabody v. Richard Realty Co.*, 69 N. Y. Misc. 582; *Conried Met. O. Co. v. Brin*, 66 N. Y. Misc. 282; *Levy v. Freiman*, 131 App. Div. (N. Y.) 298; *Doan v. Rogan*, 79 Ohio 372; *Van Tuyl v. Young* 3 Ohio C. C. (N. S.) 183, affirmed by the supreme court without opinion; *York v. York R. Co.*, 229 Pa. 236; *Fisk v. Fowler*, 10 Cal. 512. In this case an ordinary bond with condition for delivery of title to a boat within a specified time was held to liquidate the damages at the sum stated as a penalty. See § 289.

damages resulting from breach of a marriage promise;¹ of an agreement not to engage in a particular occupation or business;² from delay in completing particular works, or in doing some other act on which ulterior transactions depend;³ are manifestly

¹ *Lowe v. Peers*, 4 Burr. 2225. See *Abrams v. Kounts*, 4 Ohio 214.

² *Kimbro v. Wells*, 112 Ark. 126; *Harris v. Theus*, 149 Ala. 133, 10 L.R.A.(N.S.) 204, 123 Am. St. 17; *Shafer v. Sloan*, 3 Cal. App. 335; *Merica v. Burget*, 36 Ind. App. 453; *Augusta S. L. Co. v. Debow*, 98 Me. 496; *Wills v. Forester*, 140 Mo. App. 321; *Clark v. Britton*, 76 N. H. 64; *Robinson v. Centenary Fund*, 68 N. J. L. 723; *Ewing v. Davis*, 2 Ohio C. C. (N. S.) 90; *Worrell v. Hurlig*, 11 Pa. Dist. 788 (not to produce a particular play at any other local theater); *Rucker v. Campbell*, 35 Tex. Civ. App. 178 citing the text; *Canady v. Knok*, 43 Wash. 567; *Gropp v. Perkins*, 148 Ky. 183; *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. 177; *Boyce v. Watson*, 52 Ill. App. 361; *Stover v. Spielman*, 1 Pa. Super. Ct. 526; *Tobler v. Austin*, 22 Tex. Civ. App. 99; *Borley v. McDonald*, 69 Vt. 309; *Snider v. McKelvey*, 27 Ont. App. 339; *Palmer v. Toms*, 96 Wis. 367; *Newman v. Wolfson*, 69 Ga. 764; *Muel-ler v. Kline*, 27 Ill. App. 473; *Stevens v. Pillsbury*, 57 Vt. 205; *Tode v. Gross*, 127 N. Y. 480, 24 Am. St. 475, 13 L.R.A. 652; *Gras-selli v. Lowden*, 11 Ohio St. 349; *Applegate v. Jacoby*, 9 Dana, 206; *Mott v. Mott*, 11 Barb. 127; *Rawlinson v. Clarke*, 14 M. & W. 187; *Hitecock v. Coker*, 6 Ad. & El. 438; *Galesworthy v. Strutt*, 1 Ex. 659; *Green v. Price*, 13 M. & W. 695; *Dakin v. Williams*, 17 Wend. 447; *Williams v. Dakin*, 22 id. 210; *Lange v. Werk*, 2 Ohio St. 519;

Cushing v. Drew, 97 Mass. 445; *Atkins v. Kinnier*, 1 Ex. 776; *Mer-cer v. Irving*, 1 E. & B. 563; *Reynolds v. Bridge*, 6 E. & B. 528; *Nobles v. Bates*, 7 Cow. 307; *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *California S. N. Co. v. Wright*, 6 Cal. 258; *De Groff v. American L. T. Co.*, 24 Barb. 375; *Stewart v. Bedell*, 79 Pa. 336; *Horner v. Flint-off*, 9 M. & W. 678; *Lightner v. Menzel*, 35 Cal. 452; *Saintier v. Ferguson*, 7 C. B. 716; *Davis v. Penton*, 6 B. & C. 216; *Bigony v. Tyson*, 75 Pa. 157; *Holbrook v. Tobey*, 66 Me. 410, 22 Am. Rep. 581; *Reilly v. Jones*, 1 Bing. 302; *Leighton v. Wales*, 3 M. & W. 545; *Crisdee v. Bolton*, 3 C. & P. 240; *Geiger v. Cawley*, 146 Mich. 550; *Gerwitz v. Abraham*, 174 Ill. App. 433; *Berghuis v. Schultz*, 119 Minn. 87; *Orenbaum v. Sowell* (Tex. Civ. App.), 153 S. W. 905. See *Mount Airy M. & G. Co. v. Runkles*, 118 Md. 371.

The intention of the parties and the reasonableness of the stipulated sum must be shown. *Disosway v. Edwards*, 134 N. C. 254.

³ *Turner v. Fremont*, 170 Fed. 259, 95 C. C. A. 455; *Caldwell v. Schmulbach*, 175 Fed. 429; *Blodget v. Columbia L. S. Co.*, 164 Fed. 305, 90 C. C. A. 237; *Chapman D. Co. v. Security Mut. L. Ins. Co.*, 149 Fed. 89, 79 C. C. A. 137, 145 Fed. 434; *Simpson v. White*, 187 Fed. 418, — C. C. A. —; *Ellicott Mach. Co. v. United States*, 43 Ct. of Cls. 232; *Phoenix I. Co. v. Same*, 39 id. 526; *Cox v. Smith*, 93 Ark. 371, 137 Am. St. 89; *Blackwood v. Liebke*,

uncertain and incapable of ascertainment in accordance with any recognized standard of pecuniary values. Similarly damages

- 87 Ark. 545; District of Columbia v. Harlan, 30 App. D. C. 270; Escondido O. & D. Co. v. Glaser, 144 Cal. 494; Pogue v. Kaweah P. & W. Co., 138 Cal. 664; Mayor, etc. v. Potomac E. & C. Co., 132 Ga. 849; McCullough v. Moore, 111 Ill. App. 545; Barker A. P. Co. v. Wabash, 43 Ind. App. 167 (street paving); St. Louis, etc. R. Co. v. Gaba, 78 Kan. 432; Murray v. Barnhart, 117 La. 1023; Morrison v. Richardson, 194 Mass. 370; Ross v. Loescher, 152 Mich. 386, 125 Am. St. 418; Western G. C. Co. v. Dowagiac G. & F. Co., 146 Mich. 119; Springwells v. Detroit, etc. R., 140 Mich. 277; Detroit v. People's Tel. Co., 135 Mich. 696; Hardie-T. F. & Mach. Co. v. Glen Allen O. Mill, 84 Miss. 259; Thompson v. St. Charles County, 227 Mo. 220; Coonan v. Cape Girardeau, 149 Mo. App. 609; Ramlose v. Dollman, 100 Mo. App. 347; Van Buskirk v. Board of Education, 78 N. J. L. 650; Macey Co. v. New York, 144 App. Div. (N. Y.) 408; Davin v. Syracuse, 69 N. Y. Misc. 285; Shubert v. Sondheim, 138 App. Div. (N. Y.) 800; Harris v. Snyder, 55 N. Y. Misc. 306; Couch v. Newtown Council B. Ass'n, 109 App. Div. (N. Y.) 856; Hattersly v. Waterville, 26 Ohio C. C. 226, 4 Ohio C. C. (N. S.) 242; Crown O. Co. v. Probert, 28 Ohio C. C. 739; Carter v. Kaufman, 67 S. C. 456; Granger v. Kishi (Tex. Civ. App.), 139 S. W. 1002; Wither- spoon v. Duncan (Tex. Civ. App.), 131 S. W. 660; Marshall v. Atkins (Tex. Civ. App.), 127 S. W. 1148, citing the text; Neblett v. McGraw, 41 Tex. Civ. App. 239; Dickerman v. Reeder, 59 Wash. 405; Sheard v. United States F. & G. Co., 58 Wash. 29; Williams v. Rosenbaum, 57 Wash. 94; Erickson v. Green, 47 Wash. 613; Charleston' L. Co. v. Friedman, 64 W. Va. 151; Wheeling M. & F. Co. v. Wheeling S. & I. Co., 58 W. Va. 62; Davis v. La Crosse H. Ass'n, 121 Wis. 579; Morgan Park v. Gahan, 136 Ill. App. 515; United S. Co. v. Summers, 110 Md. 95; Ambridge Borough v. Pittsburg & B. St. R. Co., 234 Pa. 157; Pressed Steel C. Co. v. Eastern R. Co., 121 Fed. 609, 57 C. C. A. 635; Ward v. Hudson River B. Co., 125 N. Y. 230; O'Brien v. Anniston P. Works, 93 Ala. 582; Law v. Local Board of Redditch, [1892] 1 Q. B. 127; De Graff v. Wickham, 89 Iowa, 720; Hall v. Crowley, 5 Allen, 304, 81 Am. Dec. 745; Curtis v. Brewer, 17 Pick. 513; Fletcher v. Dyche, 2 T. R. 32; Hamilton v. Moore, 33 Up. Can. Q. B. 100 and 520; Gaskin v. Wales, 9 Up. Can. C. P. 314; McPhee v. Wilson, 25 Up. Can. Q. B. 169; Bergheim v. Blaenavon I. & S. Co., L. R. 10 Q. B. 319; Folsom v. McDonough, 6 Cush. 208; Harmony v. Bingham, 12 N. Y. 100; Dunlop v. Gregory, 10 N. Y. 241, 61 Am. Dec. 746; Weeks v. Little, 47 N. Y. Super. Ct. 1; Worrell v. McClanagan, 5 Strobb. 115; Young v. White, 5 Watts, 460; O'Donnell v. Rosenberg, 14 Abb. Pr. (N. S.) 59; Pettis v. Bloomer, 21 How. Pr. 317; Crux v. Aldred, 14 Week. Rep. 656; Legge v. Harlock, 12 Q. B. 1015. But see Wileus v. Kling, 87 Ill. 107; Schmulbach v. Caldwell, 196 Fed. 16, 115 C. C. A. 650; Graham v. Cooper, 119 Md. 358; McComber v. Kellerman, 162 Cal. 749 (failure

from the disclosure of the secrets of business,⁴ or from breach of an agreement to abate a nuisance,⁵ are obviously of that nature; and stipulations fixing the damages for the total loss of a bargain for the exchange, purchase or leasing of lands and real estate,⁶ or personal property,⁷ have also been frequently sustained. An agreement by an employer to pay an employee a stated sum if the former's business should be discontinued within a specified time is for stipulated damages.⁸ The consequence of failing to prosecute operations in the drilling of oil wells upon leased land justifies an agreement fixing the damages,⁹ and so of the injury which may result from the dissolution of a partnership,¹⁰ and one for the payment of an agreed sum for

to commence drilling for oil on leased land); *De Soysa v. De Pless Pol*, [1912] App. Cas. 194.

⁴ *Nessle v. Reese*, 29 How. Pr. 382; *Reindel v. Schell*, 4 C. B. (N. S.) 97; *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713.

⁵ *Grasselli v. Lowden*, 11 Ohio St. 349; *Taylor v. Times N. Co.*, 83 Minn. 523.

⁶ *Leggett v. Mutual L. Ins. Co.*, 50 Barb. 616, 53 N. Y. 394; *Heard v. Bowers*, 23 Pick. 455; *Tingley v. Cutler*, 7 Conn. 291; *Knapp v. Maltby*, 13 Wend. 587; *Slosson v. Beadle*, 7 Johns. 72; *Lynde v. Thompson*, 2 Allen, 456; *Lampman v. Cochran*, 19 Barb. 388, 16 N. Y. 275; *Mundy v. Culver*, 18 Barb. 336; *Clement v. Cash*, 21 N. Y. 253; *Hasbrouck v. Tappen*, 15 Johns. 200; *Harris v. Miller*, 6 Sawy. 319; *Hedrick v. Firke*, 169 Mich. 549; *Franceschini v. Chaucer*, 110 N. Y. Supp. 775; *Gobble v. Linder*, 76 Ill. 157; *Carlisle v. Green* (Tex. Civ. App.), 132 S. W. 1140; *Selby v. Matson*, 137 Iowa 97, 14 L.R.A.(N.S.) 1210; *Beury v. Fay*, 73 W. Va. 460; *Keefe v. Fairfield*, 184 Mass. 334; *Calbeck v. Ford*, 140 Mich. 48; *Beveridge v. West Side C. Co.*, 130 App. Div. (N. Y.)

139; *Vito v. Birkel*, 209 Pa. 206; *Lichetti v. Conway*, 44 Pa. Super. 71; *Lipscomb v. Fuqua*, 103 Tex. 585. See *Grear v. International S. Yards*, 43 Tex. Civ. App. 370; *Feinsot v. Burstein*, 141 N. Y. Supp. 330; *Strode v. Smith*, 66 Ore. 163; *Barrett v. Monro*, 69 Wash. 229.

⁷ *Berger v. Nants*, 172 Ill. App. 623 (sale of uncertain quantity, delivery in instalments covering a period of two months); *Dyer v. Cowden*, 168 Mo. App. 649; *Mon-damin Meadows D. Co. v. Brudi*, 163 Ind. 642; *Davis v. Alpha P. C. Co.*, 134 Fed. 274 (contract covering a long period during which prices might fluctuate materially); *Diestal v. Stevenson*, [1906] 2 K. B. 345; *Frost v. Foote* (Tex. Civ. App.), 44 S. W. 1071; *Peirce v. Jung*, 10 Wis. 30; *Allen v. Brazier*, 2 Bailey, 55; *Main v. King*, 10 Barb. 59; *Knowlton v. Mackay*, 29 Up. Can. C. P. 601; *Sun P. & P. Ass'n v. Moore*, 183 U. S. 642, 46 L. ed. 366.

⁸ *Glynn v. Moran*, 174 Mass. 233.

⁹ *Crown O. Co. v. Probert*, 8 Ohio C. C. (N. S.) 489.

¹⁰ *Yatsuyanagi v. Shimamura*, 59 Wash. 24.

the discharge of an employee, it not being dependent upon the wages paid and the loss resulting to him being, from the viewpoint of the parties when they contracted, uncertain.¹¹

There is more or less uncertainty in everything which depends upon the opinions or memories of witnesses; it may be increased, in the sense of furnishing a motive for stipulating damages, if the testimony under the circumstances contemplated by the contract would be at a great distance,¹² or must come solely from the defendant.¹³ In a contract for the purchase of several city lots from one having still a large number to sell the purchaser, in consideration of having the property conveyed to him for \$21,000, covenanted that he would by a certain day erect on the lots so conveyed two brick houses of specified dimensions, or, in default thereof, would pay on demand to the seller the sum of \$4,000. This sum was held to be liquidated damages. Whether the vendors would be better off if they got the money than they would have been had the houses been erected must from the nature of the case be a difficult question to decide; and that is one reason why the parties should be left to settle the matter for themselves.¹⁴ In another case an agreement was made simultaneously with a sale of village lots by the purchaser that he would not sell spirituous liquors on the premises purchased or in the buildings erected thereon, and if he did so he should be liable to pay the vendor in the first case a fine of \$10, in the second case a fine of \$20, and for each subsequent selling \$50. It was held that the contract was not invalid for being in restraint of trade;¹⁵ but the "fine" was a penalty,¹⁶ on the breach of an employee's contract not to use intoxicating liquors during the time for which he was engaged the sum stipulated may be recovered for a single breach.¹⁷

§ 291. **Same subject.** The damages for breach of contracts for the purchase of the good will of an established trade or

¹¹ *Jacobs v. Shannon F. Co.*, 13 Ohio C. C. (N. S.) 140.

¹² *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716.

¹³ *Bagley v. Peddie*, 5 Sandf. 192.

¹⁴ *Pearson v. Williams*, 26 Wend.

630, 24 id. 244. See *Chase v. Allen*, 13 Gray, 42.

¹⁵ *Laubenheimer v. Mann*, 17 Wis. 542.

¹⁶ Same case, 19 Wis. 519. See § 295.

¹⁷ *Keeble v. Keeble*, 85 Ala. 552.

business or for the withdrawal of competition, are so obviously uncertain that courts have recognized the fullest liberty of parties to fix beforehand the amount thereof in that class of cases. In the decision of such cases the strongest expressions are to be found to the effect that the intention of the parties is all-controlling, and that courts have no power to defeat it on the pretext of relieving from a bad bargain. Referring to such a stipulation, Sedgwick, J., in an early Massachusetts case, said: "The parties were competent in law to make a contract imposing a limited restraint on the defendant's trade for the plaintiff's benefit and without injury to the public. They were competent to determine on what consideration it should be made, and to liquidate the damages if it should be broken. The consideration of one dollar is a valuable consideration. It would be sufficient to pass by sale the defendant's stage and stage horses, where no fraud or imposition was practiced. The parties have considered it reasonable and adequate and the defendant, by honestly fulfilling his agreement might have protected himself from the forfeiture. But he has broken it, and he shall not be permitted to say that, although the contract was fairly and honestly made, and for a valuable consideration to which he assented, the consideration was inadequate; that he made a bad bargain, and that when the plaintiff has suffered by a breach of it, he shall be relieved from the terms to which he had voluntarily submitted."¹⁸ The tendency, however, of more recent decisions is against holding any contract for liquidated damages to be binding in this absolute sense. Courts generally assume jurisdiction to declare an excessive sum mentioned in connection with the breach of any contract a penalty.¹⁹ If the disproportion between the consideration and the undertaking and the disparity between the probable advantages of performance and the sum agreed to be paid in the event of failure

¹⁸ *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *Dakin v. Williams*, 17 Wend. 454, per Nelson, C. J.; *Streeter v. Rush*, 25 Cal. 67, per Rhodes, J. Compare *Hathaway v. Lynn*, 75 Wis. 186, 6 L.R.A. 558,

which is mentioned in a note to § 283.

¹⁹ *Wagner Co. v. Cawker*, 112 Wis. 532; *Seeman v. Biemann*, 108 Wis. 365. See *Davies v. Daniels*, 8 Hawaii 88; *Quigley v. C. S. Brackett Co.*, 124 Minn. 366.

negative the intention to limit the amount to just or reasonable compensation, they say it should be deemed a penalty, however uncertain the damages. The same principles govern this stipulation in all contracts, but courts will, in general, enforce such stipulations where the damages are uncertain;²⁰ because the parties, where no fraud or oppression is practiced, know better their situations, and can form a more correct estimate of the injury than a court or jury. Because the damages are not susceptible of precise measurement the judgment and agreement of the parties should have large scope; but when, as sometimes happens, it is discovered that such stipulations are not based on the idea of compensation they are not sustained.²¹ This will be particularly seen in the instances of contracts which provide the same sum to be paid in the case of a partial or of a total breach. Stipulations in an agreement by the vendor of a business and its good will that he will not go into business in G., or within a certain distance of it, either for himself or as clerk for another, and will not permit his wife to do so, all refer to the same thing, and the objection that the sum named is a penalty, because the forbidden acts are of different degrees of importance, is without force.²² After the sale by the vendee of the business and good will of the vendor no beneficial interest in the contract stipulating the damages re-

²⁰ *Potter v. Ahrens*, 110 Cal. 674; *Seeman v. Biemann*, 108 Wis. 365, 375; *Simon v. Lanius*, 9 Ky. L. Rep. 59; *Connelly v. Priest*, 72 Mo. App. 673; *Seim v. Krause*, 13 S. D. 530; *Hurst v. Hurst*, 4 Ex. 571; *Ponsenby v. Adams*, 2 Brown P. C. 431; *Roy v. Duke of Beaufort*, 2 Atk. 190; *Allen v. Brazier*, 2 Bailey 55; *Chase v. Allen*, 13 Gray 42; *Pearson v. Williams*, 26 Wend. 630. See §§ 289, 290.

²¹ In *Wilkinson v. Colley*, 164 Pa. 35, 26 L.R.A. 114, one physician sold his practice to another, stipulating that at the end of a certain time he would cease practicing. The vendee sold the practice to another physician. The defendant violated

his agreement, after which he and the plaintiff entered into a contract in which the defendant covenanted not to practice in the locality for ten years, and bound himself in the penal sum of \$400 to that effect. This contract he also violated. It was ruled that the sum mentioned was a penalty; that it was not the intention of the parties that the defendant was to have the privilege of practicing on the payment of it; that, because of the uncertainty of the damages, an injunction would issue for the specific performance of the contract.

²² *Stover v. Spielman*, 1 Pa. Super. Ct. 526. See *Liotta v. Abruzzo*, 82 App. Div. (N. Y.) 429.

mains in the covenantee and he cannot enforce the covenant. The purpose of the contract being to protect the property or business to which it related, it was an incident of, and adhered to, such property and business.²³

The damages which may result from delay in fulfilling contracts for particular works or for performance of any specified act stipulated to be done and completed within a given time are not always of the most uncertain nature. Damages for failure to complete a house or any other structure may sometimes be ascertained proximately by a rental standard. But when intended for a particular purpose other than to be rented, and when delay may hinder or thwart other and dependent contracts or enterprises the damages will be more uncertain. In a building contract containing the usual clauses fixing the days for completing the various parts of the work a stipulation to the effect that any neglect to comply with the conditions of the contract and finish the work as provided should entitle the employer to claim damages at the rate of \$10 per day for every day's detention so caused was held a covenant for stipulated damages.²⁴ There are authorities to the effect that the damages ordinarily resulting from the failure to fulfill a building con-

²³ *Palmer v. Toms*, 96 Wis. 367, approving *Gompers v. Rochester*, 56 Pa. 194.

²⁴ *George v. Roberts*, 186 Ala. 521; *McClintie-Marshall Const. Co. v. Board Chosen Freeholders Hudson Co.* 83 N. J. Eq. 539; *Bankers' Surety Co. v. Elkhorn River Drain. Dist.*, 130 C. C. A. 650, 214 Fed. 342; *Crawford v. Heatwole*, 110 Va. 358, 34 L.R.A.(N.S.) 587 quoting the text; *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. L. 132, 19 L.R.A. 456, 39 Am. St. 626; *Railroad v. Cabinet Co.*, 104 Tenn. 568, 50 L.R.A. 729, 78 Am. St. 933; *Collier v. Betterton*, 87 Tex. 440; *Reichenbach v. Sage*, 13 Wash. 364; *De Graff v. Wickham*, 89 Iowa 720; *Emaek v. Campbell*, 14 D. C. App. Cas. 186; *O'Donnell v. Rosenberg*,

14 Abb. Pr. (N. S.) 59; *Pettis v. Bloomer*, 21 How. Pr. 317; *Curtis v. Brewer*, 17 Pick. 513; *Hamilton v. Moore*, 33 Up. Can. Q. B. 100, 520; *Gaskin v. Wales*, 9 Up. Can. C. P. 314; *McPhee v. Wilson*, 25 Up. Can. Q. B. 169; *Bergheim v. Blaenavon I. & S. Co.*, L. R. 10 Q. B. 319; *Young v. Gaut*, 69 Ark. 114; *Brown I. Co. v. Norwood* (Tex. Civ. App.), 69 S. W. 253.

But where in a building contract a certain sum was designated to be paid as liquidated damages for each day's delay in completion of the work and the same provision was embodied in a contract between the contractor and a subcontractor, the contractor, having been relieved of the provision in his contract with his employer, recovered only actual

tract which contains only the usual conditions are not so uncertain as to be the subjects for such stipulations, the extrinsic circumstances not being unusual;²⁵ but the decisions are far from being unanimous on the question. Where a party covenants that he will transport and deliver goods within a certain time, and also that he will deduct a sum named from the freight

damages from the subcontractor for delay. *Bedford v. J. Henry Miller, Inc.*, 129 C. C. A. 44, 212 Fed. 368.

In *Fletcher v. Dyche*, 2 T. R. 32, a stipulation for 10*l.* per week for delay in finishing a church was sustained; in *Duckworth v. Allison*, 1 M. & W. 412, 5*l.* per week for delay in completing repairs on a warehouse; in *Legge v. Harlock*, 12 Q. B. Div. 1015, 1*l.* per day for delay in building a barn, wagon-shed and granary; in *Law v. Redditch*, [1892] 1 Q. B. 127, 100*l.* and 5*l.* per week for delay in constructing sewerage works; in *Ward v. Hudson River B. Co.*, 125 N. Y. 230, \$10 a day for delay in erecting dwellings; in *Malone v. Philadelphia*, in *Monmouth Park Ass'n v. Wallis I. Works*, *supra*, \$100 per day for failure to complete a grand stand for a race course.

In *Curtis v. Van Bergh*, 161 N. Y. 47, the defendants provided for the lease of a building to be erected when there was less than six months' time within which to complete it, and they needed protection from the consequences of failure on account of their business which required more room and machinery. In view of the expiration of their lease of the premises in which they were, the uncertainty of their being able to secure another place in which to do business, and the consequences of a removal, a stipulation for the payment of \$50 per day for delay in the construction of such building was sustained al-

though the rental agreed upon was but \$2,000 a year.

In *Bird v. St. John's Episcopal Church*, 154 Ind. 138, a stipulation for \$50 per day for delay in completing a church was sustained.

The defendant bound himself to complete a building within eleven months and was to receive \$100 for each day less than the time limit, and to pay \$1,000 for each day that he should exceed it. He made a contract with the plaintiff for the stone and granite work, and the latter bound himself to pay \$150 per day as a penalty for each and every day he was in default as and for liquidated damages. The latter was an agreement for stipulated damages. *Kunkel v. Wherry*, 189 Pa. 198, 69 Am. St. 802.

²⁵ *First Nat. Bank of San Marcos v. Smith*, — Tex. Civ. App. —, 160 S. W. 311; *Wait v. Stanton*, 104 Ark. 9; *Stephens v. Phoenix B. Co.*, 139 Fed. 248, 71 C. C. A. 374; *Willson v. Baltimore*, 83 Md. 212, 55 Am. St. 339; *Chicago H. W. Co. v. United States*, 45 C. C. A. 343, 352, 53 L.R.A. 122, 106 Fed. 382, quoting the text; *Wheedon v. American B. & T. Co.*, 128 N. C. 69; *Clements v. Railroad Co.*, 132 Pa. 445; *Brennan v. Clark*, 29 Neb. 385; *Patent B. Co. v. Moore*, 75 Cal. 205. But see *Ward v. Hudson River B. Co.*, 125 N. Y. 230; *Sun P. & P. Ass'n v. Moore*, 183 U. S. 642, 46 L. ed. 366.

A contract on the part of a railroad bridge builder to provide a

each day they are delayed beyond the time specified for the delivery, such agreed deduction is liquidated damages.²⁶ Under peculiar circumstances an agreement to pay \$500 for failure to surrender possession of leased premises at a certain date was sustained as liquidating the damages. The lessor was but a lessee himself, under stipulations to surrender a month later. He had authority from his lessor to put additions and improvements on the premises, all of which he had a right to remove at the end of his term. It was considered a natural and reasonable provision that, should the subtenant bind himself to leave the premises a month before the landlord's term expired, he might have sufficient time to remove his improvements and thus escape a forfeiture to his lessor.²⁷ An agreement provided that land should be restored to a prescribed condition and in default of performance the person bound should pay £100 per acre. The condition was referred to in one clause of the contract as a "penalty." The house of lords held, reversing the Scotch court, that the case was a proper one for stipulated damages.²⁸ No damages could be more uncertain than those which might result from delay in furnishing for publication the biography of a man for the time being attracting public notice. Such a man undertook to furnish his biography for publication within a specified time and for every day's delay beyond that time agreed to pay \$165. In a suit to recover for a delay of one hundred and sixty-one days the court held the agreement could not be literally enforced, and that the plaintiff could only re-

crossing for trains by a date fixed or pay \$1,000 a week if he was in default is for liquidated damages. *Texas, etc. R. Co. v. Rust*, 19 Fed. 239.

²⁶ *Harmony v. Bingham*, 12 N. Y. 100; *Sparrow v. Paris*, 7 H. & N. 594.

²⁷ *Peine v. Weber*, 47 Ill. 41.

In *Klinge v. Ritter*, 54 Ill. 140, a lease provided for the surrender by the lessee of portions of the property at different times, and without adverting to such provision there was a covenant that the lessee

should pay \$50 per day as stipulated damages for every day he should hold over after the termination of his lease. Because the provision as to damages was highly penal and the lease admitted of two constructions as to the time the damages should begin to accrue, they were not considered as commencing until the time when the entire premises were to be surrendered.

²⁸ *Lord Elphinstone v. Monkland I. & C. Co.*, 11 App. Cas. 332.

cover actual damages.²⁹ So a contract to put machinery in a boat for \$8,000 on or before a certain day, "under a forfeiture of \$100 per day for each and every day after the above date until the same should be completed as above," was held to provide for a penalty.³⁰

§ 292. **Same subject.** The damages which may result from a mechanic quitting work contrary to his contract are uncertain; but every agreement purporting to fix the amount he shall forfeit or pay in such an event will not be treated as a liquidation thereof. Where the contract of hiring required that if the employee quit without giving thirty days' notice he should forfeit all wages due him at the time of leaving, Campbell, J., said: "We have no difficulty in holding that the injury caused by a sudden breaking off of a contract of service by either party involves such difficulties concerning the actual loss as to render a reasonable agreement for stipulated damages appropriate. If a fixed sum, or a maximum within which wages unpaid and accruing since the last pay-day might be forfeited, should be agreed upon, and should not be an unreasonable or oppressive exaction, there would seem to be no legal objection to the stipulation if both parties are equally and justly protected. But the facts set forth in this record do not, we think, bring the case within any such rule. * * * The forfeiture under the contract covers all wages due at the time of leaving. This is open to the objection that the employer may have been in arrears, and thus enabled to profit by his own wrong. No such forfeiture could be enforced against wages, as such, which the workman was to have paid to him before he committed any breach of his duty. Again, it does not appear how often wages were payable, and what proportion of the year's earnings could thus be withheld for a breach of contract. It would not be reasonable to make the forfeiture cover a very long period. The inference, in the absence of proof to the contrary, would be that the price of work done by the piece might not be payable

²⁹ Greer v. Tweed, 13 Abb. Pr. (N. S.) 427. See Laubenheimer v. Mann, 17 Wis. 542, 19 id. 519.

³⁰ Colwell v. Lawrence, 38 Barb.

643; Colwell v. Foulks, 36 How. Pr. 316; Van Buren v. Digges, 11 How. 461, 13 L. ed. 771; Kennedy v. United States, 24 Ct. of Cls. 122, 142.

at the same intervals as ordinary wages. And inasmuch as the periodical earnings of such laborers could not be uniform it would be difficult to sustain an agreement for stipulated damages unless some limit should be fixed beyond which the forfeiture should not extend. The agreement set out in the record is also defective for want of mutuality. The employer, on failure to give notice before dismissal, is subjected to a payment of thirty days' wages. This stipulation, when applied to the wages of piece work, is entirely vague and indeterminate. It furnishes no standard of calculation, and lacks the first essential of stipulated damages, which are allowed to avoid uncertainty." ³¹ Where the employee's contract stipulating the dam-

³¹ Richardson v. Woehler, 26 Mich. 90; Davis v. Freeman, 10 Mich. 188.

In the last case Manning, J., said: "The plaintiffs in error were to have \$1.50 per M. for drawing the timber, \$1 of which was to be paid as the timber was drawn, in supplies to enable them to carry on the job; and the remaining fifty cents in cash when all the timber was drawn. In the language of the contract, 'it being understood that the balance kept back is to secure the completion of this contract; and it is hereby agreed between the parties that the fifty cents per thousand feet is settled, fixed and liquidated damages, in case this contract is not completed by the said first party.' They having failed to draw all the timber, the question is whether the fifty cents per thousand feet on what was drawn, and which was to be paid on completion of the contract, is to be regarded as stipulated damages, or in the nature of a forfeiture or penalty for not completing the contract. The court below charged the jury that the fifty cents per thousand feet on what had been drawn was stipulated damages. In this we think the court erred.

Suth. Dam. Vol. I.—57.

If stipulated damages for a non-performance of the entire contract, the defendant in error could not recover any other or greater damage for a nonperformance, in whole or in part. And it would follow that he would recover no damages whatever on the contract had the plaintiff in error refused to draw any of the timber. Such clearly could not have been the intention of the parties. They must have intended that if the plaintiff in error should draw part of the timber, and not the whole, they should not be paid the fifty cents per thousand feet on what had been drawn by them. That, in the language of the contract, should be 'fixed and liquidated damages.' If the contract had provided for the payment of fifty cents per thousand feet as liquidated damages for the timber not drawn, the case would be altogether different. For the nearer such a contract was completed the less would be the damages. The damages would be proportioned to the non-performance. But the contrary would be the case as the contract is, if the fifty cents per thousand is to be regarded as liquidated damages, and not as penalty. For the

ages the employer might recover if the contract of employment was violated was neither unreasonable nor oppressive the stipulation was sustained under the facts indicated in the following excerpt from the opinion: The plaintiff in error was a cotton mill, having in its employment hundreds of hands. The work is divided up into many departments. The raw material is handled by one set of hands and put in condition for another, and the second department still further advances its manufacture; and so on through the successive stages of progress. The evidence shows that each department is dependent upon that immediately below it. Now, if the operatives of one department quit or their work is delayed, its effect is felt in all to a greater or less degree. It is also shown that it is not always easy to replace an operative at once, and that the unexpected quitting of even one hand will to some extent affect the results throughout the mill. Yet the evidence shows that it would be impossible to calculate with any certainty the precise, actual loss due to an unexpected breach of an employee's engagement; though it is shown that there are some departments of work where the quitting of a small number of hands, without notice, would stop the entire mill and throw other hundreds out of employment.

nearer the contract is completed the greater are the damages in case of failure. The damages for not drawing five thousand of five hundred thousand feet would be \$247.50, whereas the damages for failing to draw four hundred and ninety-five of the five hundred thousand would be only \$2.50. The policy of the law will not permit parties to make that liquidated damages, by calling it such in their contract, which in its nature is clearly a penalty or forfeiture for nonperformance. While it allows them, in certain cases, to fix their own damages, it will in no case permit them to evade the law by agreement. See *Jaquith v. Hudson*, 5 Mich. 123." *Stearns v. Barrett*, 1 Pick. 443, 11 Am. Dec. 223.

In *Schrimpf v. Tennessee Mfg. Co.*, 86 Tenn. 219, 8 Am. St. 832, a servant agreed to give notice of his intention to quit, and if he failed to do so whatever was due him at the time he left the service was to be an indebtedness to the employer to be considered as liquidated damages. The contract was void because unreasonable and oppressive.

In *Bilz v. Powell*, 50 Colo. 482, 38 L.R.A.(N.S.) 847, a stipulation providing for liquidated damages in favor of the employer, to be retained out of commissions to be earned by the employee, was sustained. It was recognized that this is in opposition to *Davis v. Freeman*, 10 Mich. 188, and to *Stony Creek L. Co. v. Fields*, 102 Va. 1.

* * * The case is one, then, where the certainty of some damage, and the uncertainty of means and standards by which the actual damage can be determined, requires the courts to uphold the contract as one for liquidated damages and not as providing for a penalty.³² The uncertainty of the damages which follow the breach of a contract by actors with a theatrical manager for their services for a stated period by performing in another theatre before the fulfillment of their engagement with him sustains a stipulation fixing the damages for its breach.³³

The inquiry whether a fixed sum is intended as penalty or liquidated damages is generally answered according to the equity and justice of the particular case. If the damages are uncertain in their nature or difficult to be proved, and in applying the stipulation to the case the result is not manifestly at variance with the principle of just compensation it is readily adopted as consistent therewith. In such cases the intention is referred from these circumstances and the language of the parties is very liberally construed to give effect to it. The sum may be called a penalty or forfeiture or the form and phraseology may be vague and equivocal; but, nevertheless, the sum stated be held to be liquidated damages.³⁴

§ 293. **Same subject; illustrations.** Some differences will be noticed, resulting from a stricter adherence to the artificial rules of construction by some courts than by others. On the other hand, where the actual damages may be ascertained by

³² *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 161, 30 Am. St. 865, 15 L.R.A. 211; *Walsh v. Fisher*, 102 Wis. 172, 76 Am. St. 865, 43 L.R.A. 810; In accord: *Myers-G. N. Co. v. Grossman*, 167 Mo. App. 722.

³³ *Pastor v. Solomon*, 26 N. Y. Misc. 125, affirming 25 N. Y. Misc. 322; *Bustonaby v. Revardel*, 71 N. Y. Misc. 207.

³⁴ *Tidwell v. Southern E. & B. Works*, 87 Ark. 52; *Santa Fe St. R. Co. v. Schutz*, 37 Tex. Civ. App. 14; § 283m.; *Mathews v. Sharp*, 99 Pa. 560; *Lennon v. Smith*, 14 Daly 520; *Miller v. Rankin* (Pa.) 11

Atl. 615; *Eakin v. Scott*, 70 Tex. 442; *Boys v. Ancell*, 5 Bing. N. C. 390; *Streep v. Williams*, 48 Pa. 450; *Burr v. Todd*, 41 id. 206; *Bigony v. Tyson*, 75 id. 157; *Pearson v. Williams*, 26 Wend. 630; *Knapp v. Malthy*, 13 id. 587; *Up- ham v. Smith*, 7 Mass. 265; *Fisk v. Fowler*, 10 Cal. 512; *Sparrow v. Paris*, 7 H. & N. 594; *Yenner v. Hammond*, 36 Wis. 277; *White v. Arleth*, 1 Bond, 319; *Haymaker v. Schroers*, 49 Mo. 406; *Fisk v. Robinson*, 14 Ohio C. C. (N. S.) 414 (covenant against reletting premises).

mere computation or can be easily established by proof, and the sum stated is not a just measure of the actual loss or injury, these circumstances prevail against very clear and positive expressions of intention to liquidate damages.³⁵ In cases of neutral circumstances the language and form of the contract may alone be decisive. All doubts as to the justice of the stipulated sum or as to the actual intention of the parties will be resolved by treating it as a penalty. Many stipulations ostensibly providing a remuneration to be paid, or in some way to inure to the party entitled to the benefit of the contract in case of a breach, have been held not to have the effect to liquidate damages because so framed as to be inconsistent in their effect with the idea of compensation either for the reason that the intention to limit the compensation for breach to such amount as the provision in question may specify, or the purpose to afford compensation to that extent is doubtful in view of the special facts of the case. A few cases may be profitably consulted as illustrations of the uncertain nature of such stipulations, and how much at large is the judicial discretion by which their practical effect is governed. In a case in New York two parties agreed upon an exchange of real estate; each was to deliver a deed of his property or "forfeit the sum of \$500." Upon the first trial the court held this to be a provision for liquidated damages and the plaintiff had a verdict for that sum, which was set aside on the defendant's motion upon the ground that the court erred in treating that sum as other than a penalty. The case was retried upon this theory and resulted in a verdict for the plaintiff of \$1,000 against his request and exception that it should be regarded as stipulated damages. The defendant then sought to reverse the judgment on the ground that the sum stated in the contract was not a penalty, but liquidated damages. The ruling that it was a penalty was in harmony with the defendant's argument for a new trial, and he had taken no exception to a like construction of the contract on that trial. He was, therefore, not in a situation on appeal to allege that that construction was erroneous. Church, C. J., said: "It is, however,

³⁵ *Kemble v. Farren*, 6 Bing. 141; *Horner v. Flintoff*, 9 M. & W. 678.

proper to say that, if the question was before us, we should hesitate in holding it a penalty; and there are many reasons for regarding it as a provision fixing the measure of damages by the parties. The word 'forfeit' is not conclusive. A fundamental rule upon this subject is that the words employed must, in general, yield to the intention of the parties as evinced by the nature of the agreement, the amount of the sum named and all the surrounding circumstances. The sum named is reasonable in amount; it is payable for one breach, viz.: a failure to deliver a deed; and the injury is in some degree uncertain in amount and extent and might depend upon many unforeseen contingencies. These are material circumstances favorable to an inference that the parties intended to fix the sum as the measure of damages." But that question being precluded, by the absence of any objection on the appellant's part, the judgment was affirmed.³⁶

In a later case in the same state an ice company agreed to deliver to K. four thousand tons of ice in 1870, for retail. Afterwards the company, by fraudulent representations, procured from K. a written exoneration as to all the ice above five hundred and eighty-seven tons. By the original agreement K. agreed to pay the ice company \$1 per ton for each and every ton that he failed to take according to the terms of the agreement; and the ice company agreed to forfeit \$1 per ton for each and every ton that they failed to deliver according to the terms of the agreement. The contract price of the ice delivered was \$2.50 per ton, and the market price, when the exonerated quantity should have been delivered, was from \$14 to \$16 per ton. A suit was brought for rescission of the agreement obtained by fraud, reducing the quantity, and for damages. The rescission was granted, and the next question was between penalty and liquidated damages under the \$1 per ton clause referred to. The court of common pleas held that the stipulation was a penalty.³⁷ The court of appeals were of contrary opinion. Earl, J., said: "What was here intended by the parties? The \$1

³⁶ Noyes v. Phillips, 60 N. Y. 408. 28 Mo. 39. See Cotheal v. Talmage,

³⁷ Kemp v. Knickerbocker I. Co.,

51 How. Pr. 31; Basye v. Ambrose, 9 N. Y. 551, 61 Am. Dec. 716.

was certainly intended at least to limit the extent of damages to be paid in case of breach, else there would be no purpose for inserting it; and effect should be given to this intention if it can be consistently with the rules of law. There is nothing decisive in the language used. In case of failure by the plaintiffs they agreed 'to pay' the \$1, in case of failure by the defendant it agreed 'to forfeit' the same sum. The words 'to pay' and 'to forfeit' were evidently used in the same sense,³⁸ and might be used in case the sum was intended either as liquidated damages or as a penalty.³⁹ In another case, a building con-

³⁸ § 283, n.

³⁹ *Kemp v. Knickerbocker I. Co.*, 69 N. Y. 45, 57; *Winch v. Mutual Ben. I. Co.*, 9 Daly 117.

In *Lowry v. Barelli*, 21 Ohio St. 324, one party offered to sell and deliver at a specified time and place two thousand five hundred cubic feet of Italian marble at \$2.12½ per foot, and there was added the following: "For noncompliance with this contract by either party the penalty shall be as follows: If the parties of the first part are not themselves, or agents, on the spot twenty days after the stipulated notice be given, then the parties of the second part shall be at liberty to sell said marble just as if consigned to them, and claim of said first parties the difference between the net amount that the marble sold at, and what they bound themselves to pay for it, say \$2.12½ per cubic foot; provided always, that said difference shall never exceed thirty-seven and one-half cents per cubic foot, which difference shall be paid down, in cash at once, without any difficulty; and should the parties of the second part fail to deliver within the specified time the quantity of marble above mentioned, the parties of the first part shall be at liberty to buy the same quantity of marble at the

market price, and charge the difference, if any, to the parties of the second part; provided always, that the difference of the marble so purchased shall not exceed thirty-seven and one-half cents per cubic foot of the price fixed by this agreement, and that the terms of payment be cash." The vendee sued the vendor and assigned as a breach the non-delivery of the marble. The jury found, among other things, that "the defendants refused to perform the agreement on their part; that the plaintiffs did not purchase, nor attempt to purchase, marble corresponding to that described in the contract before bringing suit; that such a lot of marble could not have been purchased in New Orleans where the contract was made; that the difference between the market price and the contract price on the day of breach was greater than thirty-seven and a half cents per foot; that the damages of the plaintiff amount to \$1,516.62," for which sum they returned a verdict. A motion for a new trial was made on the ground, among others, that the verdict was contrary to the law and the evidence. On this motion it was contended on behalf of the defendants "that the sum of thirty-seven and a half cents per foot is

tract, the builder was to receive for the completed house \$4,600; the contract contained the provision that the builder, who was the plaintiff, should "forfeit ten per cent on the whole amount if the said house is not entirely completed and fit to occupy at

in the nature of a limitation of damages, and not actual or liquidated damages, and is the utmost that the parties can recover." This point was not noticed in the opinion, which was adverse to the motion, and judgment was ordered to be rendered on the verdict. McIlvaine, J., said: "It is no doubt competent for parties to limit by express stipulation the amount of damages to be recovered in the event of a breach of their contract; or to make the right to recover at all to depend upon a particular event; or they may agree that damages shall not be recovered in any event for a violation of the contract; thus making what would otherwise be a contract binding in law a mere option on the part of the promisor to do or not to do as he may choose. In our opinion the contract between the parties in this case was of the first and not of the second or third classes named. Taking it altogether, we believe the parties intended to secure the performance at what they supposed would be a reasonable compensation to the injured party in case of a default by the other in not receiving or delivering the marble.

"It cannot be doubted that the parties intended to bind each other by this contract to the purchase and sale upon the terms named therein. For the breach of very contract the law implies damages; and to escape the consequences of this rule of law the party in default should be able to show that damages had been waived. In this contract no

waiver or exemption from damages upon the estate of facts found in the special verdict is expressed, nor can it be inferred except upon the principle that *expressio unius est exclusio alterius*. This maxim, however, should not be applied in a case where, by fair construction of the whole instrument, a different intention can be ascertained. * * * Whatever might have been the law of this case, had there been such marble in the market at the time of the defendant's default, we are of opinion that the plaintiffs, under the state of facts found in the special verdict, were excused not only from making a purchase of a like quantity of marble in the market, but also from any vain and fruitless effort to do so."

In *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. ed. 71, a company having coal mines agreed to deliver one hundred and fifty thousand tons of coal, the product of its mines, to P. at \$3 a ton during the year 1870, in equal daily proportions, between the 15th of February and the 15th of December; that is to say, fifteen thousand tons each month. The contract contained this provision: "If through no fault of the parties of the second part (P.), the party of the first part (the company) shall fail in any one month to deliver all or any part of the quota of coal to which the parties of the second part may be entitled in such month, the party of the first part shall pay the parties of the second parts as liquidated damages twenty-five cents per ton for

the time agreed upon." Daniel, J., said: "The clause * * * cannot properly be regarded as an agreement or settlement of liquidated damages. The term 'forfeiture' imports a penalty; it has no necessary connection with the measure or degree of injury which may result from a breach of contract or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury

each and every ton which it may have so failed to deliver; or instead thereof, the parties of the second part may elect to receive all or any part of the coal so in default in the next succeeding month, in which case the quota which the party of the first part would otherwise have been bound to deliver under this contract shall be increased in such succeeding month to the extent of the quantity in default." Coal rose in value from about \$3 a ton to \$9; and without the fault of P. the company did fail to deliver the quota—fifteen thousand tons—due in October, and P. thereupon elected and gave notice of the election to take the said quota in November. But the company failed to deliver it then, and failed also to deliver the quota—fifteen thousand tons—due in November. P. then elected and gave notice of his election to take in December the quota due in November, as also that due in October. No coal, however, was delivered at any time, and P. brought suit for damages. It was held that the plaintiffs were entitled to their actual damages and were not limited to twenty-five cents per ton. Bradley, J., said: "The question whether this view is right or not depends upon the true construction of the agreement made by the parties. . . . It is evident

from an inspection of the contract that the election given to the plaintiffs to receive in the following month the coal which they were entitled to receive and did not receive in a particular month was a substitute for the liquidated damages of twenty-five cents per ton. With regard to that particular amount of coal, the rule of liquidated damages was at an end. The agreement did not carry it forward to the following month. It imposed upon the defendant the obligation, if the plaintiffs so elected to furnish the coal itself instead of paying the liquidated sum. If not so, what was the option worth? It amounted to nothing more than the right of giving to the defendant another month to furnish the coal. Surely they would have had that right without stipulating for it in this solemn way. Had not this option been given to the plaintiffs, the defendant would have had the option either to furnish the coal or to pay the twenty-five cents per ton for not furnishing it—a sum which they could very well afford to pay upon a slight rise in the market prices. It was evidently the very purpose of the option given to the plaintiffs to avoid this oppressive result. They could require the coal to be delivered at all events, and if they elected to do this it was the duty of the de-

or compensation it is never taken as such by courts of justice."⁴⁰ The lessor for years of part of a steam mill covenanted with his lessee to furnish him with a certain amount of steam-power during every working day in the year, and that if at any time he should fail to do so the rent should cease during the time of such failure. The lessee had taken a lease for five years for the purpose of carrying on business, and had placed machinery on the premises on the faith of the lessor's covenant to furnish him steam-power to work it. Soon after his work commenced the lessor withheld all the power and thus broke up the business. On these facts the court held that the suspension of rent was not full satisfaction of the damages; it was not satisfied that the lessee had agreed to accept such suspension as a full compensation for an entire breach of the covenant.⁴¹

fendant to furnish it. The contrary construction would make the stipulation worse than useless. The plaintiffs might continue to exercise their election to receive the coal month after month, without avail, and, at the end, find themselves exactly at the point they started from—forced to accept the twenty-five cents per ton."

⁴⁰ *Van Buren v. Digges*, 11 How. 461, 13 L. ed. 771; *Ward v. Haren*, 183 Mo. App. 569, citing the text. See p. 847n.

⁴¹ *Fisher v. Barret*, 4 Cush. 381; *Pengra v. Wheeler*, 24 Ore. 532, 21 L.R.A. 726.

In *Nowlin v. Pyne*, 40 Iowa, 166, there was an agreement for an exchange of farms, which contained this clause: "It is also understood that, in case the said P. fails to make said conveyance, as aforesaid, then he agrees to pay said N. for all plowing done by him on said land." The question was whether N. was entitled to any other damages. It was contended by the other party that he was not. Day, J.: "This position would be correct if

the parties to a contract must stipulate for the damages to be recovered in order that they may recover any. But the law, of itself, attaches to the breach of every contract the right to recover proper damages. That the parties have expressly provided for the payment of some of the damages, which, perhaps, the law would not have awarded without such provision, cannot be construed to be a waiver of the right to recover other damages which the law permits. In order to defeat the recovery of such damages it must clearly appear that the parties have stipulated for all the consequences which they intend shall follow a breach of their agreement. It is plain that this agreement more particularly refers to certain incidental damages which might not arise at all, whilst as to the principal damages, and which are certain to follow a breach of the contract if it was an advantageous one to the plaintiff, the contract is silent."

In *Potter v. McPherson*, 61 Mo. 240, there was a contract between the parties for constructing a rail-

The general doctrine was well summed up in a Pennsylvania case. The owners of a hotel had agreed to sell it for \$14,000,

road, by the terms of which payments were to be made by the employer in monthly instalments, ten per cent. being reserved by him until the completion of the work, "as security for the faithful performance of the contract;" and in case of certain breaches on the part of the contractor the amounts reserved were to be absolutely forfeited to the other party. Held, that the amounts so to be retained were not liquidated damages for such breaches, but the contractor could recover the entire sum agreed upon, less the damages which in fact might be sustained by reason of his noncompliance with the contract. Hough, J., said: "To hold otherwise in such a case would produce the grossest inequality and injustice. The amount forfeited might bear no just relation to the damage suffered. The more nearly the contract approaches completion, the greater would be the reserve, and the less would be the damage. As the damage diminished, the sum forfeited would increase." *Savannah, etc. R. Co. v. Callahan*, 56 Ga. 331. See *Phelan v. Albany, etc. R. Co.*, 1 Lans. 258; *Jemmison v. Gray*, 29 Iowa, 537; *Faunce v. Burke*, 16 Pa. 469, 55 Am. Dec. 519; *Hennessey v. Farrell*, 4 Cush. 267; *Jackson v. Cleveland*, 19 Wis. 400.

Easton v. Pennsylvania & O. C. Co., 13 Ohio, 79, was a similar case, the contract providing for monthly payments, and a reserve of fifteen per cent. to insure the completion of the work; and also that in case of its too slow progress, and in certain other contingencies, the president of the company or the engineer should have power to determine

that the contract had been abandoned, and such determination should put an end to it, and exonerate the company from every obligation arising therefrom, and then the job might be disposed of as though the contract had never existed. It was declared abandoned because, in the opinion of the engineer, the work was not being prosecuted with sufficient force to insure its completion within the time agreed on. Suit was brought by the contractor to recover the fifteen per cent. reserved in monthly payments for work done. Woods, J., said: "The contract may be supposed to be severe upon the plaintiffs. They were, however, by no means forced to execute it. It was voluntary. By its terms, extensive control over the work is conferred upon the defendant, and great confidence reposed in the honest and faithful exercise of his discretion. If the defendant has violated neither its letter nor its spirit it is difficult to see what reasons the plaintiffs have for complaint. We sit here to enforce the contracts made by others, but we have no authority to impose upon them obligations to which they have never assented. The plaintiffs were to be paid monthly on estimates made monthly by the engineer. It has been done. Fifteen per cent. was to be retained to insure the completion of the work. The defendant kept back this amount. If the contract was declared abandoned, the determination of the president or engineer is conclusive. The contract is at an end, and the defendant exonerated from every obligation thence arising by express agreement. It is insisted

of which \$3,000 was to be paid at a specific time, when a deed was to be made; part possession was to be delivered at once, and in the contract the parties agreed to forfeit \$500 in case either failed to comply with its terms. It was held that the forfeiture was intended by them as a compensation to either in case the other wholly abandoned the contract and was liquidated damages, not a penalty. As the general rule of damages might not embrace all the compensation the parties deemed would be due in view of the probable risk, trouble, loss and expense incident to the contemplated change on the part of either party they were regarded as having fixed the sum stipulated as the amount of damage each would suffer from a total failure; and the word "forfeit" was outweighed by the other elements of interpretation and meant "to pay." Agnew, J., said: "It is unnecessary to examine the numerous authorities in detail, for they are neither uniform nor consistent. No definite rule to determine the question is furnished by them, each being determined more in direct reference to its own facts than to any general rule. In the earlier cases the courts gave more weight to the language of the clause designating the sum as penalty or as liquidated damages. The modern authorities attach greater importance to the meaning and intention of the parties. Yet

that when the whole work is completed the fifteen per cent. may be recovered by the plaintiffs. Had they finished the work the position would be correct, but if the contract is abandoned, relet and others complete the work, the amount retained as security is in its nature liquidated damages. If it were not so intended, there would be no security in the retention of this amount.
* * * The president or engineer is the umpire between the parties. His determination ends the contract and exempts the company from its obligations. The agreements of the parties are the law by which their rights are to be determined, and I am extremely doubtful, at least, whether any court can legitimately

interfere and upset their arrangements when an honest discretion has been exercised, where neither fraud nor circumvention has intervened. I am instructed by my brethren, however, to say, as the opinion of the court, that in this class of cases the subject is open to inquiry whether the contractors had done any act, or omitted the performance of any duty which, within the terms of the contract between the parties, would justify the president or engineer in declaring it abandoned; and if no such act had, in fact, been done, nor duty omitted, the honest exercise of the discretion conferred to abandon the contract ought not to shield the defendant from the payment of the per centum so retained."

the intention is not all-controlling, for in some cases the subject-matter and surroundings of the contract will control the intention where equity absolutely demands it. A sum expressly stipulated as liquidated damages will be relieved from if it is obviously to secure payment of another sum capable of being compensated by interest. On the other hand, a sum denominated a penalty or forfeiture will be considered liquidated damages where it is fixed upon by the parties as the measure of the damages, because the nature of the case, the uncertainty of the proof or the difficulties of reaching the damages by proof have induced them to make the damages a subject of previous adjustment. In some cases the magnitude of the sum and its proportion to the probable consequence of a breach will cause it to be looked upon as minatory only. Upon the whole, the only general observation we can make is that in each case we must look at the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and the surroundings, the ease or difficulty of measuring the breach in damages and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case.”⁴²

A contract for the use of a patent right for six years designated the annual license fee to be paid by the licensee and bound him, if he used it after the expiration of the term without a new license, to pay double the stipulated rate. This was sustained as an agreement for stipulated damages. “As the parties could not know in 1888 what the value of the use of the patent might be after 1894, it was certainly a proper subject for agreement between them as to what should be paid as damages should the defendant continue to use the patent without license after the expiration of the term, and this they did by agreeing on the sum of \$500. It could hardly have been

⁴² *Streeper v. Williams*, 48 Pa. 450; *Shreve v. Brereton*, 51 id. 175; *Emery v. Boyle*, 200 id. 249; *Robeson v. Whitesides*, 16 S. & R. 320.

It was a condition of the sale of goods by one firm to another that the purchaser should not advertise

them as of the stock of the seller, except as to the goods actually bought, and in case of the breach of the contract the purchaser was bound “in the penal sum of \$5,000 as liquidated damages.” The difficulty of establishing the actual loss

the intention of the parties that the right of the plaintiff, in case use should be made of the patent after the expiration of five years, should be limited each year to the actual damages he might be able to show that he sustained from the use made. It would be difficult to lay down a principle by which such damages could be estimated by a jury.⁴³ There is general concurrence in the view that the uncertainty concerning the amount of coal, ore or oil the lessee of a mine may take therefrom and the corresponding uncertainty as to the royalties the lessor will receive make provisions stipulating that not less than a certain quantity of coal, ore or oil shall be taken each year binding as agreements for stipulated damages.⁴⁴ In a case where the language used was not explicit as to the intention of the parties, the words "stipulated damages," or any similar term not being used, their omission was regarded as of some significance as to such intention; and the uncertainty of the damages was urged as a reason for construing the contract as one for stipulated damages. That argument was thus answered: There is no presumption in the law that damages resulting from the breach of an obligation to convey a mining claim cannot be calculated by market value or estimated by reference to pecuniary standards; nor is there a presumption that it would be impracticable or extremely difficult to fix the actual damage in such case. True, evidence of a character different from that adduced to show the value of lands used for purposes other than mining may be required, and its procurement may be attended with difficulty and

caused by a breach was so great that the stipulated sum was recoverable. *May v. Crawford*, 142 Mo. 390, 150 Mo. 504.

Where a street railroad company and a village contracted for the construction of a road and the former deposited \$10,000 as a guaranty of its good faith and stipulated that the same should become the property of the village as liquidated damages in case of its default, such stipulation was binding. *Peekskill, etc. R. Co. v. Peekskill*, 21 App. Div.

(N. Y.) 94, affirmed without opinion, 165 N. Y. 628.

⁴³ *Knox R. B. Co. v. Grafton S. Co.*, 64 Ohio St. 361, 16 Ohio Cir. Ct. 21.

⁴⁴ *Coal Creek, etc. Co. v. Tennessee C., etc. Co.*, 106 Tenn. 651, 678; *Lehigh Z. & I. Co. v. Bamford*, 150 U. S. 665, 37 L. ed. 1215; *Flynn v. White Breast C. & M. Co.*, 72 Iowa, 738; *Consolidated C. Co. v. Peers*, 150 Ill. 344; *Powell v. Burroughs*, 54 Pa. 329.

expense; but, nevertheless, the law does not raise, and the courts do not indulge, the presumption that proof of the value of such a claim is impracticable. In the absence of exceptional circumstances a promise to pay a certain sum of money if the promisor fail to perform his agreement to convey land is mere security and a penalty;⁴⁵ and this rule is applicable to mines as well.⁴⁶

§ 294. **Stipulation for payment of a fixed sum for partial or total breach.** Contracts often contain a variety of stipulations of unequal importance and, therefore, admitting of many breaches for which the damages would be different in amount. In such a case a total breach would involve an injury greater than that which would result from the infraction of a particular stipulation. Hence it is self-evident that a sum stipulated to be paid, either for breach of one of the minor provisions or of the whole contract, could not be a liquidation of damages on the principle of compensation for actual injury. The sum would either be too great for a partial breach or wholly inadequate to one which involved the loss of the whole contract.⁴⁷ Hence, if the

⁴⁵ *Dooley v. Watson*, 1 Gray, 414.

⁴⁶ *O'Keefe v. Dyer*, 20 Mont. 477, 483.

⁴⁷ *Sledge v. Arcadia Orchards Co.*, 77 Wash. 477, quoting the text; *Madler v. Silverstone*, 55 Wash. 159, 34 L.R.A.(N.S.) 1; *Miller v. Moulton*, 77 Wash. 325; *Mansur & T. I. Co. v. Tissier A. & H. Co.*, 136 Ala. 597; *Hoagland v. Segur*, 38 N. J. L. 230.

In *Pennypacker v. Jones*, 106 Pa. 237, the stipulation was that machines put into a mill should have a designated capacity to make high grades of flour, and if the results were not as promised the machines were to be retained without payment being made for them. The court observe that nothing was "said to the effect, either that for any breach the entire machinery may be retained without payment for it, or that for a gross breach it shall be

retained as stipulated damages. No sum is fixed either as a penalty or as liquidated damages. It is manifest that if the defendants produced all the results agreed upon except a deficiency of one or two barrels in the daily product, the forfeiture of the entire contract price of the machinery would be entirely out of proportion to the damage sustained. Again, the letter of this provision of the contract is that the machines may be retained if the results are not as promised. This relates only to the non-production of the results contracted to be produced, that is, that the mill should have a capacity of two hundred barrels daily, with full modern percentage of high grade flour equal in quality to best in market. It makes no provision for damages for other breaches of contract, which may occur consistently

agreement cannot be appropriated to a total breach, but applies by necessary construction to such as would cause trifling loss or inconvenience, as well as to those of great importance, such sum is a penalty. Parke, B., said: "The rule laid down in *Kemble v. Farren*⁴⁸ was that when an agreement contained several stipulations of various degrees of importance and value, the sum agreed to be paid by way of damages for breach of any of them shall be construed as a penalty, and not as liquidated damages, even though the parties have in express terms stated the contrary. * * * When the parties say that the same ascertained sum shall be paid for the breach of any article of the agreement, however minute or unimportant, they must be considered as not meaning exactly what they say; and a contrary intention may be collected from the other parts of the agreement."⁴⁹ But in a later case⁵⁰ he is reported to have said of the same case: "That decision has since been acted upon in several cases, and I do not mean to dispute its authority. Therefore, if a party agree to pay 1,000*l.* on several events, all of which are capable of accurate valuation, the sum must be construed as a penalty, and not as liquidated damages. But if there be a contract consisting of one or more stipulations, the breach of which cannot be measured, then the parties must be taken to have meant that the sum agreed on was liquidated damages and not a penalty." And

with the production of the results stated. One of the items of damage sustained by the plaintiffs was that it took a greater quantity of grain to produce a barrel with the defendants' machines than with the ordinary process, and the referee has found especially that from this source alone there was a positive loss of \$1,096.75. This is a species of direct loss for which we think there can be a recovery. The cost to which the plaintiffs were subjected in repairing the mill after the defendants ceased work is also a direct loss arising from the defective machinery furnished, and it is not provided for in the contract.

We think it clear that none of these items come within the terms of the stipulation for the retention of the machines, and that it was not within the contemplation of the parties that they should. We therefore consider that the provision for the retention of the machines was only in the nature of a penalty, and that the true measure of damages is the loss actually sustained, flowing directly from the defects in the defendants' machines."

⁴⁸ 6 Bing. 141.

⁴⁹ *Horner v. Flintoff*, 9 M. & W. 678.

⁵⁰ *Atkyns v. Kinnier*, 4 Ex. 776.

the same antithesis is stated by him in another case: "Where a deed contains several stipulations of various degrees of importance, as to some of which the damages might be considered liquidated, whilst for others they might be deemed unliquidated, and a sum of money is made payable on a breach of any of them, the courts have held it to be a penalty only, and not liquidated damages. But when the damages are altogether uncertain, and yet a definite sum of money is expressly made payable in respect to it by way of liquidated damages, those words must be read in the ordinary sense, and cannot be construed to import a penalty."⁵¹ This latter distinction has been recognized and followed in other cases in England and in America.⁵²

⁵¹ *Green v. Price*, 13 M. & W. 695; affirmed, 16 id. 346; *Weber v. Moy*, 183 Ill. App. 200. See *Berg-huis v. Schultz*, 119 Minn. 87.

⁵² *Wilson v. Godkin*, 136 Mich. 106; *Gottschall v. Kapp*, 47 Pa. Super. 102; *Emery v. Boyle*, 200 Pa. 249; *Carpenter v. Lockhart*, 1 Ind. 434.

Cotheal v. Talmage, 9 N. Y. 551, 61 Am. Dec. 716, was decided on this distinction. *Ruggles, J.*, said: "It is contended that because the contract referred to in the bond bound the defendant to do several things of different degrees of importance, and the sum of \$500 was made payable for the nonperformance of any or either, it must be a penalty, and not liquidated damages. This doctrine, in the cases in which it is asserted, is traced to the cases of *Astley v. Weldon*, 2 Bos. & Pul. 346, and *Kemble v. Farren*, 6 Bing. 141. But I do not understand either of these cases as establishing any such rule. The principle to be deduced from them is, that where a party agrees to do several things, *one of which is to pay a sum of money*, and in case of a failure to perform any or either of the stipulations agrees to pay a

larger sum as liquidated damages, the larger sum is to be regarded in the nature of a penalty; and being a penalty in regard to one of the stipulations to be performed is a penalty as to all. In *Kemble v. Farren*, *Tindal, C. J.*, says that if the clause fixing the sum for liquidated damages 'had been limited to breaches which were of uncertain nature and amount, we should have thought it would have the effect of ascertaining the damages upon any such breach;' thus rejecting the doctrine contended for by the defendant's counsel in the present case. It is true that the doctrine thus contended for has been adopted in some English and in several American cases; hastily, I should think, and without careful examination of the cases from which it is supposed to be derived. But if it should be considered as having any solid foundation in principle, it should be applied only in subordination to the general rule, which requires the courts in these, as in all other, cases to carry into effect the true intent of the parties. It should never be applied to cases like the present, where the amount of damages is uncertain from the na-

In a recent English case there is a very full discussion of the earlier cases, and the conclusion reached is that a contract to pay a sum of money if there shall be a breach of the stipulations contained in it, they being of varied importance and none of them trivial nor conditioned for the payment of specified amounts of money, provides for liquidated damages.⁵³ In the case referred to the plaintiff agreed to sell an estate for 70,000*l.* to the defendant; the latter was to build upon it and complete the buildings within ten years. A deposit of 5,000*l.* was to be

ture of the subject itself; and incapable of proof, not only from that uncertainty, but from the circumstances already stated; and where, for these reasons, there was a necessity for ascertaining them by estimate by the parties in their contract. The only plausible ground for withholding the doctrine in any case is, that the party might be made responsible for the whole amount of damages for the breach of an unimportant part of his contract, and so be made to pay a sum by way of damages grossly disproportionate to the injury sustained by the other party. Without undertaking to deny that this rule may properly be applied to some cases, I cannot think it ought to be applied to the present. The injustice it professes to avoid is no greater than that which is tolerated in many other cases for the purpose of enforcing a faithful performance of contracts." *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713.

It is said in *Morrison v. Richardson*, 194 Mass. 370: There is no suggestion of a penalty, and the fact that the contract provided for the delivery of different things at different times does not render it necessary to construe the stipulation as penal in its nature. It is true that the things to be delivered might vary with respect to their import-

ance and to the damage resulting from failure to deliver at the times named; but the stipulation must be construed as relating to a substantial and not a trifling or unimportant breach.

In *Eilers Music House v. Oriental Co.*, 69 Wash. 618, there was a contract to sell a musical instrument, payment to be made in instalments, the title to remain in the vendor until the price was paid, and he to retain all payments as liquidated damages if the vendee should fail to pay in full, remove, attempt to remove or sell the instrument. These stipulations were of equal importance; the increase in the amount of the stipulated sum as payments were made was considered to be the equivalent in the depreciation of the value of the instrument.

⁵³ *Wallis v. Smith*, 21 Ch. Div. 243, followed in *Schrader v. Lillis*, 10 Ont. 358, notwithstanding the court of appeal had, previous to the decision of *Wallis v. Smith*, announced the contrary doctrine in *Craig v. Dillon*, 6 Ont. App. 116; *Pye v. British Auto. Com. Syndicate*, [1906] 1 K. B. 425 (The existence of a variety of stipulations of varying importance is material, but not decisive. The deposit of the agreed sum is also significant, but not conclusive).

paid by the defendant. The agreement provided that "if the defendant should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out and complete the works, or in failing to perform any of the provisions therein contained, then, and in either of the said events, the deposit money of 5,000*l.* was to be forfeited; and if the balance of such deposit had not then been paid the defendant should forfeit and pay a sum of money equal to such balance, the intention being that if default was made by the defendant as aforesaid he should forfeit and pay to the plaintiff by way of liquidated damages the sum of 5,000*l.*, and the agreement to be void and of no effect." The defendant paid no part of the deposit, expended nothing on the estate and performed none of the acts stipulated for. A suit was brought to recover 5,000*l.* as liquidated damages, and the court of appeal held, affirming the judgment of Fry, J., that such sum was recoverable. It was pointed out by Jessel, M. R., that, although the *dicta* in the earlier cases⁵⁴ seemed to lay down a positive rule, the actual decisions were in cases where one or more of the stipulations was or were for the payment of a sum of money less than that named as liquidated damages. He said: "Although I wish to leave the question open, where there are several stipulations, and one or more is or are of such a character that the damages must be small, I do not wish for a moment to abstain from stating my opinion that there is no such doctrine where there are several stipulations irrespective of importance, which is the doctrine laid down by Mr. Justice Heath,⁵⁵ and apparently approved of by Lord Justice James.⁵⁶ There is neither authority nor principle for such doctrine, and I cannot see that it is established by any case which is binding on this court." Lord Justice Cotton said: "It is not sufficient, in my opinion, to say that the covenants to the breach of which this applies are of varying importance. That may be so, but yet the parties may

⁵⁴ *Astley v. Weldon*, 2 B. & P. 346, 353; *In re Newman*, 4 Ch. Div. 731; *Reynolds v. Bridge*, 6 E. & B. 540; *Atkyns v. Kinnier*, 4 Ex. 783; *Galsworthy v. Strutt*, 1 id. 659. See

Law v. Local Board of Redditch, [1892] 1 Q. B. 127.

⁵⁵ *Astley v. Weldon*, *supra*.

⁵⁶ *In re Newman*, *supra*.

very reasonably come to the conclusion that they will agree between themselves that the sum mentioned shall be assessed between them as the damages in consequence of the breaches of these various covenants. Probably there may be an exception, that where some of the covenants are of such a character that obviously the damages which can possibly arise from a breach in any way of that covenant would be very insignificant compared with the sum which has been fixed by the parties, there the court will give the non-natural construction to the terms used by the parties. In my opinion that comes within the same principle as where the courts have interfered, where one of the covenants has been for payment of a sum of money where the damage is capable of being assessed accurately, and is very much below the sum named." This decision is correctly interpreted to mean "that an agreement with various covenants of different importance is not to be governed by any inflexible rule peculiar to itself, but is to be dealt with as coming under the general rule that the intention of the parties themselves is to be considered. If they have said that in the case of any breach a fixed sum is to be paid, then they will be kept to their agreement unless it would lead to such an absurdity or injustice that it must be assumed that they did not mean what they said."⁵⁷

This doctrine has been adhered to in the court of appeal in a case in which the lease of a farm contained a covenant by the lessees not to sell hay or straw off the premises during the last twelve months of the term, but to consume the same; it also provided that an additional rent of 3*l.* per ton should be payable by way of penalty for every ton of hay or straw so sold. It appeared that there was a substantial difference between the manurial value of hay and that of straw. This difference was sufficient to make the stipulation one for a penalty, regardless of the use of that word by the parties. Lord Esher, commenting on the following language used by the court in *Lord Elphinstone v. Monkland L. and C. Co.*⁵⁸ "When a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion

⁵⁷ *Mayne on Dam.*, 8th London ed., p. 184.

⁵⁸ *L. R. 11 App. Cas.* 332, 342.

serious, and others but trifling, damage, the presumption is that the parties intended the sum to be penal, and subject to modification," said: I think the effect is substantially the same as if, instead of the words "some of which may occasion serious and others but trifling damage," he had said "some of which may occasion serious and others less serious damage."⁵⁹

§ 295. **Same subject.** Whether the damages are certain or not a fixed sum made payable on the happening of one or of several events, each of which will be the occasion of some loss, cannot be deemed a sum intended for compensation unless the stipulations are all of primary importance and the damages resulting from their breach are equally uncertain, or the provisions are parts of one whole, steps in the accomplishment of one end, and to be regarded as a single contract. Otherwise, no stipulation can operate on that principle. In many courts the law is held to be that a sum is stipulated damages when it conclusively appears that the parties have intentionally adopted it for that purpose. But where the courts proceed on the theory that there can be no such intention when the stipulation is so framed that it cannot by any possibility operate to adjust the recompense to the actual injury, a sum made payable indifferently for one breach or for many, for a breach attended with a small loss or a large one, can have no effect to liquidate damages. In case the damages are easily computed the extent of the inequality of the provision is seen at once; but even if they are uncertain the inequality is logically certain. Ryan, C. J., stated the point with great clearness: "Where the sum is agreed to be paid for any of several breaches of the contract and the damages resulting from the breach of all of them are uncertain, and there is no fixed rule for measuring them, but the breaches are apparently of various degrees of importance and injury, the cases are conflicting on the rule whether the sum should be held as a penalty or as liquidated damages. On prin-

⁵⁹ *Wilson v. Love*, [1896] 1 Q. B. 626. One of the judges was in doubt as to whether the conclusion arrived at was correct. A majority of them disapproved *Wright v. Tracey*, Irish Rep. 7 C. L. 134, which held that

one sum was to be paid in the event of the breach of any one of several stipulations of varying degrees of importance. *Earp v. Gilliam*, 1 New South Wales St. Rep. 281, is in accord with the principal case.

eiple, we are very clear that in such a case the sum should be held as a penalty. For it appears to us that it would be as unjust to sanction a recovery of the sum agreed to be paid alike for one trivial breach, or for one important breach, or for breach of the whole contract, as it would be to sanction such a recovery equally for damages certain and uncertain in their nature. The rule holding the sum to be a penalty in the latter case goes upon the injustice of allowing such a recovery equally in case of damages, uncertain indeed, but manifestly and materially different in amount; equally for breach of part of the contract, and for breach of the entire contract. Such a rule would not only put the same value on a small part as on a large part, but would put the same value on any part as on the whole."⁶⁰ This is believed now to be the doctrine generally held; if a gross sum is stipulated to be paid for any failure to fulfill an agreement consisting of several parts and requiring several things to be done or omitted it is a penalty.⁶¹

⁶⁰ *Lyman v. Babcock*, 40 Wis. 503. In 3 *Parsons on Cont.* 161, the author says: "Let us suppose a contract between parties, one of whom, for good consideration, promises to the other to do several things, and then it is agreed that the promisor shall pay, by way of liquidated damages, a large sum, if the promisee recover against him in an action for a breach of this contract. It must be supposed that this sum is intended and regarded as adequate compensation for the breach of the whole contract; for it is all that the promisor is to pay if he breaks the whole. It would, of course, be most unjust and oppressive to require him to pay this whole sum for violating any one of the least important items of the contract. But such would be the effect, if the words of the parties prevailed over the justice of the case. The sum to be paid would, therefore, be treated as penalty, and reduced accord-

ingly, unless the agreement provided that it should be paid only when the whole contract was broken, or so much of it as to leave the remainder of no value; or unless the sum agreed upon was broken up into parts, and to each breach of the contract its appropriate part assigned; and the sum or sums payable came in other respects within the principles of liquidated damages." *Astley v. Weldon*, 2 B. & P. 346, per Heath, J.; *Boys v. Ancell*, 5 Bing. N. C. 390; *Reilly v. Jones*, 1 Bing. 302; *People v. Central Pac. R. Co.*, 76 Cal. 24, 36; *Keeble v. Keeble*, 85 Ala. 552; *Mausur & T. I. Co. v. Tissier A. & H. Co.*, 136 Ala. 597.

⁶¹ *Los Angeles Olive Growers' Ass'n v. Pacific Surety Co.*, 24 Cal. App. 95; *Gougar v. Buffalo Specialty Co.*, 26 Colo. App. 8; *Greenblatt v. McCall & Co.*, 67 Fla. 165; *Gibbs v. Cooper*, 86 N. J. L. 226; *City of Summit v. Morris County Traction*

A distinction is taken in England where a deposit is made and it is to be forfeited for the breach of a number of stipula-

- Co., 85 N. J. L. 193; *Moses v. Autuono*, 56 Fla. 499, 20 L.R.A.(N.S.) 350; *Mayor v. Ætna Ind. Co.*, 4 Ga. App. 722; *Sanders v. McKim*, 138 Iowa 122; *Evans v. Moseley*, 84 Kan. 322; *Cunningham v. Stockton*, 81 Kan. 780; *Bolware v. Crohn*, 122 Mo. App. 571; *Cæsar v. Robinson*, 174 N. Y. 492; *Brownold v. Robdell*, 130 App. Div. (N. Y.) 371; *Raymond v. Edellbrook*, 15 N. D. 231, citing the text; *Davison v. Smith*, 18 Pa. Dist. 709; *American I. Co. v. Luff*, 12 Pa. Dist. 381; *Colonna D. D. Co. v. Colonna*, 108 Va. 230; *Bell v. Seranton C. M. Co.*, 59 Wash. 659; *Myers v. Ralston*, 57 Wash. 47; *Wilkes v. Bierne*, 68 W. Va. 82, 31 L.R.A.(N.S.) 937; *Madison v. American S. E. Co.*, 118 Wis. 480; *Floding v. Floding*, 137 Ga. 531, citing the text; *Chicago, etc. R. Co. v. Dockery*, 195 Fed. 221, 115 C. C. A. 173; *Hahn v. Horstman*, 12 Bush, 249; *Palestine I. F. & G. Co. v. Connally (Tex. Civ. App.)*, 148 S. W. 1109; *Ould v. Spartanburg R. Co.*, 94 S. C. 184; *O'Brien v. Illinois S. Co.*, 203 Fed. 436, 121 C. C. A. 546; *Dilley v. Thomas*, 106 Ark. 274; *Nichols & S. Co. v. Beyer*, 168 Mo. App. 686; *Iroquois F. Co. v. Wilkin Mfg. Co.*, 181 Ill. 582; *Wilhelm v. Eaves*, 21 Ore. 194, 14 L.R.A. 297, citing the text; *Keck v. Bieber*, 148 Pa. 645, 33 Am. St. 846; *Wilkinson v. Colley*, 164 Pa. 35, 26 L.R.A. 114; *Krutz v. Robbins*, 12 Wash. 7, 14, 28 L.R.A. 676, 50 Am. St. 871; *East Moline Co. v. Weir P. Co.*, 37 C. C. A. 62, 95 Fed. 250; *People v. Central Pac. R. Co.*, 76 Cal. 24, 37, quoting the text; *Radloff v. Haase*, 96 Ill. App. 74, quoting the text; *El Reno v. Cullinane*, 4 Okla. 457; *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406; *Bignall v. Gould*, 119 U. S. 495, 30 L. ed. 491; *St. Louis, etc. R. Co. v. Shoemaker*, 27 Kan. 677; *Higbie v. Farr*, 28 Minn. 439; *Carter v. Strom*, 41 Minn. 522; *Dickson v. Lough*, 18 L. R. Ir. 518; *Charles F. Co. v. Bond*, 26 Fed. 18; *McPherson v. Robertson*, 82 Ala. 459; *Moore v. Colt*, 127 Pa. 289, 14 Am. St. 845; *Farrar v. Beeman*, 63 Tex. 175; *Lausing v. Dodd*, 45 N. J. L. 525; *Whitfield v. Levy*, 35 id. 14; *Tayloe v. Sandiford*, 7 Wheat. 13, 5 L. ed. 384; *Van Buren v. Digges*, 11 How. 461, 13 L. ed. 771; *Carpenter v. Lockhart*, 1 Ind. 434; *Cook v. Finch*, 19 Minn. 407; *Lee v. Overstreet*, 44 Ga. 507; *Owens v. Hodges*, 1 McMull. 106; *Hammer v. Breidenbach*, 31 Mo. 49; *Goldsborough v. Baker*, 3 Cranch C. C. 48; *Nash v. Hermosilla*, 9 Cal. 581; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *Martin v. Taylor*, 1 Wash. C. C. 1; *Henderson v. Cansler*, 65 N. C. 542; *Lord v. Gaddis*, 9 Iowa 265; *Hallock v. Slater*, id. 599; *Brown v. Bellows*, 4 Pick. 179; *Moore v. Platte County*, 8 Mo. 467; *Jackson v. Baker*, 2 Edw. Ch. 471; *Thoroughgood v. Walker*, 2 Jones 15; *Curry v. Larer*, 7 Pa. 470, 49 Am. Dec. 486; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Trower v. Elder*, 77 Ill. 452; *Hoagland v. Segur*, 38 N. J. L. 230; *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355; *Gower v. Saltmarsh*, 11 Mo. 271; *Watts v. Sheppard*, 2 Ala. 425; *Cheddick v. Marsh*, 21 N. J. L. 463; *Niver v. Rossman*, 18 Barb. 50; *Berry v. Wisdom*, 3 Ohio St. 241; *Clement v. Cash*, 21 N. Y. 253; *Chase v. Allen*, 13 Gray 42; *Trustees v. Walrath*, 27 Mich. 232; *Elizabethtown, etc. R. Co. v. Geoghegan*,

tions of varying importance. Though some of them may be trifling or require the payment of a designated sum of money on a given day, if the contract provides for stipulated damages it will be carried out. Commenting on this rule Fry, J., said: "In that there seems to me to be great good sense, and for this reason, that if a fund is set apart to meet a particular contingency which is described, and that contingency arises, it is difficult to say that the stakeholder, or other person having the fund, is not to hand it over at once to the person who claims it under the contingency which has happened."⁶² There are American cases which hold that where the instrument refers to a sum deposited as security for performance, the forfeiture, if reasonable in amount, will be enforced as liquidated damages, the intention being evident that the money shall be paid over upon breach of the contract.⁶³ But this rule does not extend to the case of a deposit made by a bidder where his bid does not

9 Bush 56; *Daily v. Litchfield*, 10 Mich. 29; *Staples v. Parker*, 41 Barb. 648; *Magee v. Lavell*, L. R. 9 C. P. 107; *Shute v. Taylor*, 5 Mete. (Mass.) 61; *Beckham v. Drake*, 9 M. & W. 79; *Hoag v. McGinnis*, 22 Wend. 163; *Higginson v. Weld*, 14 Gray 165; *Lea v. Whitaker*, L. R. 8 C. P. 70; *In re Newman*, 4 Ch. Div. 724; *Hooper v. Savannah & M. R. Co.*, 69 Ala. 529; *Heatwole v. Gorrell*, 35 Kan. 692; *Bryton v. Marston*, 33 Ill. App. 211.

In some of the foregoing cases the rule is quoted as applicable to agreements for performance or omission of various acts, in respect to one or more of which the damages on a breach would be readily ascertainable, because the particular case embraced such stipulations; but without any expression to indicate that the determination would have been different if all the damages had been of an uncertain nature.

In *Hathaway v. Lynn*, 75 Wis. 186, 6 L.R.A. 551 (see *Palmer v.*

Toms, 96 Wis. 367), there was a single stipulation for a series of acts of the same nature from each of which the promisee might expect a benefit, but it was contingent, and \$200 was stipulated as damages for violation or disregard of the terms of the agreement; it was held that for a partial breach only nominal damages could be recovered in the absence of proof of substantial damages. See *McCullough v. Manning*, 132 Pa. 43.

The fact that property of varying values is covered by the stipulation does not bring it within the rule stated. *Diestal v. Stevenson*, [1906] 2 K. B. 345.

⁶² *Wallis v. Smith*, 21 Ch. Div. 243, 250, 258; *Hinton v. Sparkes*, L. R. 3 C. P. 161; *Lea v. Whitaker*, 8 id. 70; *Magee v. Lavell*, 9 id. 107.

⁶³ *Sanford v. First Nat. Bank*, 94 Iowa 680; *Maxwell v. Allen*, 78 Me. 33, 57 Am. Rep. 783; *Sanders v. Carter*, 91 Ga. 450.

refer to it as either liquidated damages or a penalty, the proposals providing simply that if the successful bidders enter into contract with bond without delay their checks will be returned. The only implication from such language is that a failure to enter into bond shall entitle the party inviting the bids to so much of the deposit as will be a just compensation for any loss that may result from the failure of the bidder to furnish the bond. "A failure to give the bond is a breach of the contract and the damages which would result from that breach would be the difference the city paid, if anything, in excess of the amount of the unexecuted bid, and also the expense of a re-advertisement for new bids. These elements of damage are neither uncertain nor difficult of ascertainment."⁶⁴ This view is in accord with a New York case in which a tenant deposited with the landlord a sum of money which the lease provided should be held as security for the tenant's performance of his covenants, the same to be applied on payment of rent for the last three months of the term if the lease was not sooner terminated by the tenant's failure to perform, in which event the money was to be forfeited and become the landlord's. After default in paying one month's rent the tenant was dispossessed, and the landlord refused to pay any part of the deposit. The tenant was entitled to recover it except so much as was necessary to pay the one month's rent.⁶⁵ Where the agreement is that the money

⁶⁴ *Willson v. Baltimore*, 83 Md. 202, 213. But see § 284.

⁶⁵ *Chaudé v. Shepard*, 122 N. Y. 397. The opinion contains this: In view of the intention of the parties as derived from the entire provision in respect to this deposit, there was nothing within their contemplation in its purpose, in the event of the premature termination of their relation given by the lease, other than such damages as should result from the default of the plaintiff. This is evident from the fact that the deposit was made as security for performance of the covenants and held as indemnity for such loss as should

arise from breach. And in that view the plaintiff was entitled to the surplus remaining after such claim of the defendant was satisfied. *Scott v. Montells*, 109 N. Y. 1. It is, however, urged for the defendant that, as the money was actually placed in the possession of the defendant pursuant to the contract at the time of the execution of the lease, the disposition of it is governed by a different rule than that which would have been applicable if the claim to it had been founded upon the executory agreement of the plaintiff to pay it. That would have been so if the money had been paid

deposited may be retained by the landlord as liquidated damages if the tenant is dispossessed, without any rebate or allowance, the rights of the parties are fixed by it.⁶⁶ But the sum paid and the value of the property exercise a potent influence in the judicial mind to the same extent as where the stipulation is not accompanied by a deposit, or provision is not made that the sum paid as part of the purchase price shall become the property of the vendor if the vendee fails to perform. Where a contract for the purchase of oranges upon the trees provided for the payment of a lump sum, fifteen hundred dollars of which was paid at the time it was made, and that if the vendee did not comply with its conditions such payment was to be forfeited, the court refused to treat that sum as liquidated damages.⁶⁷

There is one class of contracts in which the general construction of stipulations liquidating damages may at first sight seem to be in conflict with the doctrine stated: contracts of a negative character, requiring a party to abstain continuously from doing certain acts, as to discontinue a nuisance.⁶⁸ or to secure enjoyment of the good will in a certain trade or business. A contract of the latter description contains a guaranty against

upon the contract by way of partial performance by the plaintiff. In such case the party so paying, and afterwards by reason of his default is deprived of or denied the benefits of his contract, cannot recover the money so paid by him upon it. *Page v. McDonnell*, 55 N. Y. 299; *Lawrence v. Miller*, 86 N. Y. 131; *Havens v. Patterson*, 43 N. Y. 218. And these views are not inconsistent with the rule applied to the facts in the cases of *Oekenden v. Henly*, *Ellis, Bl. & E.* 485, and *Hinton v. Sparkes*, 3 C. P. Div. 161. There is no provision in the lease in question that the money deposited should be treated as a payment, or to make it such, unless the plaintiff's tenancy continued to the end of the term. In that event only, it was to be applied in payment of the

rent for the three months ending with its close. The provision relating to the deposit and expressive of forfeiture cannot, therefore, be treated as indicative of intention of the parties to give it the character of liquidated damages, but rather that it should have the nature of a penalty in the event there mentioned. *Carson v. Arvantes*, 10 Colo. App. 382, is to the same effect, as is *Cunningham v. Stockton*, 81 Kan. 780. See also, *Weber v. Moy*, 183 Ill. App. 200.

⁶⁶ *Longobardi v. Yuliano*, 33 N. Y. Misc. 472.

⁶⁷ *Nicholas v. Haines*, 39 C. C. A. 235, 98 Fed. 692.

⁶⁸ *Grasselli v. Lowden*, 11 Ohio St. 349; not to poach, *Roy v. Duke of Beaufort*, 2 Atk. 190.

competition from the promisor for a certain time and at a specified place, or in some limited district. He agrees not to engage in that business for such time within that place, and if he does, or violates the contract or fails to fulfill it, he will pay a certain sum. In general, a single violation, though it be accomplished in one day, and is confined to a small part of the district, subjects him to liability for the stated sum, and a repetition of such acts or a failure to abstain at all may subject him to no greater liability.⁶⁹ These agreements are in general such as to require one continuous act of abstention, and the consideration and the amount required to be paid evince the intention that such stipulated sum be paid for a minimum of violation. The agreement may be so framed that there may be repeated recoveries for successive infractions, or so that only one infraction is possible.⁷⁰ A contract which stipulates the liability for the

⁶⁹ See *Hathaway v. Lynn*, 75 Wis. 186, 6 L.R.A. 551. *Contra*, *Townsend v. Rumball*, 19 Ont. L. R. 433 (divisional court). Compare *Broadbrooks v. Tolles*, 114 App. Div. (N. Y.) 646.

⁷⁰ *Dakin v. Williams*, 17 Wend. 447; *Dunlop v. Gregory*, 10 N. Y. 241, 61 Am. Dec. 746; *Mott v. Mott*, 11 Barb. 127; *Streeter v. Rush*, 25 Cal. 67; *Duffy v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348; *Spicer v. Hoop*, 51 Ind. 365; *Jaquith v. Hudson*, 5 Mich. 123; *Mercer v. Irving*, El. B. & E. 563; *Reynolds v. Bridge*, 6 El. & B. 528; *Sainter v. Ferguson*, 7 C. B. 716; *Muse v. Swayne*, 2 Lea 251, 31 Am. Rep. 607; *Galsworthy v. Strutt*, 1 Ex. 659; *Rawlinson v. Clarke*, 14 M. & W. 187. See *Werner v. Finley*, 144 Mo. App. 554.

It is held in Kansas that contracts not to engage in business must be sued upon as breaches thereof occur. *Heatwole v. Gorrell*, 35 Kan. 692. But this is not in accord with the weight of authority. *Streeter v. Rush*, 25 Cal. 67; *Cushing v. Drew*, 97 Mass. 445; *Gressel-*

li v. Lowden, 11 Ohio St. 349; *Moore v. Colt*, 127 Pa. 289, 14 Am. St. 845. See *Leary v. Laflin*, 101 Mass. 334.

Under a statute of New York a contract was authorized to be made with certain officers for the publication of the reports of the decisions of the court of appeals. The officers were given power to impose terms beneficial to the public on the contracting publisher, and to make provision in the contract that a party injured by the refusal of the contractor to sell and deliver as prescribed in the contract should be entitled to recover damages and might fix a sum as liquidated damages. A contract so entered into required the contractor to furnish, at the contract price, any volume published under it to any other law-book seller in the city of New York or Albany applying therefor, "in quantities not exceeding one hundred copies to each applicant," unless the contractor chose to deliver more. The contract also provided that for any failure on the part of the contractor "to keep on sale, fur-

failure to receive or deliver goods of different qualities is not open to the objection that it provides the same sum for a partial as a total breach.⁷¹

Where the stated sum obviously and grossly exceeds any just measure of compensation there is the same recognized discretion in such cases as in others to declare it a penalty.⁷²

nish and deliver the volumes, or any of them, as agreed, he shall forfeit and pay * * * the sum of \$100, hereby fixed and agreed upon, not as penalty, but as liquidated damages," to be sued for and recovered by the persons aggrieved. The plaintiff, a bookseller, applied on six different occasions for a number of copies required by him in his business, of certain volumes published under the contract, tendering the contract price, which defendant refused to deliver. In an action on the contract it was held a valid stipulation of damages, not a penalty, and that the plaintiff was entitled to recover the damages for each refusal. Miller, J., delivering the opinion of the court, treats the question as one depending on the intention of the parties, ascertained from the language of the contract and from the nature of the surrounding circumstances of the case. Referring to the case he says: "The breach provided for was a single one—a failure to keep on sale, furnish and deliver the volumes named at a price fixed. The agreement expressly provides that the sum named is fixed and agreed upon 'not as a penalty.' The failure to sell and deliver embraced not only a single volume, but might be one hundred volumes at one time. The damages for a failure to deliver a single volume might be very small, while for a larger number it would be far greater; and, in case of a bookseller, disposing of them in the course of

his trade, might be beyond the amount actually fixed. The damages for a single breach were also uncertain, and could not be determined without extrinsic evidence, and without some embarrassment. The mere loss of profits on a volume to a bookseller might also be of but trifling amount when compared with the injury to his trade by being unable to furnish to his customers volumes of the reports as required. Under the circumstances it is easy to see that there would be considerable difficulty in making proof of the actual damages incurred. In view of the facts, although the question is by no means free from embarrassment, it is, perhaps, a fair inference that the parties actually intended to guard against these difficulties by fixing the amount named in the contract as liquidated damages. As the damages which might possibly be incurred by a failure to supply a larger number of copies provided for by the contract might be greater, we think the amount was not unreasonable, or grossly disproportionate to the probable estimate of actual damages." *Little v. Banks*, 85 N. Y. 258.

⁷¹ *Diestal v. Stevenson*, [1906] 2 K. B. 345.

⁷² *Wheatland v. Taylor*, 29 Hun 70; *Burrill v. Daggett*, 77 Me. 545; *Smith v. Wedgwood*, 74 id. 457; *Stearns v. Barrett*, 1 Pick. 443, 11 Am. Dec. 223; *Grant v. Pratt*, 52 App. Div. (N. Y.) 540, 549.

In *Perkins v. Lyman*, 9 Mass. 522,

§ 296. Effect of part performance accepted where damages liquidated. For the same reason that one sum cannot consist-

11 id. 76, 6 Am. Dec. 158, the defendant covenanted for a valuable consideration that he would not be directly or indirectly interested in any voyage to the northwest coast of America or in any traffic with the natives of that coast for seven years, in the penal sum of \$8,000. It was held a violation of such covenant to own and fit a vessel for such voyage, although before her departure the covenantor divested himself of all interest in the vessel and cargo; but also held that the \$8,000 was penalty. "The question whether a sum of money mentioned in an agreement shall be considered as a penalty and so subject to the chancery powers of this court or as damages liquidated by the parties is always a question of construction, on which, as in other cases where a question of the meaning of the parties in a contract, provable in a written instrument, arises, the court may take some aid to themselves from circumstances extraneous to the writing. In order to determine upon the words used there may be an inquiry into the subject-matter of the contract, the situation of the parties, the usages to which they may be understood to refer, as well as to other facts and circumstances of their conduct; although their words are to be taken as proved by the writing exclusively." The court considered there was nothing in the transaction and subject-matter to indicate whether the sum stated was penalty or liquidated damages. It might be either consistently with the object of the contract. But the court say: "If the sum of \$8,000, mentioned in the agreement, is to be treated as liquidated damages,

then for one instance, in which the contract should be broken, and for a thousand in which the defendant should interfere in the trade contemplated by the parties to be secured to the plaintiffs for seven years, exclusively of him and of all acting under him, the same damages, the amount of demand, would be recovered, and having been once paid, if demanded as a penalty, there would be an end of the contract; but if demanded as damages, then, it seems, the demand might be repeated. Examined in this view we see nothing which gives this contract any other determinate meaning than that of penalty. If there is nothing to prevent the plaintiffs, in case the defendant should have injured them in the breach of his contract to a greater amount than \$8,000 from recovering upon his covenant, and in that form of action, the extent of the damage actually sustained, although greatly exceeding the sum mentioned, it would be a severe construction, indeed, which should consider him liable to that amount upon one breach, however slight the injury and loss may have been. * * * He binds himself in the sum of \$8,000 for his faithfully and strictly adhering to this contract. It is not said, if he does so, contrary to his agreement, then he will pay that sum as a satisfaction. Nor is there anything expressed which would conclude the plaintiffs, unless it be their form of action (debt), when the amount of damages should exceed \$8,000, from demanding to the extent of their loss."

Where there was a contract to purchase a certain number of wag-

ently be compensation alike for a total and partial breach, a stated sum made payable for the former cannot by construction be applied to any infraction after acceptance of part performance.⁷³ In case of such a stipulation the stated sum is only recoverable upon the happening of the very event mentioned in the contract. If a partial breach occurs it has sometimes been said the stated sum is as to that breach only penalty, and damages are given on proof without regard to it.⁷⁴ In other instances it has been held that the damages for a partial breach are a constituent of the sum stipulated for an entire failure to perform. Thus, where there were liquidated damages for a failure to convey land and a part only of it was conveyed and a failure as to the residue, the damage allowed was a sum which bore the same ratio to the stipulated sum that the value of the land not conveyed bore to that of the whole.⁷⁵ If the owner of the building, with the consent of the contractor, who has bound himself

ons at a stipulated price and the specified sum was payable without regard to the time the breach might occur, the court said: It can readily be seen that, if the purchaser had given notice of his intention to cancel on the day after the contract was made, the damage to the seller would in all probability have been less than if he had waited until the seller had gone to the trouble and expense of getting the wagons together and of packing them and preparing them for shipment, and yet the contract makes no difference between the effect of a cancellation received at one time and the effect of a cancellation received at a time when in the nature of things the damages would have been wholly different. Hence, the sum named was a penalty. *Florence W. Works v. Salmon*, 8 Ga. App. 197.

⁷³ *Mount Airy M. & G. Co. v. Runkles*, 118 Md. 371; *Hoagland v. Segur*, 38 N. J. L. 230; *Shute v. Taylor*, 5 Metc. (Mass.) 61; *Taylor v. The Marcella*, 1 Woods 302;

Watts v. Sheppard, 2 Ala. 425; *Berry v. Wisdom*, 3 Ohio St. 241; *Lampman v. Cochran*, 16 N. Y. 275, per *Shankland, J.*; *Sheill v. McNitt*, 9 Paige 101; *Mundy v. Culver*, 18 Barb. 336; *Smith G. Co. v. Newall*, 22 R. I. 295. The text is approved in *Wibaux v. Grinnell L. S. Co.*, 9 Mont. 154, 165. In the last case a contract for the sale and purchase of cattle stipulated that a sum should be paid if the vendor failed to deliver the entire number called for; no provision was made for the delivery of a less number. Less than the whole were delivered and accepted. As a result the agreement for stipulated damages was converted into one in the nature of a penalty.

⁷⁴ *Sledge v. Arcadia Orchards Co.*, 77 Wash. 477, quoting the text; *Myers v. Ralston*, 57 Wash. 47, quoting the text; *Wheatland v. Taylor*, 29 Hun 70; *Shute v. Taylor*, 5 Metc. (Mass.) 61.

⁷⁵ *Watts v. Sheppard*, 2 Ala. 425. See *Chase v. Allen*, 13 Gray 42.

to pay \$10 per day as liquidated damages for delay in completing it, occupies a part of the building after the time stipulated for its completion, but before it is finished, the liability for the stipulated sum terminates with such occupancy; thereafter the contractor is only liable for the actual damages.⁷⁶

§ 297. **Liquidated damages are in lieu of performance.** It has been held that in all cases where a party relies on the payment of liquidated damages it must clearly appear from the contract that they are to be paid and received in lieu of performance.⁷⁷ Where the stipulated sum covers the loss of the whole contract, and does not apply where there is merely a violation of some detail of it, they are in lieu of the performance of the entire contract; they satisfy the whole and every particular of it. Thus, if in an agreement for submission of a controversy to arbitration it is mutually agreed that either party failing to fulfill it shall pay to the other a specified sum as stated damages, not so large in itself as to imply a penalty, it would be recoverable from the party who should revoke the power of the arbitrators, for he would thereby repudiate the submission and defeat the entire object of the agreement. But if there be no revocation and after an award is made one party refuses to perform it, the refusal is not such a breach as the stated sum applies

The sum named must be regarded as liquidated as to all the provisions to which it shall extend, or it will not be so regarded as to any. It cannot be liquidated damages in one case and not in the other. If the contract applies to the covenant of one party to convey, and to that of the other party to pay the consideration money on the delivery of the deed, the measure of damages in one case is the unpaid purchase-money, which can be ascertained, and as to that covenant it cannot be considered liquidated damages, and if not liquidated as to that covenant it is not as to the other. *Lansing v. Dodd*, 45 N. J. L. 525;

Whitfield v. Levy, 35 id. 149, 156; *Laurea v. Bernauer*, 33 Hun 307.

If the acts of one in whose favor damages are stipulated are responsible for part of the delay in the execution of a building contract, there cannot be an apportionment of the stipulated sum. *Willis v. Webster*, 1 App. Div. (N. Y.) 301.

⁷⁶ *Collier v. Betterton*, 87 Tex. 440.

⁷⁷ *Hedrick v. Firke*, 169 Mich. 549; *Koch v. Streuter*, 218 Ill. 546, 2 L.R.A.(N.S.) 210; *Gray v. Crosby*, 18 Johns. 219; *Winch v. Mutual Benefit Ice Co.*, 9 Daly 177. See *Cape May R. E. Co. v. Henderson*, 42 Pa. Super. 1, 231 Pa. 82.

to.⁷⁸ And if such sum is made payable as liquidated damages for a breach of some particular only of the agreement, then it may still be a question whether that feature of the contract will, notwithstanding the breach, and the claim or even payment of those damages, be of continuing obligation so as to admit of other breaches and successive claims and recoveries of the same

⁷⁸ *Id.* In *Lowe v. Nolte*, 16 Ill. 475, an action was brought on an award. The submission stated that several suits were pending between the parties, arising out of a contract in relation to the purchase of grain; and it was agreed that all matters connected with the contract and the suits were to be referred; that the decision be conclusive, and that judgment, on ten days' notice, should be entered on the award. It was also provided that the submission should not operate to dismiss any of the pending suits until final judgment on the award, or the performance of it; the parties binding themselves to abide by the award "in the penalty of \$1,000 as stipulated damages, to be paid by the party delinquent to the party complying." The award was for \$5,876.46. *Scates, C. J.* (speaking of causes of demurrer to the declaration), said: "The most important is the want of an averment of a failure to pay the liquidated damages, stipulated to be \$1,000, for non-compliance with the award, and which it is here contended is all that can be recovered under the submission and award. If this view is sustainable no action will lie upon the award as it is here brought, but alone upon the submission. To solve this objection it is necessary to ascertain, from the nature of the matters in controversy and the terms and language of the parties in their submission, whether they intended by this part of the agree-

ment that the \$1,000 fixed as liquidated damages should be strictly and technically so held, or only as a penalty. Courts have not been confined and controlled alone by the literal terms, stipulated damages, used by the parties, when inquiring into their true intention and meaning; but they have looked to the subject-matter of the dispute, the situation and condition of the parties, and all the circumstances, together with the effects and consequences, as aids in arriving at the true meaning. Where a covenant is made concerning an existing cause of action, that cause may or may not be merged in the covenant. If it be merged, and the covenant be broken, the party is liable alone on the covenant, and not on the original cause of action. If it is not merged, then the covenant affords a new and additional cause of action and remedy upon it. In this latter case, if the amount named in the covenant or agreement be fixed as liquidated or stipulated damages, and is *intended* by the parties to be paid in lieu of performance, then the recovery will be confined to that amount for the breach, as well as to his action on the covenant or agreement for his remedy, and cannot preserve his original cause of action. But when such intention does not appear, the sum named as stipulated or liquidated damages will be received and treated as a penalty; and the party may recover upon the original cause."

stipulated damages. This question is not to be settled by any rule peculiar to the construction of such stipulations; it depends on the intention of the parties as ascertained by a fair interpretation of the contract. Where certain work is required to be done within a specified time it may be, and often is, agreed that a stated sum shall be paid for every week, month or other period during which its completion is delayed beyond that time. In such cases there is, by necessary implication, a continuing obligation as well as right to finish the work, though the stipulated time of performance has elapsed. These sums are recoverable and may be aggregated,⁷⁹ and they are severally payable only as complete satisfaction for the delay of performance and not in lieu of it.

§ 298. **Effect of stipulation upon right of action.** It is not the effect of the ordinary contract which stipulates for damages to constitute the person who claims the benefit of the stipulation a tribunal to determine his rights thereunder. Hence, where a contractor has not performed according to his agreement the contractee may sue for the sum which the other has agreed shall be the damages;⁸⁰ and where the amount is to be deducted from the payment last due, if such deduction has been made, the fact may be shown in bar of the action.⁸¹ A plaintiff who elects to take liquidated damages cannot have an injunction; he may elect between the two remedies, but cannot have both.⁸² If it is not apparent that the payment of the stipulated sum is to be made as an alternative in lieu of strict performance equity will enjoin the defendant from breaching his covenant,⁸³ or will

⁷⁹ *Fletcher v. Dyche*, 2 T. R. 32; *Pettis v. Bloomer*, 21 How. Pr. 317; *Hall v. Crowley*, 5 Allen 304, 81 Am. Dec. 745. See § 291; *Weeks v. Little*, 47 N. Y. Super. Ct. 1.

⁸⁰ *Mitchell v. McKinnon*, 65 Mich. 683; *Lea v. Whitaker*, L. R. 8 C. P. 70.

Recovery will be confined to the damages stipulated. *Stone, Sand & Gravel Co. v. United States*, 234 U. S. 270, 58 L. ed. 1308.

⁸¹ *Mitchell v. McKinnon*, 65 Mich.

683; *Stillwell v. Temple*, 28 Mo. 156.

⁸² *General Accident Assur. Co. v. Noel*, [1902] 1 K. B. 377.

⁸³ *Heinz v. Roberts*, 135 Iowa 748 (unless the contract indicates that the stipulation was intended to be the exclusive remedy); *Wills v. Forester*, 140 Mo. App. 321, and cases cited; *Ewing v. Davis*, 2 Ohio C. C. (N. S.) 90; *Davies v. Daniels*, 8 Hawaii 88; *Augusta S. L. Co. v. Debow*, 98 Me. 496; *Wilkinson v.*

specifically enforce performance of the covenant where the circumstances justify it.⁸⁴

§ 299. **Waiver of right to stipulated damages.** If part performance of an entire contract is accepted, a stipulation concerning future damages is waived.⁸⁵ An exception has been made where a city consented to the operation of a street railway partially constructed and from the operation of which it received the license fees and stipulated percentage of receipts, though there was no election to declare a forfeiture.⁸⁶ The waiver of the right to annul a building contract waives a claim to stipulated damages for either non-performance or delay by the contractors, in the absence of an express agreement to the contrary,⁸⁷ as where the contract gives the employer the absolute right to the reserved percentage.⁸⁸ There is no waiver of the right to such damages on the ground of part performance where the obligee performs for and at the request of the obligor; no consent that an existing breach shall be disregarded can be implied from the obligee's act.⁸⁹ Action taken in pursuance of the contract does not affect the right to recover the stipulated sum.⁹⁰ Nor does the making of payments to subcontractors who are not responsible for the delay in performance of the contract.⁹¹ Acceptance of the work without asserting a claim for the stipulated sum in accordance with the contract is a waiver of the right

Colley, 164 Pa. 35, 26 L.R.A. 114; Harris v. Theus, 149 Ala. 133, 123 Am. St. 17, 10 L.R.A.(N.S.) 204; Hickey v. Brinkley, 88 Neb. 356. *Contra*, Rucker v. Campbell, 35 Tex. Civ. App. 178, if the defendant is not insolvent.

⁸⁴ Johnston v. Blanchard, 16 Cal. App. 321; Koch v. Streuter, 218 Ill. 546, 2 L.R.A.(N.S.) 210; Diamond M. Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464. *Contra*, Mallory v. Globe-B. C. M. Co., 11 Ariz. 296.

⁸⁵ Wibaux v. Grinnell L. S. Co., 9 Mont. 154; Fruin-B. C. Co. v. Ft. Smith & W. R. Co., 140 Fed. 465.

So in case of acceptance of performance otherwise than in accordance with the terms of the contract.

Suth. Dam. Vol. I.—59.

Poppenberg v. R. M. Owen & Co., 84 N. Y. Misc. 126.

⁸⁶ Wright v. Chicago, 137 Ill. App. 240.

⁸⁷ Henderson B. Co. v. O'Connor, 88 Ky. 303, 331; O'Connor v. Henderson B. Co., 95 Ky. 633. See Macy Co. v. New York, 144 App. Div. (N. Y.) 408, and compare Couch v. Newtown C. Council B. Ass'n, 109 App. Div. (N. Y.) 856.

⁸⁸ Louisville & N. R. Co. v. Mason, 126 Ky. 844, distinguishing the cases because of the difference in the terms of the contracts.

⁸⁹ Parr v. Greenbush, 42 Hun, 232.

⁹⁰ Lamson v. Marshall, 133 Mich. 250.

⁹¹ Stephens v. Essex County P. Com., 143 Fed. 844, 75 C. C. A. 60.

thereto,⁹² as where payment of the first installment for work done after it should have been completed is made.⁹³ But this does not affect the right to recover the liquidated amount for subsequent defaults.⁹⁴ Where it is provided that a sum shall be deducted from the contract price for the performance of work for each week's delay beyond a time fixed, the right thereto is not waived because the amount is not deducted from the monthly estimates or claimed from month to month, if the contract is silent as to the time when the claim shall be asserted.⁹⁵ If the defendant's right to retain the money which has been agreed upon as stipulated damages depends upon the failure of the plaintiff to perform and the termination of the contract for that reason, the fact that the contract is ended by consent does not waive the right to the damages.⁹⁶ But such damages cannot be recovered if the delay in the performance of a building contract in whole or in part is owing to the failure of the person for whom it is being performed to perform a condition precedent.⁹⁷ If such a contract provides for the completion of the building by a day designated, and, in default, that the contractor shall pay liquidated damages, and, further, that other work may be ordered in addition to that expressly provided for, and such work is ordered with the necessary result that the completion of the building is delayed, the contractor is not liable for the liquidated damages unless he has agreed that, whatever additional work may be ordered, he will complete the whole within the

⁹² *Central B. P. Co. v. Mt. Clemens*, 143 Mich. 259.

⁹³ *Erickson v. Green*, 47 Wash. 613.

⁹⁴ *Keefe v. Fairfield*, 184 Mass. 334.

⁹⁵ *Texas, etc. R. Co. v. Rust*, 19 Fed. 239, 245.

⁹⁶ *Wolf v. Des Moines R. Co.*, 64 Iowa, 380.

⁹⁷ *Long v. Pierce County*, 22 Wash. 330, 348; *Eldridge v. Fuhr*, 59 Mo. App. 46; *Standard G. Co. v. Wood*, 9 C. C. A. 362, 61 Fed. 74; *Kerr E. Co. v. French River T. Co.*, 21 Ont. App. 160; *Jefferson H. Co. v. Brumbaugh*, 168 Fed. 867, 94 C. C. A. 279; *Caldwell v. Schmul-*

bach, 175 Fed. 429; *Ittner v. United States*, 43 Ct. of Cls. 336; *Wallis v. Wenham*, 204 Mass. 83; *Holland T. B. Co. v. Nixon*, 61 N. Y. Misc. 469; *Callanan Road Imp. Co. v. Oneonta*, 117 App. Div. (N. Y.) 332; *Beattie Mfg. Co. v. Heinz*, 120 Mo. App. 465; *Strobel S. Co. Sanitary Dist.*, 160 Ill. App. 554. See *Chamberlin v. Booth*, 135 Ga. 719, 35 L.R.A. (N.S.) 1223; *Moore v. Board of Regents*, 215 Mo. 705; *Starr v. Gregory C. M. Co.*, 6 Mont. 485, 13 Pac. 195; *King I. B. & Mfg. Co. v. St. Louis*, 43 Fed. 768, 10 L.R.A. 826; *Ortmann v. First Nat. Bank*, 49 Mich. 56; *Dannat v. Fuller*, 120 N. Y. 554.

specified time.⁹⁸ And where the delay in the performance is caused by the default of both parties and the damages cannot be apportioned the stipulation for compensation cannot be enforced.⁹⁹ If delay in the completion of a contract results from radical alterations provided for therein a deduction will be made for the time consumed in making them.¹ Where the employer was in default in furnishing machinery, in consequence of which the contractor could not finish the work in the stipulated time, the time was treated as extended so as to permit the installation of the machinery after it was furnished though it could not have been installed in time if delivered earlier; damages were allowed for the delay beyond the extended time.² The employer is deprived of his right to the stipulated damages

⁹⁸ *Dodd v. Churton*, [1897] 1 Q. B. 562; *Holmes v. Guppy*, 3 M. & W. 387; *Westwood v. Secretary of State for India*, 11 Week. Rep. 261, 7 L. T. 736. (*Jones v. St. John's College*, L. R. 6 Q. B. 115, was distinguished on the ground that the court had no opportunity to construe the contract, the allegation that the builder had entered into the contract pleaded being admitted by the demurrer); *Bloomington H. Co. v. Garthwait*, 227 Ill. 613; *Callanan v. Road Imp. Co.*, 117 App. Div. (N. Y.) 332; *Small v. Burke*, 92 App. Div. (N. Y.) 338. See *Reardon v. Cushing*, 90 Minn. 360; *Bagwell v. American S. Co.*, 102 Mo. App. 707; *Ottawa Northern & W. R. Co. v. Dominion B. Co.*, 36 Can. Sup. Ct. 347.

The owner of a building may not claim any advantage because an oral order of his for alterations from the plans was accepted by the contractor as a compliance with the contract which specified that extra work should be ordered in writing. *Focht v. Rosenbaum*, 176 Pa. 14.

⁹⁹ *Mitchell & McNeeley v. Davis*, 73 W. Va. 403, citing the text; *Early v. Tussing*, 182 Mich. 314;

Caldwell v. Schmulbach, *Jefferson H. Co. v. Brumbaugh*, 168 Fed. 867, 94 C. C. A. 279; *Vilter Mfg. Co. v. Tygart's Valley B. Co.*, 168 Fed. 1002; *Mosler S. Co. v. Maiden Lane S. D. Co.*, 199 N. Y. 479, 37 L.R.A. (N.S.) 363, 138 App. Div. (N. Y.) 905; *Champlain C. Co. v. O'Brien*, 117 Fed. 271; *Holland T. B. Co. v. Nixon*, 61 N. Y. Misc. 469; *Wiley v. Hart*, 74 Wash. 142.

The exercise of any right arising from the breach of the contract is not a waiver of the right to recover the sum stipulated to be paid for its breach. *Barrett v. Monroe*, 69 Wash. 229, 40 L.R.A. (N.S.) 763.

In a late case it is laid down that the exercise of the authority given by the contract to require the performance of additional work gives the contractor a reasonable extension of time in which to perform it; but would not excuse unnecessary delay in the completion of the contract or relieve from the stipulated liability therefor. *Coal & I. R. Co. v. Rehner (C. C. A.)* 204 Fed. 859.

¹ *Williams v. Rosenbaum*, 57 Wash. 94; *Wilkens v. Wilkerson (Tex. Civ. App.)*, 41 S. W. 178.

² *Morse D. D. & R. Co. v. Sea-*

only in so far as he is responsible for the delay which has ensued.³ By exercising the option to re-enter because of the non-payment of rent a landlord waives the right to claim a deposit made by the tenant except as to rent accrued,⁴ and so where the tenant remains in possession pursuant to the landlord's solicitations; there can be no recovery beyond the rent agreed upon.⁵ Acquiescence in delay may make it inequitable to enforce the stipulated liability.⁶ By discharging the contractor and taking over the work the employer waives his right to the agreed damages,⁷ and so by bringing an action to enforce the payment of the contract price.⁸ A waiver does not result from making partial payments to a contractor after the time fixed for performance if a sufficient sum is retained to cover the stipulated damages, nor by using the building being erected;⁹ nor from the payment of the agreed price for property undelivered at the time stipulated though no rights are reserved.¹⁰ Compliance with the conditions upon which the stipulated sum is to be paid must be shown, as the written statement of the architect showing responsibility for the delay.¹¹

In equity the acceptance of money under a contract after the right to declare a forfeiture has accrued, without giving the party bound notice of intention to insist upon strict performance of the contract, is a waiver of the right to declare a forfeiture.¹² Apportionment of the damages caused by delays in consequence of the default of the respective parties will be made when, either by competent and satisfactory evidence, or by a contractual standard fixed by the parties, this can be done with reasonable certainty. The contractor must show the number of days he is exempt from liability for the stipulated sum by reason of the contract.¹³

board T. Co., 161 Fed. 99, 88 C. C. A. 445.

³ Wallis v. Wenham, 204 Mass. 83.

⁴ Cunningham v. Stockton, 81 Kan. 780.

⁵ Kenwood H. Co. v. Hiland, 153 Ill. App. 108.

⁶ Coryell v. Dubois, 226 Pa. 103.

⁷ New Haven v. National S. E. Co., 79 Conn. 482.

⁸ Garrison v. Glass, 139 Ala. 512.

⁹ Lawrence County v. Stewart, 72 Ark. 525.

¹⁰ Clydebank E. & S. Co. v. Yzquierdo y Castaneda, (1905) App. Cas. 6.

¹¹ Swift v. Dolle, 39 Ind. App. 653.

¹² Baerenklau v. Peerless R. Co., 80 N. J. Eq. 26.

¹³ Schmulbach v. Caldwell, 196 Fed. 16, 115 C. C. A. 650.

CHAPTER VIII.

INTEREST.

§ 300. Definitions and general view.

301. Interest by the early common law.

302. Interest in England legalized by statute.

303. Interest at common law in America.

304. Agreements for interest.

SECTION 1.

GENERAL PROMISE TO PAY MONEY "WITH INTEREST."

305. Rule of construction.

306. Law or custom fixes the rate.

307. Legal or stipulated rate applies from date.

308, 309. Whether same rate will apply after debt due.

SECTION 2.

AGREEMENTS FOR INTEREST "UNTIL PAID."

310. Agreements for interest from date until debt paid.

311, 312. Agreements for a different rate after debt due.

SECTION 3.

AGREEMENTS FOR MORE THAN LEGAL RATE BEFORE MATURITY.

313. Effect of usury found.

314. Who may take advantage of usury.

315. When contracts not void for usury.

316, 317. Recoveries under usury statutes.

SECTION 4.

AGREEMENTS FOR MORE THAN LEGAL RATE AFTER MATURITY.

318. Not usury; but penalty.

319. Same subject; when debtor relieved in Illinois.

SECTION 5.

INTEREST AS COMPENSATION.

320. Scope of section.

321. Right not absolute.

322. Tacit agreements to pay interest on accounts.

323. Interest where payment unreasonably and vexatiously delayed

- § 324. *Quantum meruit* claim to interest.
- 325. Allowed on money loaned.
- 326, 327. Allowed on money paid.
- 328. *Quantum meruit* claim to interest between vendor and purchaser.
- 329. Interest allowed from time when money ought to be paid.
- 330. No interest on penalties nor statutory liability for riots.
- 331. When allowed on penalty of bonds.
- 332. Interest against government.
- 333, 334. Judgments bear interest.
- 335. Not allowed on revival of judgment by *scire facias*.
- 336. Interest in condemnation proceedings.
- 337. Interest on taxes, license fees, special assessments and customs duties.
- 338. Infants liable for.
- 339. Interest as between landlord and tenant.
- 340. Interest on damages for infringing patents.
- 341. Right to interest as affected by the marital relation.
- 342. Interest as between partners.
- 343. Interest on stockholders' statutory liability.
- 344. Allowed on annuities and legacies.
- 345. Interest on advancements.
- 346. On money due on policy of insurance, and on premiums.
- 347, 348. Not allowed on unliquidated demands.
- 349, 350. Interest on accounts.
- 351. When demand necessary.
- 352. When allowed on money had and received.
- 353. When allowed against agents, trustees and officers.
- 354. On money obtained by extortion or fraud, or wrongfully withheld or disposed of.
- 355. Interest in actions for torts.

SECTION 6.

THE LAW OF WHAT PLACE AND TIME GOVERNS.

- 356. Importance of subject.
- 357. General rule as to contracts.
- 358. Rule as to notes and bills.
- 359. Bonds to the United States.
- 360, 361. Between parties in different states.
- 362-365. Where usury is involved.
- 366. The law of what place governs the rate as damages.
- 367. Pleading and proof of foreign law.
- 368-370. Effect of change in law of place of contract.

SECTION 7.

INTEREST AS AN INCIDENT TO THE PRINCIPAL.

- 371. Interest due by agreement a debt
- 372. Interest as damages accessory to principal.

SECTION 8.

INTEREST UPON INTEREST.

- § 373. Compound interest.
- 374. Instances of interest on interest.
- 375. Interest on instalments of interest.
- 376. Separate agreements for interest.
- 377. Periodical interest after maturity of debt.
- 378, 379. Computation, application and effect of partial payments.

SECTION 9.

SUSPENSION OF INTEREST.

- 380. Miscellaneous cases.
- 381. Where payments prevented by legal process.
- 382. Where war prevents payment.
- 383. Tender stops interest.
- 384. Tender not allowed for unliquidated damages.
- 385, 386. When tender may be made.

SECTION 10.

PLEADING.

- 387. How interest claimed in pleading.

SECTION 11.

INTEREST DURING PROCEEDINGS TO COLLECT A DEBT.

- 388. Interest on verdict before judgment.
- 389. On judgments pending review.

Interest as an element of damage has already been several times mentioned, and will frequently be considered in the chapters which treat of special branches of the law of damages. But as such and otherwise it is an elementary topic deserving more particular treatment, and this seems the most appropriate place to introduce it.

§ 300. Definitions and general view. Interest is the compensation fixed by agreement or allowed by law for the use or detention of moneys, or for the loss thereof to the party entitled to such use. It is computed at a certain rate per centum by the year, unless stipulated for upon some other period of time. In a strict sense, it is the compensation agreed to be paid for the use of money while the debtor has a right to retain the principal

and during a stipulated period of credit; in other words, before the principal is due and payable. A creditor is not entitled to be paid for the use of money owing to him before it is due unless by agreement, express or implied.¹ And this should be for the prospective use of money; otherwise it has been held not to be strictly interest.² But past use may be a valid consideration for a promise to pay money by way of compensation.³ When expressly stipulated for to accrue during the period of forbearance it becomes, as it accrues, a positive addition to the principal and is thence a distinct and integral part of the debt,⁴ payable, unless otherwise agreed, when the principal is due,⁵ and in the same funds.⁶ As such it has a substantive character. The

¹ *Minard v. Beans*, 64 Pa. 411; *Thorndike v. United States*, 2 Mason 1; *Beardslee v. Horton*, 3 Mich. 560; *Robinson v. Bland*, 2 Burr. 1077; *Rensselaer G. Factory v. Reid*, 5 Cow. 587; *Robinson v. Brock*, 1 Hen. & M. 211; *White v. Walker*, 31 Ill. 422; *Pollard v. Yoder*, 2 A. K. Marsh. 264; *Brainerd v. Champlain T. Co.*, 29 Vt. 154; *Evans v. Beckwith*, 37 Vt. 285; *Tanner v. Dundee L. I. Co.*, 8 Sawyer, 187, 12 Fed. 648; *In re Cole's Estate*, 85 N. Y. Misc. 630.

² *Daniels v. Wilson*, 21 Minn. 530. The action was on a note given for a sum agreed upon for interest after the time for which it was computed had elapsed, and at a rate in excess of that antecedently specified in the contract for the principal. The court say: "A contract to pay interest is a contract to pay a consideration for the future use of money. The contract in this case was a contract to pay a consideration for the past use of money, and, therefore, not a contract to pay interest in any proper or legal sense." *Adams v. Hastings*, 6 Cal. 126, 65 Am. Dec. 496.

³ *Wilcox v. Howland*, 23 Pick. 167.

⁴ *Southern Cent. R. Co. v. Moravia*, 61 Barb. 181; *West Branch Bank v. Chester*, 11 Pa. 282, 51 Am. Dec. 547; *Foster v. Harris*, 10 Pa. 457.

Interest is also an incident of the principal, in analogy to the doctrine of accession, in cases of breach of trust. *Stickney v. Parmenter*, 74 Vt. 58 (*sub nom.* *Johnson's Adm'r v. Parmenter*).

⁵ *Tanner v. Dundee L. I. Co.*, *supra*; *Koehring v. Muemminghoff*, 60 Mo. 406; *Ramsdell v. Hulett*, 50 Kan. 440; *Motsinger v. Miller*, 59 Kan. 573; *Saunders v. McCarthy*, 8 Allen, 42; *Cooper v. Wright*, 23 N. J. L. 200.

⁶ *McCalla v. Ely*, 64 Pa. 254.

It was expressed in a note, payable subject to collateral agreements, that interest was payable semiannually. Such agreements gave the creditor, if the note was not paid when due, the right to look to certain securities for its payment, and waived his right to any other remedy. By failing to collect the semiannual interest it became a part of the principal, and

creditor is not obliged to forego what is unearned of the interest for an agreed period on a tender of the principal. The borrower or debtor cannot, by tendering the money to pay the debt before it is due, stop the interest; for the time of payment is part of the contract and is fixed for the mutual benefit and convenience of the parties.⁷ The lender is entitled to rely upon the receipt

subject to the conditions in such agreements. *Reed v. Cassatt*, 153 Pa. 156.

⁷ *Davis v. Yuba County*, 75 Cal. 452; *Ellis v. Craig*, 7 Johns. Ch. 7.

In the last case interest was payable at stated periods before the principal was due. This circumstance appears, in some measure, to have influenced the decision, but the general course of reasoning, as well as the force of the authorities cited, are in favor of the broader doctrine stated in the text. The chancellor said: "There can be no doubt that the parties may, by express stipulation, agree that a debt shall not be paid before a given time, and until that time arrives the debtor cannot tender the debt and stop interest. The question then occurs, what was the intention of the parties in this case, upon a fair and sound interpretation of the terms of the condition of this bond? The time of payment was made an essential part of the contract for the loan of the money. The terms of this bond were equally the agreement of both parties, and in which their mutual interest and convenience are presumed to have been consulted. A prolonged time of payment, when money is loaned upon interest payable periodically, is not always given for the accommodation of the debtor: the time is intended to meet the will and wishes of both parties; under the case of persons who are unable to earn money by their own exertions, or to employ

themselves profitably in business, such as aged and infirm persons, women and infants, and also in the case of literary and charitable institutions, a safe investment of money with a prolonged time of payment of the principal and short times of payment of the interest is most likely to meet their wants and promote their welfare. The interest of money is liable to fluctuation, and money itself is a marketable commodity, and subject to greater or less demand according to the vicissitudes of trade and credit. These considerations may be supposed to have had a material influence upon the terms of the loan. We can hardly believe that both parties in this case had not equally in view their own convenience in fixing upon a distant day of payment of the principal, or that it was the meaning of the contract that the obligor, should he be able on the next day, or the next month after the loan, to force back the money upon the plaintiff, and break up an advantageous investment. Why were the usual words *or before* omitted in the condition of the bond but to show the intentions of the parties that the principal was not to be paid before the day specified in the condition?

"The cases in the common-law courts do not appear to have settled the question by any direct or definitive decision. I think, however, the language of the books is against the defendant; and it would seem to be

of the returns from his investment during the period covered by the contract. After it accrues and is due it may be recovered

everywhere conceded that in no case was a tender before the day good. If the condition of a bond be payable *on or before* such a day, a plea of payment before the day, to wit, on such a day, is good. Anonymous, 2 Wils. 173. But if the condition of the bond be payable on *such a day*, a plea of payment before the day is bad, and the defendant must either plead it by way of accord and satisfaction, or plead *solvit ad diem*, and prove payment before the day (Jernegan v. Harrison, 1 Str. 317; Anonymous, 2 Wils. 150; Winch v. Pardon, Buller's N. P. 174). These cases turned upon the technical terms of pleading; and whatever subtleties exist on that subject, there can be no doubt that if money be tendered and accepted before the day appointed it would, when skilfully pleaded, amount to a discharge of the bond; for if, as Lord Coke says (Coke, Litt. 212b), 'If the obligor pay a lesser sum before the day and the obligee receives it, it is a satisfaction.' The bearing of these cases upon the point now under discussion consists, however, in the distinction which they assume between a bond payable *on* such a day, and *on or before* such a day, and in the doctrine which they necessarily convey that it requires the assent and concurrence of the creditor to discharge, before the day, a bond payable on a given day.

"The language of Lord Hardwicke, as chief justice of the king's bench, in Tryon v. Carter (2 Str. 994), is still more explicit on the subject. The bond in that case was payable on or before the 5th of December, and payment was made on that day.

The case itself is not applicable, but the observations of the chief justice are much in point. 'In the case,' he observes, 'of a bond conditioned for payment at a certain day, or *upon such a day*, there can properly be no *legal payment* or *legal performance* of the condition till that day. Payment before the day may, indeed, be given in evidence on *solvit ad diem*, but that goes upon the reason that the money is looked upon as a deposit in the hands of the obligee until the day comes, and then it is actual payment.' The argument in favor of the right of the obligor to pay before the day stipulated is founded on the assumption of the fact that the delay of the time of payment is introduced into the contract solely for the benefit of the debtor, and that he may waive a benefit or renounce a time given on his account according to the maxim that *quisquis potest renuntiare jure pro se introducto*. But this is asking the concession of the very point in dispute. When a specific sum without interest is made payable at a distant day, or perhaps, where the sum may be on interest, but the interest is not payable periodically in the intermediate time, there is color for the construction that the time is given solely for the accommodation of the debtor; and if I am not mistaken, the doctrine contended for on the part of the defendant is founded entirely on that ground. But when money is loaned upon interest, payable quarter yearly, and a distant day is mentioned for the payment of the principal, the delay is evidently as much for the benefit of the creditor as of the debtor, and

by action whether the principal be then due or not,⁸ or whether the principal has been paid or not.⁹ In pleading to show a case for such interest, the agreement must be specially counted on and a breach of it alleged. Interest is also recoverable for the detention of money after it is due. It is in many such cases recoverable of right and as a matter of law, independently of the discretion of a jury.¹⁰ It may also be claimed of right under various circumstances of contract and tort, on the value of property or things in action, and on the value of services, though such value has to be proved; on money lent, paid, had and received, as well as on divers other forms of loss to the plaintiff or gain to the defendant, capable of pecuniary estimate; and in such cases it is immaterial that there is no agreement for interest or forbearance. When the principal is due upon contract, of course the obligation or duty to pay interest for its detention results from the same contract and is recoverable thereon as damages for failure to perform; and when recoverable in tort it is chargeable on general principles as an additional element of damage for the purpose of full indemnity to the injured party.

As damages interest is an inseparable incident to the principal demand; follows it as the shadow follows the substance. Whenever the demand is satisfied and discharged the accrued interest which was accessory, whether paid or not, is extin-

the law itself most clearly implies it. The one party wants the principal to employ as capital in his business, and the other party relies upon the enjoyment of a portion of the profits of that capital, in the shape of interest periodically paid for his support and comfort. These cases of loans upon interest are, therefore, cases of mutual accommodation, and each party has an equal interest in the preservation of the definite period of payment; and neither can violate it without a violation of the terms and intention of the contract."

⁸ Walker v. Kimball, 22 Ill. 537; Dulaney v. Payne, 101 id. 325, 40

Am. Rep. 205; Sparhawk v. Willis, 6 Gray 163; Andover Sav. Bank v. Adams, 1 Allen 28; French v. Bates, 149 Mass. 73, 4 L.R.A. 268; Smart v. McKay, 16 Ind. 45.

⁹ King v. Phillips, 95 N. C. 245, 59 Am. Rep. 238; Kurz v. Suppiger, 18 Ill. App. 630. See Eames v. Cushman, 135 Mass. 573.

¹⁰ "Both reason and authority say that if by the terms of the contract, whether oral or written, a debt be due at a certain time, then it by law carries interest from that time in the absence of any agreement otherwise by the parties." Henderson C. Mfg. Co. v. Lowell Mach. Shops, 86 Ky. 668, 673.

guished.¹¹ In pleading it is sufficient to declare on a default in not paying the principal demand; the interest as damages, when not made special by contract but left to be measured by law, may be recovered under a general allegation of damages, without being specially claimed.¹² In another class of cases, similar to those last mentioned, but where the right to interest is less obvious, and in some others where the injury cannot be measured by any precise pecuniary standard, interest is allowable under the advice of the court in the discretion of the jury. These distinctions will be made more manifest, and the authorities which recognize and support them cited, when we come to discuss particular interest topics and the law of damages in connection with particular subjects.

301. Interest by the early common law. By the ancient common law it was not only unlawful, but criminal, to take any kind of interest. As late as the reigns of Henry VII., of Edward VI., and of Mary, every rate of interest was forbidden by express statute.¹³

¹¹ *Louisville & N. R. Co. v. Alford*, 5 Ga. App. 428; *Southern R. Co. v. Dunlop Mills*, 22 C. C. A. 302, 76 Fed. 505; *Stewart v. Barnes*, 153 U. S. 456, 38 L. ed. 781; *Hayes v. Chicago, etc. R. Co.*, 64 Iowa 753; *Devlin v. Mayor*, 60 Hun 68; *Cutter v. Mayor*, 92 N. Y. 166; *Hamilton v. Van Rensselaer*, 43 id. 244. See *Southern Cent. R. Co. v. Moravia*, 61 Barb. 181; *Consequa v. Fanning*, 3 Johns. Ch. 587; *Gillespie v. Mayor*, 3 Edw. 512; *Jacot v. Emmett*, 11 Paige, 142; § 372.

¹² *Heiman v. Schroeder*, 74 Ill. 158; *McConnel v. Thomas*, 3 id. 313; *Padley v. Catterlin*, 64 Mo. App. 629, 645, summarizing the foregoing propositions and citing the text.

¹³ *Earl of Chesterfield v. Jansen*, 1 Wils. 290; *Schwitters v. Springer*, 236 Ill. 271.

In *Houghton v. Page*, 2 N. H. 42, 9 Am. Dec. 30, Judge Woodbury

says: "To take it (interest) was also *in foro conscientie* punished as a crime, and not only subjected the offender to the forfeiture of all his estate, but in the 'Mirror of Justice,' 191 and 248, one of the first English lawbooks extant, it is lamented, as 'an abusion of the common law,' that the offender was not likewise deprived of Christian burial." After referring to the prohibitory statutes in England, he remarks: "It therefore follows that if the common law of England concerning interest should be adopted, we must hold void all contracts for any quantity of interest, however small and reasonable. But in this enlightened age such a rule could no more be tolerated than the absurd principles of the common law concerning witchcraft and heresy." *Laycock v. Parker*, 103 Wis. 161; *Pekin v. Reynolds*, 31 Ill. 529, 83 Am. Dec. 244.

§ 302. **Interest in England legalized by statute.** In 1545 the statute of 37 Henry VIII. was enacted. The preamble shows that the taking of interest was still illegal and criminal, but the act gave a negative sanction to it by providing that "none shall take for the loan of any money or commodity above the rate of ten pounds for one hundred pounds for one whole year." It is said that the first legal interest was taken in England under this statute. The rate was subsequently, in Queen Anne's time, reduced to five per cent.¹⁴ And in the reign of William IV., and by various statutes of Victoria, interest has been directly and affirmatively provided for. The existing statutes repealed the law against usury, and parties are at liberty to contract for any rate of interest.¹⁵

§ 303. **Interest at common law in America.** There are some cases in which judges have declared interest to be of statutory creation.¹⁶ But the general course of judicial decision and legislation in this country assumes the validity of contracts for interest without statutory sanction and the legal obligation to pay it in many cases not provided for either by contract or statute.¹⁷ That the law recognizes the use of money as valuable is

¹⁴ 12 Anne, St. 2, ch. 16.

¹⁵ 17-18 Victoria, ch. 90 (August 10, 1854).

¹⁶ *Close v. Fields*, 2 Tex. 232; *Isaacs v. McAndrew*, 1 Mont. 437; *Eastin v. Vandorn*, Walk. (Miss.) 214; *Hamer v. Kirkwood*, 25 Miss. 95; *Harts v. Fowler*, 53 Ill. App. 245.

In some states interest, as such, is only recoverable in the cases provided for by statute. *Vietti v. Nesbitt*, 22 Nev. 390; *Hurlburt v. Dusenbury*, 26 Colo. 240; *Board of Com'rs v. Flanagan*, 21 Colo. App. 467; *Cobb v. Stratton's Estate*, 56 Colo. 278; *Thompson v. Tonopah Lumber Co.*, — Nev. —, 141 Pac. 69; *Richardson v. Investment Co.*, 66 Ore. 353.

¹⁷ *Thomas v. Clarkson*, 125 Ga. 72, 6 L.R.A.(N.S.) 658, and cases

cited; *Young v. Godbe*, 15 Wall. 562, 21 L. ed. 250; *Parmelee v. Lawrence*, 48 Ill. 331; *Davis v. Greely*, 1 Cal. 422.

In *Young v. Polack*, 3 Cal. 208, the plaintiff and the defendant had a joint lease for improving certain property; the plaintiff, with consent of the defendant, made a contract in his own name for making the improvement and performed it. He paid all the expenses out of his own funds. That contract was drawn by the defendant, of whom the plaintiff claimed damages for not paying his share of the expense as the building advanced. The court decreed that he should pay his contribution of one-half, with three per cent. interest per month, the current rate, which decree was affirmed.

placed beyond question by the allowance of interest as damages for its detention when the debtor is in default or guilty of fraud. Interest is now universally treated as a legitimate consideration for the use of money. To take it is deemed morally, as well as legally, just in the general commerce of the world; and not only where private interests may be subserved by credit, but also in those public exigencies which induce states and nations to become borrowers. Statutes generally exist providing what shall be the rate when it is not fixed by agreement, and in many states a maximum rate is established beyond which interest is expressly or impliedly prohibited. In some states the consequences of transcending this limit are prescribed; these are various.

§ 304. **Agreements for interest.** There is no difference in principle between agreements to pay for the use of money and those to make compensation for anything else that is valuable. And, as a general rule, contracts are valid and will be enforced although there is a great disproportion between the burden of the undertaking on one side and the value of the consideration for it furnished on the other. The theory of the law is, and its practical operation is consistent therewith, that a small consideration will support an onerous agreement. The comparative benefits to be derived from the mutual considerations, executed or executory, which are technically valuable in character are not weighed. It is enough that a valuable consideration exists; its adequacy is not an element in determining whether or not an agreement founded upon it is valid. A few examples of unconscionable bargains are to be found in the books,—examples of contracts so immensely unequal, and, if held valid, so certain to be disastrous to one party, that on the ground of being unconscionable they were held not obligatory. Still, it is an axiom of the law of contracts that mere inadequacy of consideration is no defense.

The compensation, however, for the use of money or for its detention, there being always a customary or legal rate, is susceptible of precise measurement. Therefore, contracts for a higher rate, though intended to have effect only after the principal sum is due and to measure the damages for delaying its

payment, are liable to be treated in respect to the interest they provide for as contracts for penalties.¹⁸ But when parties are authorized by statute to contract for more than the ordinary legal rate of interest, either with or without restriction, such contracts are permitted to have a more liberal effect. A contract to pay interest at a given rate, while the debtor has a right for a definite period to the use of the principal, is different in its nature and incidents from a contract to pay interest after that right has expired; in the one case it is the price of a rightful use and possession of the money; in the other it is a liquidation of the damages for detaining it without right; in the former case the contract creates the law; in the latter interest as damages is imposed by law, though the rate may be regulated by agreement. In the computation of interest, however, beginning before and continuing after maturity of the debt, no rest is to be made at maturity or at the commencement of the suit, but the interest is to be computed continuously from the time when it commences to the settlement, judgment or decree.¹⁹

Where there is an agreement for the payment of money at a future day and it contains or is accompanied with an express promise to pay interest²⁰ from date to the time specified for payment, the law is settled that interest is chargeable afterwards if the principal remains unpaid although the contract is silent in regard to interest after maturity. This results from the general principle that all contracts to pay money give a right to interest from the time the principal ought to be paid.²¹ It can

¹⁸ *Dunn v. Malone*, 6 Ont. L. R. 484; *Mosby v. Taylor*, Gilmer, 172; *Taul v. Everet*, 4 J. J. Marsh. 10; *Gould v. Bishop Hill Colony*, 35 Ill. 324. See § 286.

¹⁹ *Lamprey v. Mason*, 148 Mass. 231; *Barker v. International Bank*, 80 Ill. 96; *Brewster v. Wakefield*, 1 Minn. 352, 69 Am. Dec. 343; *Folsom v. Plumer*, 43 N. H. 469.

²⁰ See *Harts v. Fowler*, 53 Ill. App. 245.

²¹ *Boddam v. Riley*, 2 Bro. Ch. 2; *Williams v. Sherman*, 7 Wend. 109;

Ten Eyck v. Houghtaling, 12 How. Pr. 523; *Cartmill v. Brown*, 1 A. K. Marsh. 576, 10 Am. Dec. 763; *Van Rensselaer v. Jewett*, 2 N. Y. 135; *Hunt v. Jucks*, 1 Hayw. 199; *McKinley v. Blackledge*, 2 Hayw. 28; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Purdy v. Phillips*, 11 N. Y. 406; *Farquhar v. Morris*, 7 T. R. 124; *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267; *Robinson v. Bland*, 2 Burr. 1077; *Chapin v. Murphy*, 5 Minn. 274; *West Republic M. Co. v. Jones*, 108 Pa. 55;

make no difference with the application of this principle that the contract contains an express stipulation for interest until the day fixed for payment, for that is not inconsistent with the implication that if not paid on that day interest is to be paid afterwards; since, without such express stipulation, no interest could accrue until a default of payment. The maxim *expressum facit cessare tacitum* does not apply,²² for the contract does not speak to the particular case.²³

The law will not presume the existence of a contract to pay interest where a direct agreement to pay it would have been a felony; in such a case interest cannot be recovered as profits.²⁴ One who holds money in readiness for another who has given an interest-bearing obligation for it is entitled to interest though it is not actually called for.²⁵

Contracts relating to interest have not been enforced with uniform construction and effect. The English and American courts have not entirely harmonized; and there is a diversity in the decisions of the latter. For the purpose of showing more clearly and in detail the distinctions which have been made and the conflict of judicial decisions the classifications of subjects in the following sections has been adopted as convenient and sufficiently comprehensive.

SECTION 1.

GENERAL PROMISE TO PAY MONEY "WITH INTEREST."

§ 305. **Rule of construction.** Under the first point it is to be observed that such contracts, in common with all others, are to

Henderson C. Mfg. Co. v. Lowell M. Shops, 86 Ky. 668; Fleming's Est., 184 Pa. 80.

Where a trust company bound itself to pay the debts of M., not to exceed \$130,000, and the indebtedness was computed with interest to January 1, 1894, and amounted to \$140,000, creditors who had been paid in part prior to that date were not entitled to interest on such

amounts from date of payment to January 1, 1894. Barnes v. Mendenhall, 89 Minn. 383, 62 L.R.A. 757.

²² See Spaulding v. Lord, 19 Wis. 533.

²³ Thorndike v. United States, 2 Mason 1.

²⁴ Los Angeles v. City Bank, 100 Cal. 18.

²⁵ Primley v. Shirk, 163 Ill. 389, aff'g 60 Ill. App. 312.

have a reasonable construction with a view to carrying out the actual lawful intention of the parties. The construction as to unrecompensed sureties will be strict.²⁶ It is liberal in respect

²⁶ *Bowery Sav. Bank v. Clinton*, 2 Sandf. 113. The bond of J. to the plaintiffs bore interest at six per cent. C. indorsed a covenant binding himself to them for "an additional one per cent. per annum interest, making in all seven per cent. per annum on the principal secured by the bond, until the principal should be paid; the interest to be paid at the time and in the manner mentioned in the bond. It was held that C. was not bound to pay *seven* per cent. interest but only *one per cent.* on the amount of the bond; that he was bound to pay one per cent. until the bond was paid off."

In *Hamilton v. Van Rensselaer*, 43 Barb. 117, 28 How. Pr. 192, it was held that a surety who guarantees the payment of the interest on a money bond not bearing interest by its terms is liable for interest accruing after the bond becomes due.

In *Hamilton v. Van Rensselaer*, 43 N. Y. 244, the defendant guaranteed "the punctual payment of the interest" upon a bond payable in six years and six months from date, with interest semiannually. It was held that the guaranty only extended to the interest falling due before the time of the payment of the principal; and that after the principal sum has fallen due, interest is payable, not by the original terms of the agreement, but as damages for its breach. Church, C. J., said: "He (the guarantor) neither agreed to pay the principal nor to be liable for the consequences of its nonpayment. The intent of the defendant, ascertained by legal rules, was to
Suth. Dam. Vol. I.—60.

agree to pay the interest expressly provided for in the bond only; but when the plaintiff urges that the defendant has employed general words guarantying the payment of interest upon the bond without limitation, and that these words include interest after as well as before default, and claims to enforce the rigid rule of liability therefor, it is pertinent to answer that by strict legal rules interest as such cannot be recovered after default in the payment of the principal; and that such interest is not therefore within the language of the contract. We do not place the decision upon this narrow ground, but prefer to rest it upon the proposition that by the plain, ordinary meaning of the language used in the contract, when applied to the facts existing at the time it was made, the interest recoverable after the principal became due, whether it is regarded as interest upon a continuing contract, or as damages for its non-performance, was not in the contemplation of the parties at the time, and was not the interest specified and provided for in the defendant's contract. The construction contended for by the plaintiff might render the contract as burdensome as if it had been a guaranty of the payment of the principal itself. The defendant might never be able to discharge the obligation except by the payment of the principal, and in that case the result would be to compel him substantially to perform a contract which it is conceded he never entered into."

A promise to pay a debt which,

to the ordinary short hand expressions by which interest is commonly stipulated for orally, and which frequently find their way into written promises. Contracts for interest at a given rate per cent will be treated as contracts for that rate per annum,²⁷ and even an abbreviation like "interest at ten per cent," has received the same construction.²⁸ These characters in a note were interpreted to mean interest at the rate of six per cent per annum, "int. at 6 p. a."²⁹ A bond payable "\$2,000 within two years from date; balance in annual payments, with interest, until aggregate sum is paid," carries interest from its date.³⁰ An agreement to pay a given per cent has been construed as though it were an agreement in terms to pay interest at that per cent.³¹ "With the interest at the rate of one and one-quarter" was construed to mean that no rate was specified;

otherwise, would be barred will enable the creditor to recover interest as well as principal, though interest was never demanded and nothing was said concerning it between the parties. *Fritz's Est.*, 19 Phila. 95.

²⁷ *Thompson v. Hoagland*, 65 Ill. 310.

"Annual interest" means interest payable annually. *Kurz v. Suppiger*, 18 Ill. App. 630.

If a note is silent as to interest and is described in a mortgage contemporaneously executed as collateral security as bearing interest the description will be imported into the note. *Priehard v. Miller*, 86 Ala. 500.

A testator, two years after he had compromised with his creditors and nine years after he had failed in business, made his will expressing "that the balance due my old creditors whose claims were compromised be paid in full." This was construed to provide for interest on the unpaid principal. *Sinclair's App.*, 116 Pa. 316.

²⁸ *Fitzgerald v. Lorenz*, 181 Ill. 411, aff'g 79 Ill. App. 651; *Durant*

v. Murdock, 3 D. C. App. Cas. 114; *Gramer v. Joder*, 65 Ill. 314. See *Strickland v. Holbrook*, 75 Cal. 268.

Where the jury were instructed that if they found for the plaintiff they should allow him interest, a verdict allowing interest on the amount due "at .07 per cent. per annum" from a given date until verdict supported a judgment for the sum found due with interest at seven per cent. per annum. *Lake Shore C. Co. v. Modoc L. & L. Co.*, 130 Cal. 669.

²⁹ *Belford v. Beatty*, 145 Ill. 414.

³⁰ *Kilmer v. Gallaher*, 107 Iowa 676.

³¹ *Davis v. Rider*, 53 Ill. 416; *Higley v. Newell*, 28 Iowa 516. But see *Griffith v. Furry*, 30 Ill. 251, 83 Am. Dec. 186, which was a suit on a note in these words: "One day after date, we promise to pay D. F., or order, four hundred and fifty-six and 75-100 dollars, value received, ten per cent." It was held that the words "ten per cent." in their connection were without meaning. The note being described in the declaration as a note bearing

hence the legal rate was due.³² One who agrees to contribute to the cost of a work if it is successfully completed and to pay interest on expenditures is liable for interest from the time of making the expenditures.³³ An obligation to pay interest on condition will be construed according to its terms.³⁴ A promise to pay money "with interest" means simple interest only;³⁵ and a promise to pay "accruing interest" means running or accumulating interest; it does not include interest due at the time it was made.³⁶ A statute providing for interest on recognizances taken under the direction of a court will not be read into a recognizance entered into between the parties, without action by the court, the instrument being silent as to interest.³⁷

§ 306. Law or custom fixes the rate. If the promise is to pay interest simply the law supplies the rate if one is fixed by statute, for the parties are supposed to contract in that general way with reference to the law.³⁸ Where no rate is established by

ten per cent. interest, it was rejected when offered in evidence on the ground of variance.

In *Patterson v. McNeely*, 16 Ohio St. 348, the action was upon a promissory note made payable one year after date, and which contained this clause: "the above to be at ten per cent. annually." It was held that the word "annually" should be understood as relating to and defining the rate of interest and as equivalent to the words per annum: it did not bind the debtor for the annual payment of interest. *English v. Smock*, 34 Ind. 115, 7 Am. Rep. 215. But see *Kurz v. Suppiger*, 18 Ill. App. 630.

The omission of the words "with interest" from a note which expressed that "five years from date at the rate of six one-half per cent. per annum, payable semi-annually," was taken to be a clerical error. *Marston v. Bigelow*, 150 Mass. 45, 5 L.R.A. 43.

³² *Salazar v. Taylor*, 18 Colo. 538.

³³ *Union I. Co. v. Markle*, 191 Pa. 329.

³⁴ *Folmar v. Carlisle*, 117 Ala. 449.

³⁵ *Sawyer v. Child*, 68 Vt. 360.

³⁶ *Gross v. Partenheimer*, 159 Pa. 556.

³⁷ *Meyers' Est.*, 179 Pa. 157.

³⁸ *Patrick v. Kirkland*, 53 Fla. 768, 125 Am. St. 1096; *In re Immanuel P. Church*, 112 La. 348; *Gay v. Berkey*, 137 Mich. 658; *Jersey City v. Flynn*, 74 N. J. L. 104; *Edwards v. Sartor*, 69 S. C. 540; *Salazar v. Taylor*, 18 Colo. 538; *Prevo v. Lathrop*, 2 Ill. 305; *Clay v. Drake, Minor*, 164; *Everett v. Dilley*, 39 Kan. 73; *O'Brien v. Young*, 95 N. Y. 428; *Genet v. Kissam*, 53 N. Y. Sup. Ct. 43; *Pearson v. Treadwell*, 179 Mass. 462, 467.

The rate of interest in a future contract must be fixed by the parties as a component part of the price to be paid and received. *Kaplan v. Whitworth*, 116 La. 337.

statute it is assumed that, in making and accepting a promise for interest generally, the parties have in view the rate which is customary where the contract is made and to be executed. That rate will govern in respect to liquidated debts on which the law permits interest to be recovered as damages for delay of payment after it is due.³⁹ In the absence of a statute limiting the rate of interest on contract if parties to an account acquiesce in the statements of credits and charges made and stated they adopt the rate of interest charged with the same effect as if there had been an express agreement in writing to pay it.⁴⁰ In transactions with banks if it is the custom to compute interest at thirty days to the month and twelve months to the year and no mode of computation was agreed upon such custom may be followed though it is not the ordinary legal rule.⁴¹ A corporation which has assumed liability for the payment of bonds and which circulates among their holders a notice to the effect that if they forebore demanding payment until a fixed date it would pay the contract rate of interest—the legal rate being less—is liable for the former rate.⁴² If parties may agree for the payment of any rate of interest the statute so providing binds a court of equity as well as a court of law and neither may set aside nor annul contracts because the stipulated rate is largely in excess of the current rate.⁴³ Where a contract expressed that the plaintiff shall pay to the defendant “a fair proportion of the interest of the investment” of the defendant “in its power house and equipment, and in car houses and equipment” there was no “legal indebtedness” within the meaning of a statute providing that interest for any “legal indebtedness” shall be at the rate of seven per cent; neither was the case one where the analogy of the statute was applicable. The plaintiff was not liable for the rate of interest the defendant incurred in constructing such property, nor the rate which it then paid or was paying at the time the

³⁹ *Seton v. Hoyt*, 34 Ore. 266, 43 L.R.A. 634, 75 Am. St. 641; *Young v. Godbe*, 15 Wall. 562, 21 L. ed. 250; *Reeves v. Lane*, 8 New Zeal. 44; *Willard v. Mellor*, 19 Colo. 534.

⁴⁰ *Sayward v. Dexter*, 19 C. C. A. 176, 72 Fed. 758; *Auzerais v.*

Naglee, 74 Cal. 60; *Van Vleet v. Sledge*, 45 Fed. 750; *McKnight v. Taylor*, 1 How. 168, 11 L. ed. 89.

⁴¹ *Pool v. White*, 175 Pa. 459.

⁴² *Kelley v. Phenix Nat. Bank*, 17 App. Div. (N. Y.) 496.

⁴³ *Boyce v. Fisk*, 110 Cal. 107.

action was brought on any such indebtedness but was liable for a reasonable interest or income on the investment.⁴⁴

§ 307. **Legal or stipulated rate applies from date.** A promise to pay interest on money payable at a future day will be construed as an agreement to pay it before, rather than exclusively after, maturity.⁴⁵ Statutes exist in England and in many states of the Union authorizing parties to contract for a greater than the legal rate which is applied in the absence of any agreement on money due. When agreements of this kind, or for less than the legal rate are made in general terms, not specifying when the stipulated rate shall commence, or how long it shall continue, and the principal is payable at a future day the promise is uniformly held to apply from date to maturity;⁴⁶ but whether it shall continue afterwards to operate, if the principal remain unpaid, the adjudications are not harmonious. Some cases hold that the contract operates *ex vigore* only until the debt by the agreement becomes due and that if it be not then paid the contract has no longer any effect whatever to govern the rate, and the damages for detention afterwards are limited

⁴⁴ Lakeside R. Co. v. Duluth St. R. Co., 78 Minn. 129.

⁴⁵ Salazar v. Taylor, 18 Colo. 538; Conners v. Holland, 113 Mass. 50; Dewey v. Bowman, 8 Cal. 145; Hackenberry v. Shaw, 11 Ind. 392; Pittman v. Barret, 34 Mo. 84; Ayres v. Hayes, 13 Mo. 252; Winn v. Young, 1 J. J. Marsh. 51, 19 Am. Dec. 52; Ely v. Witherspoon, 2 Ala. 131; Campbell P. P. & M. Co. v. Jones, 79 Ala. 475; Kennedy v. Nash, 1 Starkie 152.

A note for a specified sum, with interest, provided for the return of the horse on account of the purchase of which it was given and for the sale of another horse in lieu of the first, and that a credit should be given on it on account of the exchange. Interest was due on the note from its date, and not merely from the time the second horse was

delivered. Elwood v. McDill, 105 Iowa 437.

⁴⁶ State Nat. Bank v. Board of Com'rs, 121 La. 269. See authorities last cited.

Interest is allowable on a certificate of deposit providing for the payment thereof if the deposit remains a stated time only from the time suit is brought, that being done before expiration of said time, and no previous demand being made. Beardsley v. Webber, 104 Mich. 88.

A note payable in two years after date with interest at the rate of six per cent. per annum from—until paid bears interest from its date, and not merely from date of maturity. Miller v. Cavanaugh, 99 Ky. 377, 59 Am. St. 463.

In Johnson v. Pullman S. Bank, 40 Wash. 64, the stipulated rate seems to have governed as to money due before the note was executed.

to the ordinary legal rate of interest; other cases hold the contract rate to be *prima facie* the rate after maturity, but subject to be put aside by consideration of whether it be a reasonable rate or there is a mutual intention to continue it; and a third class that the contract operates by its own vigor after the rate commences until the debt is paid or merged in a judgment or decree.

§ 308. **Whether same rate will apply after debt due.** If the stipulated rate is less than the legal, and the principal is made payable at a distant day, so that it is obvious from this circumstance, or from this and others, that the time of credit expressly given is the whole time of forbearance mutually intended the creditor would seem, in reason, entitled on the expiration of that period to receive the principal, or have that rate of interest afterwards which the law gives generally upon default in the payment of money. This would appear more especially his right if he, with reasonable promptness, asserts his claim to the money by actual demand or resorts to legal measures for its collection. But silence and inaction after the maturity of the debt might imply acquiescence in the debtor's retention of the money and justify the inference that the creditor is satisfied to prolong the credit on the original terms. A prompt demand, however, or notice that such is not his intention, or any conduct which negatives acquiescence in the delay of payment on the terms which governed before the debt was due will prevent the old rate being extended by implication from extraneous facts or otherwise than by necessary legal construction. Where a mortgagee contracted to receive a rate of interest less than the legal rate during the time of credit agreed upon it was held that if he suffers the mortgagor to remain in possession after the mortgage money becomes due an understanding of the parties will be presumed that the interest shall continue at the same rate until the mortgagee thinks proper to demand payment; but that no such presumption can be raised where the mortgagee attempts to foreclose his mortgage or take possession of the mortgaged premises on the supposition that he has actually acquired the equity of redemption as a substitute for his debt.⁴⁷ Two other equity

⁴⁷ Bell v. Mayor, 10 Paige, 49. See Lawrence v. Trustees, 2 Denio 577.

cases in New York seem to hold the rate to be the same absolutely after maturity as before by virtue of the contract fixing it.⁴⁸ In both of these the rate was less than the legal rate. In the latter the vice-chancellor decided that the creditor was not entitled to the legal rate after maturity, though the debtor had regularly paid interest at that rate for over six years after the debt became due. Such payments were held not to be evidence of a continuing agreement to pay more than the rate specified in the bond as the rate before maturity. Later cases have been decided at law in the same manner;⁴⁹ though the latest expression of the court of appeals assumes the rule to be settled to the contrary.⁵⁰ In a case decided in 1880 it was held that the right

⁴⁸ *Miller v. Burroughs*, 4 Johns. Ch. 436; *New York L. Ins. & T. Co. v. Manning*, 3 Sandf. Ch. 58.

⁴⁹ *Andrews v. Keeler*, 19 Hun 87; *Association v. Eagleson*, 60 How. Pr. 9.

⁵⁰ *Savage v. Beecher* (N. Y. Misc.), 139 N. Y. Supp. 173, citing *Pryor v. Buffalo*, 197 N. Y. 142; *Zeller v. Leiter*, 114 App. Div. (N. Y.) 155, and other local cases.

It is assumed in *O'Brien v. Young*, 95 N. Y. 428 (followed in *Oswego City Sav. Bank v. Board of Education*, 70 App. Div. (N. Y.) 538, 543), that, in the absence of a stipulation to pay the contract rate until the discharge of the obligation, the legal rate will govern, and that this is according to the weight of authority in that state. Earl J., refers to *Macomber v. Dunham*, 8 Wend. 550; *United States Bank v. Chapin*, 9 id. 471; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Ritter v. Phillips*, 53 id. 586; *Southern Cent. R. Co. v. Moravia*, 61 Barb. 180.

In *Ferris v. Hard*, 135 N. Y. 354, 365 it is said: If an instalment were not paid when due, the contract was violated, and interest after that upon such instalment could only be recovered as damages,

and at the rate of interest authorized by law. *Hewett v. Chadwick*, 8 App. Div. (N. Y.) 23.

The law in New York on this subject is not settled, or is not regarded as settled, by the late cases referred to. In *Elmira I. & S. R. M. Co. v. Elmira*, 5 N. Y. Misc. 194, the cases are reviewed, and the conclusion stated that *O'Brien v. Young* and *Ferris v. Hard*, *supra*, are not adjudications on the question. Smith, J., said: I have examined carefully the authorities cited by Judge Earl [in *O'Brien v. Young*] from the New York courts, and they do not state to me the rule of law which he seems to derive therefrom. In none of those cases was the question squarely discussed and decided. This question was not before Judge Earl when the opinion was written, and his attention does not seem to have been called to the cases in this state holding a contrary doctrine. In *Ferris v. Hard*, Judge Peckham seems to indicate that the interest would be at the statutory rate after the maturity of the contract. But in the case he was discussing there was no rate specified in the contract. It seems to be settled beyond dispute,

to the same rate after maturity, which was fixed by contract before, is a contract right which cannot be impaired by subsequent legislation.⁵¹ In a case in Illinois⁵² there was a stipulation for "five per cent per month as damages from maturity." The payee, from time to time after maturity, accepted interest at ten per cent per annum until the death of the maker. It was held that such acceptance of interest evidenced an agreement to substitute ten per cent per year in place of five per cent per month and was a waiver of the higher rate. But in the absence of a waiver the rate stipulated to be paid after maturity is recoverable.⁵³ In a Pennsylvania case⁵⁴ it was held that a note payable at a future day with three per cent interest from date carried that rate till the day of payment fixed in the contract,

where the rate is not specified in the contract, that after maturity interest is to be reckoned at the statutory rate. In *Ferris v. Hard* there was no occasion to present to the court the authorities which I think must control the construction of a contract wherein the rate of interest is specified, and those authorities are not discussed in the opinion. The same remarks apply to *Loos v. Wilkinson*, 113 N. Y. 485, 10 Am. St. 495, 4 L.R.A. 353. Reference is made to *Miller v. Burroughs*, 4 Johns. Ch. 436; *Van Beuren v. Van Gaasbeek*, 4 Cow. 497; *Sullivan v. Fosdick*, 10 Hun 81; *Association v. Eagleson*, 60 How. Pr. 9; *Patteson v. Graham*, 16 N. Y. St. Rep. 703 and *Genet v. Kissam*, 53 N. Y. Super. Ct. 43, as holding contrary to the cases first referred to. But see *Oswego City Sav. Bank v. Board of Education*, *supra*.

In *Zimmerman v. Klauber*, 139 App. Div. (N. Y.) 26, the rule is said to be that where the parties have stipulated for interest at a fixed rate until payment, that rate prevails up to judgment; but where a rate is provided without limita-

tion as to time it is determined as fixed by the contract up to the time of default, and the legal rate governs thereafter. See *City R. E. Co. v. MacFarland*, 67 N. Y. Misc. 286.

Special interest contracts with an insolvent trust company bear interest at the stipulated rate to the time a receiver takes possession of its assets; thereafter the legal rate prevails as against the claims of stockholders to the surplus. *People v. Merchants' T. Co.*, 187 N. Y. 293.

In equity the legal rate of interest governs. *Pryor v. Buffalo*, 197 N. Y. 123.

⁵¹ *Association v. Eagleson*, 60 How. Pr. 9. See *Morrisania Sav. Bank v. Bauer*, 3 N. Y. L. Bull. 102; *Taylor v. Wing*, 84 N. Y. 471.

⁵² *Bradford v. Hoiles*, 66 Ill. 517.

⁵³ *Hennessey v. Walsh*, 142 Ill. App. 237.

⁵⁴ *Ludwig v. Huntzinger*, 5 W. & S. 51. The rule of this case, which involved a long time bond, does not apply to a note payable one day after date and bearing less than the legal rate of interest. *Neal's Est.*, 14 Pa. Dist. 227.

and after that legal interest. A similar rule was laid down in South Carolina,⁵⁵ and in Kentucky, the promise being to pay "from date,"⁵⁶ and in North Carolina.⁵⁷

§ 309. **Same subject.** A contract for the payment of money at a definite future time with a stipulation for interest at a specified rate stands, if not performed after the date fixed for the payment of the principal, simply as a chose in action. It has then no future; the time has elapsed for performance; there remains but a right of action for damages. There is no continuing contract to pay interest in any other sense than there is to pay the principal. The promise was, as to both, to pay at a day which is past.⁵⁸ If the principal had been loaned for a term of years with an agreement to pay interest semi-annually this agreement, while it runs, would impose the duty to pay interest only at those half-yearly periods. But no periodicity would be recognized in the obligation to pay interest after the maturity of the debt.⁵⁹ In a suit brought three months after that date there can be no doubt that the creditor would be entitled to a computation of interest for that time or for any time to the day of obtaining judgment or decree.⁶⁰ The creditor's claim for such interest could not be defeated by the argument that the interest contract continues by implication until payment of the debt, and by such contract the debtor is bound to pay only once in six months. Such an argument would be entitled to prevail if the interest contract were a continuing one—if by its own prolonged

⁵⁵ *Langston v. South Carolina R. Co.*, 2 S. C. 248.

A clause in a bank charter giving the corporation power to make discount at prescribed rate on instruments having less than twelve months to run does not establish a rule as to the rate of interest. *Chambliss v. Robertson*, 23 Miss. 302; *United States Bank v. Chapin*, 9 Wend. 471. See *Tuffli v. Ohio L. Ins. & T. Co.*, 2 Disney 121.

⁵⁶ *Sanford v. City Nat. Bank*, 15 Ky. L. Rep. 607; *McNeil v. Watkins*, id. 780.

⁵⁷ *Sykes v. Life Ins. Co.*, 148 N. C. 13.

A depository of public funds is liable for the agreed rate of interest so long as it retains them, though circumstances may seem to make it imprudent for it to use them. *State Nat. Bank v. Commonwealth*, 129 Ky. 637.

⁵⁸ The text is quoted in *Palmer v. Laberee*, 23 Wash. 409, 421.

⁵⁹ But see *O'Neill v. Bookman*, 9 Rich. 80.

⁶⁰ *Wheaton v. Pike*, 9 R. L. 132, 11 Am. Rep. 227.

operation and effect it absolutely regulated the interest *after*, as it did *before*, the debt was due.

Parties may by agreement liquidate damages to be paid in case of a future breach of contract, and may, in like manner and upon the same principle, fix the rate of interest within reasonable limits to be paid after the debt is due.⁶¹ But an agreement in general terms to pay interest on a time debt is primarily for the same time as the agreement for the payment of the principal. The intention of the parties is to be ascertained from its language, and thus ascertained the debtor intends to pay and the creditor to receive the debt, consisting of principal and agreed interest, on the day fixed for such payment. To put any other construction on the agreement is to infer bad faith or that the parties do not intend what they clearly say. Strictly, therefore, such an agreement does not operate beyond the pay day. Whatever influence it has in determining the interest afterwards is secondary and probative.

If the debtor does not pay when the debt is due, and this omission occurs by his default, the expectation that he will pay interest at the same rate at least as during the period of stipulated credit is natural and reasonable; and the existence of a legal obligation to do so is agreeable to the analogy of other contracts and by such analogy is liable to be modified by circumstances. The question of interest after maturity is much governed by the equity of the case; circumstances may take away the right altogether. Those which will have this effect will readily occur to the professional mind. Among them is a tender of the debt which puts an end to the default and stops interest;⁶² the continued absence of the creditor from the state in which the debt is payable;⁶³ a state of war which places the debtor and creditor in the relation of alien enemies to each other's government.⁶⁴ The failure of a creditor to present his demand for payment at the place stipulated therefor is cause

⁶¹ Hubbard v. Callahan, 42 Conn. 524, 19 Am. Rep. 564. See Palmer v. Leffler, 18 Iowa 125; Taylor v. Meek, 4 Blackf. 388.

⁶² §§ 276, 383.

⁶³ Du Belloix v. Waterpark, 1 D.

& R. 348n; Gage v. McSweeney, 74 Vt. 370.

⁶⁴ Mease v. Stevens, 1 N. J. L. 433; Bean v. Chapman, 62 Ala. 58.

The rate of interest stipulated for is not affected by the payee's refusal

for limiting his recovery of interest to less than the stipulated rate, and therefore as damages.⁶⁵

So the rate of interest which was obligatory by agreement during the life of the contract may be so low or so high as to negative the intention when the contract was made or during the default that it should continue after the contract had expired; and that circumstance may influence the court to reject the rate so agreed on as a rule in determining the interest to be allowed as damages.⁶⁶ To the rate specified in the contract the

to furnish the payor with a statement of the amount due, no tender being made. *Lamprey v. Mason*, 148 Mass. 231.

⁶⁵ *Skinner v. Franklin County*, 179 Fed. 862.

⁶⁶ *Henry v. Thompson, Minor*, 209. This case is thus succinctly stated by Loomis, J., in *Hubbard v. Callahan*, 42 Conn. 524, 19 Am. Rep. 564: "The suit was for the recovery of a large number of notes, differing in their terms, and no particular description of them reported; but they were reduced to four general classes in the briefs of counsel: '1st. To pay the principal at a future day, and if not punctually paid, to pay the premium or interest at the rate expressed from the date. 2d. To pay the principal at a future day, with interest at the rate expressed from the date till paid. 3d. To pay the principal at a future day, with a distinct agreement to pay the interest, not stating the time from which or till which it was to run. 4th. To pay the principal at a future day, with interest from the maturity of the note.' The rates of interest stipulated for were in some cases one hundred and twenty per cent. per annum; in others sixty per cent.; and the very lowest was thirty per cent. The statute of Alabama then in force provided 'that any rate of interest or premium for

the loan or use of money, wares, merchandise, or other commodity, fairly and *bona fide* stipulated and agreed upon by the parties to such contract, expressed in writing and signed by the party to be charged therewith, shall be legal.' A majority of the judges concurred in refusing to allow the stipulated rates of interest, but they did not agree as to the grounds of the decision. Judges Crenshaw and Minor delivered very able dissenting opinions sustaining the stipulations for interest as valid contracts. The majority opinions were given by the chief justice and by Judge Safford. Judges Ellis and Gayle concurred with the chief justice in the opinion that the contract on its face fails to show that the consideration was a loan. One reason for giving such a literal application of the statute is stated to be the unparalleled rate of interest. But in the course of the opinion the chief justice says: 'As to the second, third and fourth classes of cases as arranged in the brief and arguments of counsel, I am of opinion that if the consideration had been a fair and *bona fide* loan, the parties had a right to stipulate any rate of interest without limiting it to a future day, or to the maturity of the note, provided the contract for interest be absolute and unconditional.' Judge

parties have thereby given a sanction by adopting it before maturity; they have admitted it to be a fair compensation for

Safford held (in which Gayle also concurred) that where the rates of interest were exorbitant, and there was no time of forbearance fixed by the contract, they were not within the statute." *Bell v. Mayor*, 10 Paige 49.

Cook v. Fowler, L. R. 7 H. of L. Cas. 27, was an action upon a warrant of attorney given to secure the payment of £1,330 "on the 2d day of June next," with interest at five per cent. per month, "judgment to be entered up forthwith." The lord chancellor remarked upon the stipulation for interest up to a certain day, without any mention of subsequent interest upon the face of the instrument. He says: "No doubt, *prima facie*, the rate of interest stipulated up to the time certain might be taken, and generally would be taken, as the measure of interest; but this would not be conclusive. It would be for the tribunal to look at all the circumstances of the case and to decide what was the proper sum to be awarded by way of damages." The house of lords declined to award damages at the rate of sixty per cent. because it was highly inequitable. The holder not having entered up judgment, nor made any definite claim against the debtor's estate (such debtor having died), for the space of four years and upward, it was held that the tribunal before which the claim at last came was justified in awarding by way of damages such a rate of interest as the holder of the warrant of attorney would have been entitled to, according to the ordinary rule of the court of chancery, had he entered

up judgment on the day named in the defeasance to the warrant of attorney, namely, at the rate of four per cent. It was held, also, that there is no rule of law that upon a contract for the payment of money on a certain day, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest is to be implied. *Reeves v. Lane*, 8 New Zéal. 44.

In *Brewster v. Wakefield*, 22 How. 118, it was held that such a contract is spent when the day of payment arrives; that there is no stipulation in relation to interest after the debt becomes due; and that if the right to interest depended altogether on contract, and was not given by law in such a case, the creditor would be entitled to no interest whatever after the day of payment. The contract being entirely silent as to interest, if the notes be not punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision of the contract. Therefore the interest after maturity should be after the rate established by law, where there is no contract to regulate it. There were two notes sued on, one stipulating interest at the rate of twenty and the other twenty-four per cent. per annum. Taney, C. J., said: "Nor is there anything in the character of this contract that should induce the court *by supposed intention of the parties*, or doubtful inferences, to extend the stipulation for interest beyond the time specified in the written contract. The law of Minnesota has fixed seven

the use of the money. The debtor's omission to pay the debt when due should have the same effect to continue that rate after maturity, on the ground both of intention and admission of its fairness, where it exceeds the legal rate, as the silence and inaction of the creditor where the rate is less.⁶⁷ The statutory

per cent. per annum as a reasonable and fair compensation for the use of money; and where a party desires to exact from the necessities of a borrower more than three times as much as the legislature deems reasonable and just, he must take care that the contract is so written in plain and unambiguous terms; for with such a claim he must stand upon his bond."

⁶⁷ *Eastern T. Co. v. Cushing S. F. Co.*, 3 New Bruns. Eq. 392; *Beckwith v. Trustees of Hartford, etc. R. Co.*, 29 Conn. 268, 76 Am. Dec. 599. A railroad company issued bonds, by virtue of a statute, bearing interest payable semiannually at the rate of seven per cent. per annum; the interest coupons were paid up to the time when the principal of the bonds fell due. And the question was submitted to the court whether the bondholders were legally entitled to seven per cent. interest or only to six, the legal rate. *Hinman, J.*, says: "We are of opinion that the plaintiff in this case is entitled to seven per cent. per annum for the detention of his money after the principal became due. Technically speaking, it is no doubt true that the sum recoverable for such detention is treated as damages for the breach of the contract rather than interest for the money loaned, because, strictly speaking, interest can only be claimed under a contract to pay it, either express or implied, and the express contract, of course, ceased

on the day when the principal was to be paid, and no implied contract can be raised from a total refusal to pay anything. But damages are recoverable for the breach of the contract; and courts, in order to give to him to whom the money is due what he may fairly be supposed to have suffered by withholding it from him, and at the same time to prevent the borrower from making a profit by the breach of his contract, have regulated the damages for such breach by the usual rate of interest at the place where the money is detained. This, though an arbitrary rule, will generally operate justly and is much more convenient than any other which could be adopted. But the usual rate of interest at any place is itself as arbitrary a provision of law as the damages dependent upon it, and is by no means uniform. It is not only known to differ in different states and countries, generally depending upon positive statutes, but may vary from the ordinary or more general rate by the parties agreeing upon a lesser rate, or if authorized so to do, as in the case under consideration, by their agreement upon a higher rate; or there may be a general statute authorizing a higher rate for money borrowed for some particular purpose, or by a particular class of persons or corporations; . . . and the different rates thus agreed upon become the legal rates of interest in respect to the particular contracts

provisions, enacted in many states, that judgments shall bear the same rate of interest as that expressed on the face of the contract or the contract rate is a legislative sanction of the same rate after as before maturity.⁶⁸

In some states the rate stipulated to be paid during the period of credit has no influence in determining the rate afterwards, but the legal rate is uniformly applied. This is so in Minnesota,⁶⁹ Kansas,⁷⁰ Kentucky,⁷¹ Maine,⁷² Alabama,⁷³ Maryland,⁷⁴ Arkansas,⁷⁵ Rhode Island,⁷⁶ South Carolina,⁷⁷ Georgia (according to the judge of the federal circuit court),⁷⁸ California (in

during their existence. And the rates of interest thus established by agreement must be presumed to be just and equitable under the circumstances; that is, a fair compensation in such case for the use of the money between the parties during the time the contract had to run. Then, why should we not presume, as between the same parties, that such continues a fair compensation for its use until the contract is performed; as well after as before the day when the principal was to be paid; and thus permit the rate of interest agreed upon to control the damages to be paid for the detention of the money, as well as the interest for its use. There is no equity in favor of one rate of interest rather than another, where they are both legal and within reasonable limits, and the defendants ought not to complain as long as it is in their power, by paying the principal, to protect themselves from paying what they thought a reasonable rate when they borrowed the money."

⁶⁸ *Hand v. Armstrong*, 18 Iowa 324.

⁶⁹ *Talcott v. Marston*, 3 Minn. 339; *Mason v. Callender*, 2 id. 350, 72 Am. Dec. 102; *Kent v. Brown*, 3 Minn. 347; *Chapin v. Murphy*, 5 id. 474; *Lash v. Lambert*, 15 id. 416, 2

Am. Rep. 142; *Moreland v. Lawrence*, 23 Minn. 84.

⁷⁰ *Robinson v. Kinney*, 2 Kan. 184; *Searle v. Adams*, 3 id. 515, 89 Am. Dec. 598.

⁷¹ *Gray v. Briscoe*, 6 Bush 687; *Rilling v. Thompson*, 12 id. 310; *White v. Curd*, 86 Ky. 191.

⁷² *Duran v. Ayer*, 67 Me. 145; *Eaton v. Boissonnault*, id. 540, 24 Am. Rep. 52.

⁷³ *Kitchen v. Branch Bank*, 14 Ala. 233.

⁷⁴ *Brown v. Hardecastle*, 63 Md. 484.

⁷⁵ *Newton v. Kennerly*, 31 Ark. 626, 25 Am. Rep. 592; *Woodruff v. Webb*, 32 Ark. 612; *Pettigrew v. Summers*, id. 571; *Gardner v. Barnett*, 36 id. 476; *Harbison v. Hammons*, 113 Ark. 120; *Johnson v. Downing*, 76 Ark. 128.

⁷⁶ *Pearce v. Hennessy*, 10 R. I. 223. *Contra*, in equity. *Silverman v. Shattuck*, 33 R. I. 67.

⁷⁷ *Earle v. Owings*, 72 S. C. 362; *Langston v. South Carolina R. Co.*, 2 S. C. 248; *Maner v. Wilson*, 16 id. 469; *Thatcher v. Massey*, 20 id. 542; *Bell v. Bell*, 25 id. 149.

⁷⁸ *Sherwood v. Moore*, 35 Fed. 109. But see *Daniel v. Gibson*, 72 Ga. 367, 53 Am. Rep. 845; *Trippe v. Wynne*, 76 Ga. 200.

certain cases) by virtue of the code,⁷⁹ Washington,⁸⁰ Missouri, so far as coupon interest notes are concerned,⁸¹ and Oregon, in cases of implied contracts,⁸² and formerly in Indiana.⁸³ The same principle is held by the supreme court of the United States,⁸⁴ where the question does not come before it from a state in which the law is settled to the contrary.⁸⁵ It has been said of the cases cited that they recognize the principle that if the parties have fixed a rate to be paid up to the time of the extinguishment of the debt that rate will be respected; this rule was applied where the specified rate was payable until the obligation was paid.⁸⁶ Such is the rule in Connecticut though the stipulated rate is less than the legal rate.⁸⁷ The circuit

⁷⁹ *United States Nat. Bank v. Waddingham*, 7 Cal. App. 172; See. 1917, Civil Code; *Nash v. El Dorado County*, 24 Fed. 252; *Malone v. Roy*, 107 Cal. 518; *Randall v. Duff*, 107 Cal. 33; *Lambert v. Schmalz*, 118 Cal. 33. See *Falkner v. Hendy*, 80 Cal. 636.

The California statute limiting the rate of interest on judgments does not include claims against solvent estates; hence an allowed claim against such an estate based upon a contract bearing a rate of interest exceeding that which judgments carry continues to bear the contract rate until it is paid. *Richardson v. Diss*, 127 Cal. 58.

Under sec. 1919, Civil Code, a contract providing that deferred instalments of interest shall bear interest at a higher rate than that borne by the principal is void. *Yndart v. Den*, 116 Cal. 533, 58 Am. St. 200. As is the whole interest agreement, *Bell v. San Francisco S. Union*, 153 Cal. 64.

⁸⁰ *Bank v. Doherty*, 42 Wash. 317, 4 L.R.A.(N.S.) 1191, 114 Am. St. 123 (note executed in another state is governed by the Washington statute).

⁸¹ *Citizen's Nat. Bank v. Donnell*, 172 Mo. 384.

⁸² *Thompson v. Hibbs*, 45 Ore. 141; *Graham v. Merchant*, 43 Ore. 294.

⁸³ *Burns v. Anderson*, 68 Ind. 202, overruling *Kilgore v. Powers*, 5 Blackf. 22; *Richards v. McPherson*, 74 Ind. 158. *Burns v. Anderson* is overruled by *Shaw v. Rigby*, 84 Ind. 375, 43 Am. Rep. 96.

⁸⁴ *Brewster v. Wakefield*, 22 How. 118, 16 L. ed. 301; *Burnhisel v. Firman*, 22 Wall. 170, 22 L. ed. 766; *Holden v. Trust Co.*, 100 U. S. 72, 25 L. ed. 567.

If the obligation does not specify the rate after maturity and provides that the interest due before it is payable shall be added to the principal, the legal rate will govern thereafter. *Elwell v. Daggs*, 108 U. S. 143, 27 L. ed. 682.

⁸⁵ *Cromwell v. County of Sac*, 96 U. S. 57, 24 L. ed. 686 (an Iowa case), the conventional rate was continued; *Ohio v. Frank*, 103 id. 697; *Massachusetts Ben. Ass'n v. Miles*, 137 id. 689; *Vermont L. & T. Co. v. Dygert*, 89 Fed. 123. See *Perry v. Taylor*, 1 Utah 63.

⁸⁶ *New Orleans v. Warner*, 175 U. S. 120, 147, 44 L. ed. 96, 109.

⁸⁷ *Winsted Sav. Bank v. New Hartford*, 78 Conn. 319.

court for the eastern district of Wisconsin has deemed the rule of the federal supreme court applicable to bonds which have been declared due because of default in the payment of interest coupons. "The stipulation of the trust deed which authorizes the trustee, at its election, to mature the principal upon default in the payment of interest does not purport to abrogate the rate of interest which the obligor agreed to pay during the stated period. The exercise of the election matured the principal, but left untouched the stipulation for interest. The rate was agreed upon by the parties to the contract, and was to continue during a stated period of time, notwithstanding that by the election of the trustee the principal was matured at an earlier date than that specified in the contract." As to the coupons which matured by their own terms, no rate of interest being fixed after their maturity, they carried the legal rate.⁸⁸

In several of the enumerated states the question is solved according to the intention of the parties. Thus, where the stipulation is for an unusually low rate of interest there is no presumption that it was contemplated to be continued after maturity, and the legal rate will govern.⁸⁹ A note payable one day after date, with interest in excess of the minimum legal rate, bears the stipulated rate after maturity,⁹⁰ and so if it bears less than the legal rate.⁹¹ The expressions of the parties also control, though they fall short of being distinct.⁹² In Eng-

⁸⁸ *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 94 Fed. 454.

⁸⁹ *Brown v. Hardeastle*, 63 Md. 484.

⁹⁰ *Capen v. Crowell*, 66 Me. 282; *Paine v. Caswell*, 38 Me. 80; *Casted v. Walker*, 40 Ark. 117, 48 Am. Rep. 5; *Gray v. Briscoe*, 6 Bush 687; *White v. Curd*, 86 Ky. 191; *Piester v. Piester*, 22 S. C. 139; 53 Am. Rep. 711.

But a note dated in February, payable one day after date, with interest at one per cent. per month from the first of the preceding January, bears only the legal rate after maturity. "The time named from which the interest was to run—something more than a month be-

fore the execution of the note—made it possible to count the interest for a 'month' without going beyond its maturity, and excluded the conclusion, otherwise necessary, that the phrase 'per month' could not have its full effect without touching time beyond the maturity of the note." The court remark that "this may look like a small difference to produce such consequences, but we think it is founded on principle and the decided cases." *Smith v. Smith*, 33 S. C. 210.

⁹¹ *Neale's Est.*, 14 Pa. Dist. 227.

⁹² A note payable with "ten per cent. per annum from date," and stipulating that if the interest is not paid annually it shall become

land the stipulated rate before maturity would seem to be *prima facie* the rate afterwards,⁹³ but subject to easier relaxation and broader discretion conceded to the jury⁹⁴ than is consistent with

principal and bear the same rate of interest, continues to carry the contract rate after maturity. *Vaughan v. Kennan*, 38 Ark. 114; *Miller v. Hall*, 18 S. C. 141. And so with a note payable one day after date "with interest from date at the rate of twelve per cent. per annum, interest to be paid annually." *Sharpe v. Lee*, 14 S. C. 341.

A note payable twelve months after date "with interest from date, interest payable annually," was described in a mortgage contemporaneously executed by the same person as a note "with interest thereon at the rate of twelve and a half per cent. per annum until paid." The language of both instruments indicated an indefinite extension of credit and interest at the specified rate. *Mobley v. Davega*, 16 S. C. 73, 42 Am. Rep. 632.

⁹³ *Cook v. Fowler*, L. R. 7 H. of L. Cas. 27; *Keene v. Keene*, 3 C. B. (N. S.) 144; *Morgan v. Jones*, 8 Ex. 620; *Das v. Lal*, L. R. 22 India App. 199.

A note conditioned for the payment of the principal sum with interest "until the repayment thereof" means until the day fixed for payment, and is not a contract to pay the agreed rate beyond that time. *In re European Cent. R. Co.*, 4 Ch. Div. 33. See *Ex parte Fewings*, 25 id. 399.

Where the promise was to pay seven per cent. so long as the principal or any part thereof should remain due a judgment did not merge the contract in it so as to prevent the creditor from recovering the difference between the judgment and the contract rate. *Popple v. Suth. Dam.* Vol. I.—61.

Sylvester, 22 Ch. Div. 98; *Lowry v. Williams*, [1895] 1 Irish 274.

The two last preceding cases and *Ex parte Fewings*, *supra*, are discussed in *Usborne v. Limerick Market Trustees*, [1900] 1 Ch. 85. In the last case a mortgagor covenanted to pay the principal sum on a day named, and also, if it should not then be paid, that so long as the same or any part of it was unpaid, he would pay the stipulated rate of interest. A judgment against the mortgagor for principal and interest merged the covenant therein, and the mortgagee was only entitled to recover the legal rate of interest thereafter. To the same effect, *Hanford v. Howard*, 1 New Bruns. Eq. 241, following *St. John v. Rykert*, 10 Can. Sup. Ct. 278, and *People's L. & D. Co. v. Grant*, 18 id. 362.

"Interest is payable as interest, and not as damages, under a bond having a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, even although no express mention of interest is made in the bond; and I cannot see any just reason for holding that the amount of interest recoverable is diminished by reason only of the bond being conditioned for payment of principal and interest up to or at a certain date. The bond may be so framed as to show an intent to limit interest recoverable as up to a specified date; but in my judgment it wants more than the circumstance I have referred to to show such an intent." *Haynes v. Dixon*, [1899] 2 Ch. 561.

⁹⁴ *Du Belloix v. Waterpark*, 1 D.

the rule established by a preponderance of American authority, which is believed to be that the rate stipulated for in general terms before maturity will be continued until verdict,⁹⁵ upon

& R. 348n; *Cameron v. Smith*, 2 B. & Ald. 305; *Bann v. Dalzel*, Moo. & M. 228; *Page v. Newman*, 9 B. & C. 378; *Arnott v. Redfern*, 3 Bing. 353; *Higgins v. Sargent*, 2 B. & C. 348; *Calton v. Bragg*, 15 East 223; *Keene v. Keene*, 3 C. B. (N. S.) 144; *Gibbs v. Fremont*, 9 Ex. 25.

⁹⁵ *Morris v. Baird*, 72 W. Va. 1; *Evans v. Rice*, 96 Va. 50; *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494, 75 Am. St. 935; *Hallam v. Telleren*, 55 Neb. 255; *Meaders v. Gray*, 60 Miss. 400, 45 Am. Rep. 414; *Tishmingo Sav. Inst. v. Buchanan*, 60 Miss. 496; *Hydraulic Co. v. Chatfield*, 38 Ohio St. 575; *Shaw v. Rigby*, 84 Ind. 375, 43 Am. Rep. 96, overruling cases to the contrary; *Kimball v. Burns*, 84 Ind. 370; *Hume v. Mazelin*, id. 574; *Shipman v. Bailey*, 20 W. Va. 140; *Brown v. Steck*, 2 Colo. 70; *Buckingham v. Orr*, 6 id. 587; *Broadway Sav. Bank v. Forbes*, 79 Mo. 226, affirming 9 Mo. App. 575; *Kerr v. Haverstick*, 94 Ind. 178; *Kellogg v. Lavender*, 15 Neb. 256, 48 Am. Rep. 339; *Hager v. Blake*, 16 Neb. 12; *Jefferson County v. Lewis*, 20 Fla. 980, 1009; *Borders v. Barber*, 81 Mo. 636; *Bowers v. Hammond*, 139 Mass. 360; *Parks v. O'Connor*, 70 Tex. 377; *Bressler v. Harris*, 19 Ill. App. 430; *Joiner v. Enos*, 23 id. 224; *Thorn v. Smith*, 71 Wis. 18; *Barbour v. Tompkins*, 31 W. Va. 410; *Kohler v. Smith*, 2 Cal. 597, 56 Am. Dec. 369; *Beckwith v. Trustees of Hartford, etc. R. Co.*, 29 Conn. 268, 76 Am. Dec. 599; *Adams v. Way*, 33 Conn. 419; *Hubbard v. Callahan*, 42 id. 524, 19 Am. Rep. 564; *Kilgore v. Powers*, 5 Blackf. 22; *Gordon v. Phelps*, 7 J. J. Marsh.

619; *Pate v. Gray*, Hemp. 155; *Henderson v. Desha*, id. 231; *Spencer v. Maxfield*, 16 Wis. 179; *Pruyn v. Milwaukee*, 18 id. 367; *Marietta I. Works v. Lottimer*, 25 Ohio St. 621; *Monnett v. Sturges*, id. 384; *Besser v. Hawthorn*, 3 Ore. 129; *Etnyre v. McDaniel*, 28 Ill. 201; *Williams v. Baker*, 67 Ill. 238; *Brewster v. Wakefield*, 1 Minn. 352, 69 Am. Dec. 343; *Van Beuren v. Van Gaasbeek*, 4 Cow. 496; *Montgomery v. Boucher*, 14 Up. Can. C. P. 45; *Pridgen v. Andrews*, 7 Tex. 461; *Hopkins v. Crittenden*, 10 id. 189; *Harden v. Wolf*, 2 Ind. 31; *Engler v. Ellis*, 16 id. 475; *Hand v. Armstrong*, 18 Iowa 324; *Thompson v. Pickel*, 20 id. 490; *Wilson v. King*, *Morris*, 106; *Burkhart v. Sappington*, 1 G. Greene 66; *Guy v. Franklin*, 5 Cal. 416; *Corcoran v. Doll*, 32 Cal. 82; *McLane v. Abram*, 2 Nev. 199; *Overton v. Bolton*, 9 Heisk. 762, 24 Am. Rep. 367; *Warner v. Juif*, 38 Mich. 662; *Cecil v. Hicks*, 29 Gratt. 1, 26 Am. Rep. 391; *Burgess v. Southbridge Sav. Bank*, 2 Fed. 500; *Brannon v. Hursell*, 112 Mass. 63, 37 Am. Rep. 305; *Union Inst. v. Boston*, 129 Mass. 82; *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. ed. 681; *Fauntleroy v. Hannibal*, 5 Dill. 219; *Hovey v. Edmison*, 3 Dak. 449 (it is so provided in the code); *United States M. Co. v. Sperry*, 26 Fed. 727; *Gage v. McSweeney*, 74 Vt. 370; *Rew v. Independent School Dist.*, 125 Iowa 28, 106 Am. St. 282 (by statute); *Clark v. Nichols*, 79 Kan. 612 (in favor of a stranger to the mortgage during the period the mortgagor might redeem); *Milwaukee T. Co. v. Van Valkenburgh*, 132 Wis. 638.

the theory, according to some authorities, that it was the intention of the parties that the agreed rate should so continue, while

If the stipulation is for the payment of a rate in excess of the minimum legal rate "until maturity," the latter will be the limit thereafter. *Hamer v. Rigby*, 65 Miss. 41.

Under statutes to the effect that where there is no express agreement fixing a different rate of interest bonds, notes, etc., shall bear interest at seven per cent. after they have become due, and that judgments shall bear interest at the rate agreed upon in the contracts upon which they were rendered, a note which bears an agreed rate of interest, but is silent as to the rate after its maturity, carries interest at the stipulated rate. *Greenhaw v. Holmes*, 8 Ariz. 94, citing *Kohler v. Smith*, 2 Cal. 597, 56 Am. Dec. 369; *Hand v. Armstrong*, 18 Iowa 324; *Brannon v. Hursell*, 112 Mass. 63; *Marietta I. Works v. Lottimer*, 25 Ohio St. 621; *McLane v. Abrams*, 2 Nev. 199; *Phinney v. Baldwin*, 16 Ill. 108, 61 Am. Dec. 62; *Hopkins v. Crittenden*, 10 Tex. 189; *Spencer v. Maxfield*, 16 Wis. 185; *Borders v. Barber*, 81 Mo. 636; *Warner v. Juif*, 38 Mich. 662; *Kellogg v. Lavender*, 15 Neb. 256, 48 Am. Rep. 339; *Wyckoff v. Wyckoff*, 44 N. J. Eq. 56; *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. ed. 681.

In *Spencer v. Maxfield*, 16 Wis. 178, the action was upon a note payable at a future day with interest at the rate of twelve per cent. It was silent as to interest after maturity. The statute in force permitted parties to contract for any rate not exceeding twelve per cent., and seven was the ordinary legal rate. The stipulated rate was held to govern after maturity as a rate legally fixed. *Cole, J.*: "We have

no doubt but the general understanding among business men has been that notes in the form of the one under consideration draw interest at the rate of twelve per cent. after as well as before maturity. Such we believe to be the construction placed upon these contracts by the community, and we think it is the correct one. . . . It seems to be strictly analogous to the case where a tenant holds over, where the law implies an agreement to pay rent according to the terms of the express lease." The contract, on this theory, imports an agreement to pay the same rate of interest after as before maturity. There is supposed to be a *tacit* agreement as distinguished from a *duty or obligation* which is to be enforced on the fiction of a promise; or as distinguished from a measurement of compensation for detaining money, by the standard of the rate of interest stipulated for its use immediately before such detention.

In *Spaulding v. Lord*, 19 Wis. 533, where the agreement was to pay interest "until the time when the principal sum will be payable," the inference of a contract to pay the specified rate after maturity was repelled by the particular language.

In *Etnyre v. McDaniel*, 28 Ill. 201, suit was brought on a promise to pay money and ten per cent. interest. *Breese, J.*, said: "Here are two rates of interest provided for; one conventional, the other statutory. The ten per cent. rate is expressly stipulated by the parties and must prevail over the statute rate. This contract must be construed like all other contracts, and

others reason that the stipulated rate should be adopted as the just measure of damages for nonpayment at maturity. This

the intention of the parties must prevail. Now what did the parties intend when making a contract to pay ten per cent.? Can any one doubt it was the intention as well of the maker as of the payer of this note, that ten per cent. should be paid until the note was fully discharged. Such is the common-sense understanding of the contract, and the statutory interest does not control at all. Such contracts are made every day. It is the rate of interest fixed by the parties themselves, and to attach to the debt until it should be fully paid, and so long as it remains a note, conventional, not legal, interest was the contract, and such contracts are sanctioned by law."

The conclusion that the contract rate shall govern after maturity is reached by substantially the same reasoning in Wisconsin, Illinois, and Iowa. The construction of the contract is different from that put upon the notes in *Brewster v. Wakefield*, and on the bonds in *Beekwith v. Trustees*. These cases agree that such contracts for interests do not extend beyond the day fixed for the payment of the principal. In the former (*Brewster v. Wakefield*), for that reason it was held that the conventional interest ceased at maturity; but the Connecticut case, while it concedes that the contract operates only to the time when the principal is due, holds nevertheless that the conventional rate of interest should be adopted as the just measure of damages after maturity, having been the conventional rate immediately before, and because if the debtor is unwilling to pay dam-

ages at that rate he can avoid them by paying the debt.

In *Montgomery v. Boucher*, 14 Up. Can. C. P. 45, the defendant having made his promissory note payable two months after date, with interest at the rate of twenty per cent. per annum, and having made default in payment thereof at maturity, in an action by the holder thereon the question was submitted to the jury as to the amount they would allow after the note became due, not exceeding twenty per cent. The jury allowed only six per cent. after the note matured. Upon motion to increase the verdict by the difference between six and twenty per cent., it was held that the rate of interest agreed upon by the terms of the note is the amount which should be allowed by the jury, when allowing interest in the nature of damages, from the maturity of the note to the entry of the judgment.

In *Howland v. Jennings*, 11 Up. Can. C. P. 272, on the authority of *Keene v. Keene*, 3 C. B. (N. S.) 144, the court refused to reduce the verdict of a jury which had allowed interest for the whole period from the date at the rate of twenty per cent. per annum, on a promissory note payable one month after date, with interest at that rate. The defendant contended that from the time the note became due only six per cent. should have been allowed; and the judge, at *nisi prius*, gave him leave to move the full court to reduce the verdict, which they refused to do. "On the whole," say the court, "we think the weight of authority is in favor of the interest agreed upon by the parties being the proper amount to be allowed by the jury

rule has been applied where bonds had coupons attached for the annual interest up to maturity, but no coupons therefor after

as interest, when allowing interest in the nature of damages, from the time the note matures to the time the judgment is to be entered. It may also be argued this is the proper mode of estimating the interest or damages to be allowed, as being that which was in the contemplation of the parties when they entered into the contract, according to the doctrine laid down in *Hadley v. Baxendale*, 9 Ex. 341."

It may be doubted whether these cases are to be relied upon as the law of Canada at present. It is held in *St. John v. Rykert*, 10 Can. Sup. Ct. 278, following some English cases stated *ante*, n. § 309, that a promise to pay interest until the principal is paid means until the time fixed for the payment of the principal.

In *Keene v. Keene*, 3 C. B. (N. S.) 144, the suit was against the drawer on a bill of exchange payable with interest at ten per cent. per annum. The master computed interest at that rate after maturity to judgment. A motion was made on behalf of the defendant to refer to the master for reconsideration; and it was stated in support of the motion that the acceptor, whose liability measures that of the drawer, is liable only to interest at five per cent. after due. Counsel was interrupted by Willes, J., who said: "That clearly is not so; until maturity of the bill the interest is a debt; after its maturity the interest is given as damages, at the discretion of the jury. Col. Fremont had to pay twenty-five per cent. (the California rate of interest) upon the bills which he drew there on Mr. Buchanan, the secretary of state, at

Washington, and which were protested for non-acceptance. *Gibbs v. Fremont*, 9 Ex. 25. The jury saw fit to adopt, as the measure of damages, the rate of interest which the parties themselves have fixed, and the master is substituted for the jury." On the decision of the case, Cockburn, C. J., said: "The master has, as he well might, given in the shape of damages the rate of interest the parties themselves have contracted for. I think he has done quite right." Crowther, J., said: "The master would, I think, have acted very unreasonably if he had not assessed the damages by the rate which the parties had stipulated as the value of the money." *Pujol v. McKinlay*, 42 Cal. 559.

By statute in Nevada the rate of interest or damages for detention is the same after breach as that fixed by the contract before breach. So that though the statute gives damages at the rate of ten per cent. per annum for withholding money generally, it allows a higher rate corresponding to the contract rate when money is withheld which bore, by contract, a higher rate before maturity. *McLane v. Abrams*, 2 Nev. 199.

Nutting v. McCutcheon, 5 Minn. 382, was a suit on a note for \$1,000, and interest at two and a half per cent. per month, secured by mortgage. When the note became due the maker obtained the privilege of retaining the money longer, upon condition that he would pay interest thereon quarterly at the current rates. No contract for forbearance for any specific time was entered into, nor did the maker, at the beginning of the several extensions

maturity.⁹⁶ A mere change in the form of a security does not work a reduction of the interest from the agreed to the legal rate.⁹⁷ If an instrument which is barred by the statute of limitations is revived by a new promise the conventional rate of interest therein specified may be collected, notwithstanding it is higher than that allowed by law when such promise is made.⁹⁸ A stipulation as to semi-annual rests has no effect after the maturity of the obligation in the absence of an express agreement to that end.⁹⁹

A statute requiring that an express contract be made for in-

that were granted, specially agree to pay any particular rate of interest and no writings were executed in relation to the same; but at the end of each quarter the parties would meet and agree upon the value of money for the past quarter, and the maker would pay and the payee would receive such amount in satisfaction of the interest accrued, and indorse the same upon the note as payment up to that date, with the consent of the maker. It was held that the absence of a definite contract for forbearance on the one side, and payment on the other, at the beginning of each quarter, did not affect the validity of the payments, as the parties obviated any such difficulty by stipulating the precise terms at the end of the time, and immediately executing them as settled. When a contract lacking the essential feature of mutuality at its inception is subsequently, by the act of the parties, corrected in this particular, and executed, the question of mutuality between the parties is put to rest, although the statute requires that the contract for the payment of such interest shall be in writing; yet where it is made without writing, and executed by the parties, money paid thereunder cannot be recovered back.

The rule that where contracts are made in violation of statutory provisions, or in contravention of public policy, they are void, and money paid thereunder may be recovered back, is confined in its application to such contracts as involve, by their subject-matter, some substantial violation of the spirit of the law or policy, and not such as stipulate some matter recognized and permitted by law or policy, but in a manner other than the one prescribed.

A stipulation for interest annually extends only to the maturity of the note; after that it is to be computed at the rate stipulated without annual rests. *Ingram v. Scattergood*, 15 Ohio C. C. (N. S.) 93.

In West Virginia the stipulated, if less than the legal, rate controls after judgment. *Peirpoint v. Peirpoint*, 71 W. Va. 431, 43 L.R.A. (N.S.) 783.

⁹⁶ *People v. Getzendaner*, 137 Ill. 234; *Pruyn v. Milwaukee*, 18 Wis. 367; *Kendall v. Porter*, 120 Cal. 106.

⁹⁷ *Union Mut. L. Ins. Co. v. Slee*, 110 Ill. 35.

⁹⁸ *Vines v. Tift*, 79 Ga. 301.

⁹⁹ *Rew v. Independent School Dist.*, 125 Iowa 28, 106 Am. St. 282.

terest in excess of seven per cent does not govern the rate recoverable on an account stated where interest has been regularly charged at a higher.¹

The rate of interest stipulated for in a note does not bind one who assumes its payment; his liability is for the legal rate of interest.²

SECTION 2.

AGREEMENTS FOR INTEREST "UNTIL PAID."

Agreements for interest at higher than legal rates, both before and after maturity, will be discussed in the next section. Two classes of contracts will receive present attention: first, those which provide expressly for interest from date at a uniform rate until the debt is paid; and second, those which provide for interest from date, in case the debt, not otherwise bearing interest, shall not be punctually paid, or for interest to commence at maturity, or thenceforth to bear an increased rate in case of default.

§ 310. Agreements for interest from date until debt paid. Agreements which belong to the first class have, of course, no other effect than to give interest before maturity, if the rate stipulated is the legal rate, and this will continue until the debt is paid or collected.³ Where the conventional rate is higher than the ordinary legal rate, but does not exceed that which the parties are authorized by law to stipulate for, the contract is binding according to its terms; that is, until the debt is paid or the contract merged in a judgment or decree,⁴ except in Min-

¹ *Atkinson v. Golden Gate T. Co.*, 21 Cal. App. 168.

² *Continental State Bank v. Tra-bue* (Tex. Civ. App.), 150 S. W. 209.

³ Interest does not cease on the death of a mortgagor because no demand was made, there being no administrator or curator on whom it could be made. *Tatum v. Gibbs*, 19 Ky. L. Rep. 665.

⁴ *Augusta Nat. Bank v. Hewins*, 90 Me. 255; *Freehold L. Co. v. McLean*, 8 Manitoba 116; *Manitoba & N. L. Co. v. Barker*, id. 296; *Fisher v. Bidwell*, 27 Conn. 363; *Palmer v. Leffler*, 18 Iowa 125; *Pujol v. McKinlay*, 42 Cal. 559; *Taylor v. Meek*, 4 Blackf. 388; *Mead v. Wheeler*, 13 N. H. 351; *Dudley v. Reynolds*, 1 Kan. 285, affirmed in *Young v. Thompson*, 2 Kan. 83;

nesota. In Iowa the contract rate is computed on the judgment in furtherance of the spirit and intent of the contract,⁵ but the interest included in the judgment bears interest only at the legal rate.⁶ In Minnesota the statute authorizing parties to contract for any rate of interest is construed strictly; the rate stipulated for does not extend beyond the date fixed for payment. It is held there that interest as damages cannot be increased by contract above the ordinary legal rate; such contracts are treated as providing penalties to secure punctuality of payment and, consequently, as having no legal effect.⁷

The courts which hold that a general promise of interest before maturity at a given rate will operate afterwards by supposed intention of the parties will and do enforce a continuance of the same rate when that intention appears expressly or inferentially.⁸ And other courts which enforce the same rate after as before maturity, not on the ground mainly of intention, but because the rate adopted by the parties for one period is presumed to be fair and just for another immediately succeeding, will continue that rate when the parties have given a like assurance of its fairness for the whole period that they contemplated the possibility of the money being retained.⁹ Wherever the privilege given to parties to stipulate special rates of interest above the general rate is held to apply to the time the debtor retains the money after it is due it would seem to be matter of course to enforce such agreements if the agreed rate is the same before and after the specified day of payment.¹⁰

New Orleans v. Warner, 175 U. S. 120, 147, 44 L. ed. 96, 109.

⁵ Wilson v. King, Morris, 106.

⁶ Burkhart v. Sappington, 1 G. Greene 66.

⁷ Kent v. Bown, 3 Minn. 347; Talcott v. Marston, id. 339; Mason v. Callender, 2 id. 350, 72 Am. Dec. 102; Daniels v. Ward, 4 Minn. 168; Brown v. Nagel, 21 id. 415; Holbrook v. Sims, 39 id. 122.

⁸ § 309; Capen v. Crowell, 66 Me. 282; Paine v. Caswell, 68 Me. 80, 28 Am. Rep. 21; Hubbard v. Calla-

han, 42 Conn. 524, 537, 19 Am. Rep. 564.

⁹ Beckwith v. Trustees of Hartford, etc. R. Co., 29 Conn. 268, 76 Am. Dec. 599.

An obligation stipulating for interest from its date until a specified day draws interest at the legal rate after that day. Ehrhardt v. Varn, 51 S. C. 550.

¹⁰ It is obvious that the final decisions in Brewster v. Wakefield, 22 How. 118 (see New Orleans v. Warner, 175 U. S. 120, 147, 44 L.

§ 311. **Agreements for a different rate after debt due.** The second class of cases comprises those in which interest by agreement is made retrospectively to attach for the period of credit, or prospectively at a severer rate in consequence of the principal not being paid when due. An agreement in advance that if the principal be paid at maturity the debt may be discharged without interest, but otherwise to bear interest from date at a legal rate, is an undertaking conditionally to do something which the parties had a right to stipulate for at first absolutely. Nor is there any intrinsic difference between such an agreement and one for payment of the principal at a certain day with interest, with a proviso that if such principal be punctually paid no interest shall be charged. There can be no other legal objection to making money as interest payable on a contingency, or upon the happening of a default, than to make the principal itself depend on an uncertain event. The question in both cases is whether the payment required on one alternative—the other dispensing with it—is a penalty. The fact of there being an alternative or contingency in the contract does not decide the question. A party may have two prices for goods, one for cash, and another and higher price when time is given for payment. A purchaser who is advised of these terms and chooses to buy on time would not be heard to object that the time price, or its excess over the cash price, was a penalty. He is as firmly bound for the price at which he purchased as though no opportunity to purchase on other terms had been offered. Either price being legal when the purchaser made his contract, it is binding; and an alternative price, determinable by default, may become absolute and collectible.¹¹ There is not the same latitude allowed concerning agree-

ed. 109), and *Cook v. Fowler*, 7 H. of L. Cas. 27, turned on the absence of an express agreement fixing or intending to fix the rate after maturity. It was held in both that the agreed rate before is not, in every instance at least, the agreed rate after maturity, and the intimations were that an express agreement to continue the rate after maturity would be effectual. And in

Florence v. Jennings, 2 C. B. (N. S.) 454, the promise of a guarantor to pay a specified interest after maturity was enforced. *Popple v. Sylvester*, 22 Ch. Div. 98. See § 309n.

¹¹ "Usury can only attach to a loan of money or the forbearance of a debt. It is well settled that on a contract to secure the price or value of work and labor done or to be done, or of property sold, the con-

ments for interest as for prices of property, but there is entire freedom to contract for interest not above legal rates. A party who is a debtor or who makes a loan and to whom forbearance for one period is offered without interest, and another and longer period on terms of paying interest, may choose either offer without advantage by way of mitigation of his agreement for having rejected the other. Nor is a contract any less binding in respect to either alternative, which may become absolute, when one of the parties has a continuing option until the time of performance and may then make his election by performance.¹²

It is true, one of the test rules for distinguishing a penalty from liquidated damages is that if a larger sum is agreed to be paid for default in paying a smaller the larger is a penalty. A note made payable for a sum certain on a specified day, without interest if punctually paid, otherwise, with interest from date, comes within the letter of the rule. If the letter controlled, the stipulation for interest would be held to be a penalty. The rule, however, does not apply to such a case.¹³ It is designed to prevent agreements to pay a large sum in consequence of default in paying a small one, which is the actual debt, because interest is the established measure of damages for such default. It does not apply to invalidate any legal rate promised on the event of a default.

No damages for the mere non-payment of money can ever be so liquidated between the parties as to evade the provisions of the law which fixes the rate of interest.¹⁴ In all such cases the law, having fixed the rate by positive rules, has bounded the

tracting parties may agree upon one price if cash be paid, and upon as large an addition to the cash price as may suit themselves, if credit be given; and it is wholly immaterial whether the enhanced price be ascertained by the simple addition of a lumping sum to the cash price or by a percentage thereon. In neither case is the transaction usurious. It is neither the loan nor the forbearance of a debt, but simply the contract price of work and labor done

or property sold." *Graeme v. Adams*, 23 Gratt. 234, 14 Am. Rep. 130, quoted with approval in *Evans v. Rice*, 96 Va. 50, 54; *Garrity v. Cripp*, 4 Baxter 86; *Brown v. Gardner*, 4 Lea 157; *Bank v. Mann*, 94 Tenn. 17, 27 L.R.A. 565. But see *Bang v. Windmill Co.*, 96 Tenn. 361.

¹² § 282.

¹³ *Finger v. McCaughey*, 114 Cal. 64.

¹⁴ *Sedgw. on Dam.* 216.

measure of damages.¹⁵ This is the rule, the other the corollary; because interest is the measure of damages for breach of contract to pay money the law will treat as a penalty any larger sum which a debtor may agree to pay for such a default. But within the bounds of the legal rate of interest parties may liquidate damages for not paying money when it is due.¹⁶

¹⁵ *Orr v. Churchill*, 1 H. Black. 232.

¹⁶ *Wrenn v. University L. Co.*, 65 Ore. 432; *Linton v. National L. Ins. Co.*, 44 C. C. A. 54, 104 Fed. 584; *Thompson v. Gerner*, 104 Cal. 168, 43 Am. St. 81; *Sheldon v. Pruessner*, 52 Kan. 579, 22 L.R.A. 709; *Havemeyer v. Paul*, 45 Neb. 373, 388, overruling *Richardson v. Campbell*, 34 Neb. 181; *Connecticut Mut. L. Ins. Co. v. Westerhoff*, 58 Neb. 379, 76 Am. St. 101; *Hackenberry v. Shaw*, 11 Ind. 392; *Brown v. Maulsby*, 17 Ind. 10; *Gully v. Remy*, 1 Blackf. 69; *Wakefield v. Beckley*, 3 McCord 480; *Daggett v. Pratt*, 15 Mass. 177. See *Richards v. Marsham*, 2 G. Greene 217.

In *Alexander v. Troutman*, 1 Ga. 469, judgment had been entered without including the back interest, and this judgment satisfied by execution; afterwards the judgment was amended, under the order of the court, so as to include the interest from date. *Nesbitt, J.*: "The several assignments of error in this cause resolve themselves into one question, and that is, is the agreement upon the face of the papers to pay interest from date, if the principal sum is not punctually paid at its maturity, in the nature of a penalty? The court below decided it to be an undertaking to pay the back interest as damages for a failure to pay the principal sum at the maturity of the note. . . . If this back interest is stipulated damages, then the plaintiff below is en-

titled to recover it; if a penalty, he is entitled under the contract to recover whatever, in the proper form of action, he could prove to be the *quantum* of his injury. The parties do not call it either the one or the other; if they did the name they gave to it would not change its nature. That is settled by the authorities. *Story's Eq.*, sec. 1318. The amount in this case is liquidated, whether it be penalty or damages; for the agreement is in case of non-payment punctually, then to pay 'interest from date;' that is, the interest which the law allows, to be computed from the date of the note. By referring to the note, and the law of the state, the amount will be ascertained, *id certum est quod certum reddi potest*. One thing is very clear; that is, that neither the courts of Great Britain nor of our Union have established any rule by which it can always with certainty be determined what is a penalty and what liquidated damages. We shall, of course, undertake to establish none. It is settled by the later cases that in order to ascertain whether the sum specified in the agreement is to be considered a penalty or liquidated damages, the court must look at the whole of the agreement; and unless it clearly appear thereby to have been intended by the parties as liquidated damages, it will be considered as a penalty. *Tidd's Pr.* 877; 6 Barn. & Cress 216; 11 Mass. 81. In commenting on this subject Mr. Justice

§ 312. **Same subject.** A rate of interest fixed by statute is entirely arbitrary; but if it fixes an absolute limit which cannot be

Story remarks: 'But we are carefully to distinguish between cases of penalties, strictly so called, and cases of liquidated damages. The latter properly occur when the parties have agreed that in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum as the just, appropriate and conventional amount of the damages sustained by such act of omission. In cases of this sort, courts of equity will not interfere to grant relief; but deem the parties entitled to their own measure of damages; provided always, that the damages do not assume the character of *gross extravagance*, or of wanton or unreasonable disproportion to the nature or extent of the injury.' Story's Eq. Jur., sec. 1318; Eden on Injunctions, 41.

"Upon a careful review of the authorities, we are prepared to say that this extract affords the best general rule upon a question of no little complexity. We do not see why its application may not, in most cases, determine what is a penalty, and what damages. Its application relieves us from doubt as to what is the law of the case before us. It is a safe general rule not to interfere with the contract which parties have thought proper to make; it is the business of courts of justice not to make, but to enforce, contracts. If the meaning of the parties is reasonably plain, the court will not be astute to find out a different meaning. The parties in this case, and in all others of like character, have the unquestionable right to fix their own measure of damages. They are

presumed to know, better than a jury could determine for them, what injury would result from any given act or omission. And if the parties have made their contract, and it is not in contravention of the law, let it even be conceded to be unreasonable, it is right to compel them to abide by it. In *Lowe v. Peers* (4 Burr. 2229), Lord Mansfield sustains these general views in these words: 'When the precise sum is fixed and agreed upon between the parties, that very sum is the ascertained damages, and the jury is confined to it.' In that case Peers had in writing bound himself to marry Mrs. Lowe, and in default to pay her one thousand pounds. This was held to be a case of damages. A reason for abiding the damages which the parties have agreed upon is found in the difficulty which a jury would find, in many cases, of ascertaining the amount of the injury sustained. 6 Bing. 141. In the case we are now determining we know of but one criterion which the jury would have by which to fix the damages which the payee sustained, and that is the very one by which the parties themselves ascertained them; to wit, the legal rate of interest on the money. * * * On the other hand, it may be considered as settled, that where a larger sum is stipulated to be paid in order to secure the prompt payment of a lesser, it is a case of penalty. 2 Bos. & Pul. 346. So, too, where a specified sum is agreed upon to cover different breaches, and would be in some cases too large, and in others too small, that is a case of penalty. 6 Barn. & Cress. 216. In all cases where the damages are ex-

transcended by any interest contract, while payment is expressly postponed, any agreement for a greater rate after maturity,

cessive they are held to be penalty. Story's Eq., sec. 1318. Such was the case read from Alabama determined by the supreme court of that state. There the back interest reserved ranged from two and a half to ten per cent. per month."

After showing that the facts fulfil the other conditions of Judge Story's rule in respect to liquidated damages, the opinion continues: "The benefits of these contracts upon time, contrary to the received opinion, according to the legal view of them are reciprocal. When A. sells property or lends his money to B. and takes his note at twelve months, the possession of the property or the money passing at the time to B., the legal inference is that the price of the property or money is enhanced by the interest on the cash price of the property, or the actual sum loaned for twelve months. This interest is added to the note. Now if there be a stipulation that in case of non-payment at maturity the note shall bear interest from date, and it is not paid and the back interest is collected, the common opinion is that A. in the above case realizes sixteen per cent. upon this contract. But is this true? It is true that he does in fact receive sixteen per cent., but eight per cent. of that interest is off-settled by the use of the property or the money in the hands of B., the use being worth eight per cent. to him. The consequence is that in cases where the damages thus stipulated do not exceed eight per cent. the payee realizes only eight per cent. upon his money or the price of his property. Then the result of such a contract as the one before us, enforced, is

that the payee gets eight per cent., the lawful interest upon money. Now is such an amount otherwise than just? We think not. And if just it is not *grossly extravagant* or wanton, or unnecessarily disproportioned to the injury.

"We know that in point of fact the giving of time does often enhance the price of property or money far beyond eight per cent., as stated. But how do we judicially know that to be the case here? We reason from the record. The reasonableness and justness of the damages may be variously illustrated. We refer only to the instance of administrators whose notes are taken at twelve months, and very often with the condition found in this note. It is of serious importance to the estate which he represents that the debts thus contracted be promptly paid. At the expiration of twelve months he is liable not only to be called upon but to be sued, if the estate which he represents, which is very generally the case, has no resources to pay its debts but the proceeds of sales; and the debts contracted on account of such sales are not promptly met; then he is put to great inconvenience, and the estate of his intestate injured. He is compelled, perhaps, to borrow money at exorbitant rates; to submit to be sued and pay costs, or to sue upon the notes in his hands and pay commission for collecting. In this case eight per cent. for twelve months cannot be considered unjust or excessive as damages." This opinion seems to rest on the fallacious assumption that though agreements to pay on time the price of property or a loan

by reference to that standard, provides for more than compensation. This, however, is the case only in a technical point of view; for the default in paying may occur under such circumstances, that the higher rate will be no more than just compensation. Treating a sum agreed to be paid at a future day as representing the actual debt due on that day, and the credit or forbearance to that time as having been in some way fully compensated in the transaction in which the debt originated, an agreement to pay an additional sum, whether under the name of interest or not, in case of default in not paying that debt when it becomes due, is essentially an agreement for a penalty; but unless the statute arbitrarily fixes a rate not to be exceeded, it cannot be said that any rate is so perfectly a compensation that any larger rate would be more than that. If a debtor owing a sum certain agrees to pay it at a future day, with interest at a given rate, he should be deemed to have discharged his precise legal duty and obligation by paying when due that sum, together with interest computed at that rate. An additional provision in the agreement that if he makes default in paying such principal and interest when due he shall pay a higher rate of interest from date is an agreement that by its terms, if literally enforced, would make the debtor liable on the day following the maturity of his debt for an extra sum which would be greatly disproportioned to the interest for one day; ¹⁷ still, could it be treated as penalty if it would not be such had the same rate been adopted absolutely in the contract? Where additional interest, depending on default, is stipulated, and this higher rate does not exceed the legal rate, or is a reasonable one not exceeding any limit below which parties are authorized to contract for any rate, it should probably be legally assumed that the consideration was deemed by the parties, when contracting, as equivalent to the

where the interest is added to the principal when the promise is made, the debtor really pays no interest for that time because he obtains as equivalent or more in the possession of the property or money, and that therefore the restrospective interest made payable on the face

of the note for want of punctuality in paying the debt when due, consisting by concession of principal and interest, is the only interest in the transaction.

¹⁷ *Billingsly v. Cahoon*, 7 Ind. 184; *Wernwag v. Mothershead*, 3 Blackf. 401.

higher rate; or that such increased rate is no more than a just indemnity for the disappointment and injury occasioned by the default; that they have made, and intended to make, an alternative contract as to interest to secure punctuality of payment; or in case of default, to give the creditor the rate he was authorized to claim and demanded for forbearance.¹⁸ Contracts of the nature indicated are different from those which provide that in default of the payment of the semi-annual interest instalment the whole debt shall bear interest at a higher rate than it would by its terms otherwise bear. Such a contract is in the nature of a penalty for non-payment of the instalment of interest, and does not provide for the payment of a contract rate for the use of money borrowed.¹⁹

Where, looking at the substance of the contract rather than the particular collocation of words by which it is expressed, the damages or pecuniary consequences stipulated to result from default do not contravene any statutory provision, nor transcend what the parties might legitimately and reasonably agree shall be paid without default, or during a prolonged period of credit, there would seem to be no legal impediment to adjudging that the very contract which they have made shall be enforced. Contracts for a higher rate of interest after maturity than the debt had previously borne, and higher than the ordinary rate fixed by law, have been upheld and enforced according to their terms. Though there is some conflict of decision, it is believed that, according to the decided preponderance of authority, such contracts are valid unless the rate exceeds that which the statute authorizes to be stipulated for; and also subject, in extreme cases, to having the rate cut down because it is so disproportioned to the actual value of money that it should be regarded as in the nature of a penalty.²⁰ Contracts for very large rates

¹⁸ *Pass v. Shine*, 113 N. C. 284. See *Mead v. Wheeler*, 13 N. H. 351; *Wilkinson v. Daniels*, 1 G. Greene 179.

¹⁹ *Connecticut Mut. L. Ins. Co. v. Westerhoff*, 58 Neb. 379, 76 Am. St. 101.

²⁰ *Bell v. San Francisco S. Union*, 153 Cal. 64; *Wernwag v. Mothers-*

head, 3 Blackf. 401; *Latham v. Darling*, 2 Ill. 203; *Young v. Fluke*, 15 Up. Can. C. P. 360; *Witherow v. Briggs*, 67 Ill. 96; *Davis v. Rider*, 53 Ill. 416; *Young v. Thompson*, 2 Kan. 83; *Gould v. Bishop Hill Colony*, 35 Ill. 324; *Wilkinson v. Daniels*, 1 G. Greene 179; *Taylor v. Meek*, 4 Blackf. 388; *Phinney v.*

of interest has been sustained; as three dollars per month for the detention of thirty;²¹ five dollars per week for detention of four hundred and thirty-two dollars;²² and other instances of rates from twenty to one hundred and twenty per cent per annum.²³

SECTION 3.

AGREEMENTS FOR MORE THAN LEGAL RATE BEFORE MATURITY.

§ 313. **Effect of usury found.** It is not proposed to discuss what constitutes usury; but the effect of usury found on the amount of recovery or of agreeing to pay interest before maturity of the debt exceeding the limit fixed by statutes. The early statutes in this country have been generally moulded after the statute of Anne;²⁴ first, forbidding the taking of interest above a certain rate; and second, declaring void agreements and securities for greater rates. The taking of usury has sometimes also been made a criminal offense. Under such legislation the important question is the existence of usury. It is not a favored plea; though a legal defense to which, when established, the courts have given effect, it has been judicially denounced as unconscionable.²⁵ Courts require parties who would avail themselves of it to pursue correct practice in the first instance; if they err their defense will not be treated with indulgence.²⁶

Baldwin, 16 Ill. 108; Palmer v. Leffler, 18 Iowa 125; Reeves v. Stipp, 91 Ill. 609; Downey v. Beach, 78 Ill. 53; Lawrence v. Cowles, 13 Ill. 577; Smith v. Whitaker, 23 Ill. 367; Blair v. Chamblin, 39 Ill. 521, 89 Am. Dec. 322; Miller v. Kempner, 32 Ark. 573; Badgett v. Jordan, id. 154; Portis v. Merrill, 33 id. 416; Bailey v. McClure, 73 Ind. 275; White v. Iltis, 24 Minn. 43; McKay v. Belknap Sav. Bank, 27 Colo. 50, 54; Lynde v. Thompson, 2 Allen, 456; Finger v. McCaughey, 114 Cal. 64; Rogers v. Sample, 33 Miss. 310, 69 Am. Dec. 349; Rum-

sey v. Mathews, 1 Bibb, 242; Eccles v. Herrick, 15 Colo. App. 350; Close v. Riddle, 40 Ore. 592; Draper v. Horton, 22 R. I. 592. But see Newell v. Holton, 22 Minn. 19.

²¹ Latham v. Darling, 2 Ill. 203.

²² Wernwag v. Mothershead, *supra*.

²³ Taylor v. Meek, 4 Blackf. 388.

²⁴ 12 Anne, St. 2, ch. 16.

²⁵ Merrills v. Law, 9 Cow. 65; Marsh v. Lasher, 13 N. J. Eq. 253.

²⁶ Beach v. Fulton Bank, 3 Wend. 573; Lovett v. Cowman, 6 Hill, 223; Woolcott v. McFarlan, id. 227; National F. Ins. Co. v. Sackett, 11

It is deemed equitable that the creditor should receive the principal and legal interest; but it is an imperfect equity; the creditor cannot himself assert it by an action or suit based upon it; on the contrary, usury is as fatal to his suits in equity to enforce usurious demands as at law; and if the debtor has paid usury otherwise than voluntarily²⁷ he may recover it. It is a pas-

Paige, 660; *Collard v. Smith*, 13 N. J. Eq. 43; *Remer v. Shaw*, 8 id. 355; *McCauley v. Ward*, 2 Marvel, 183; *Turner v. Hamilton*, 88 Fed. 467; *McCready v. Phillips*, 56 Neb. 446.

A statute requiring that a defendant who pleads usury must tender the principal sum is not applicable to a case arising under and governed by the usury laws of a foreign state. *Maynard v. Hall*, 92 Wis. 565.

²⁷ When voluntarily paid usury cannot be recovered. *Smith v. Coopers*, 9 Iowa 376; *Nicholls v. Skeel*, 12 id. 300; *Shelton v. Gill*, 11 Ohio 417; *Graham v. Cooper*, 17 id. 605; *Moseley v. Smith*, 21 Tex. 441; *Manny v. Stockton*, 34 Ill. 306; *Carter v. Moses*, 39 Ill. 539; *Tompkins v. Hill*, 28 Ill. 519; *Dykes v. Wyman*, 67 Mich. 236; *Kendall v. Davis*, 55 Ark. 318; *Matthews v. Ormerd*, 140 Cal. 578; *Murphy v. Citizens' Bank*, 82 Ark. 131, 11 L.R.A.(N.S.) 616. See *Pearce v. Martin*, 130 Ill. App. 24; *Chase v. Baker Co. v. National Trust & Credit Co.*, 215 Fed. 633; *Helmick v. Carter*, 171 Ill. App. 25.

Nor can the debtor charge the excess of payments above the legal rate against the principal debt. *Pettis v. Ray*, 12 R. I. 344. See *Bond v. Jones*, 8 Sm. & M. 368.

In New Hampshire payments of usurious interest are excepted from the general rule that payment of an illegal claim with full knowledge of its illegality is irrevocable, being
Suth. Dam. Vol. I.—62.

regarded as made under duress. *Peterborough Sav. Bank v. Hodgdon*, 62 N. H. 300; *Albany v. Abbott*, 61 id. 157; *Cross v. Bell*, 34 id. 82; *Willie v. Green*, 2 id. 333.

The rule that usurious interest voluntarily paid cannot be recovered has no application if the transaction has not been closed; if the note sued on is a renewal of a prior note upon which such interest has been paid the debtor may have all such payments applied upon the principal debt. *Harris v. Bressler*, 119 Ill. 467; *Nierosi v. Walker*, 139 Ala. 369.

Under sec. 5198, R. S. of U. S., a national bank which stipulates for usury upon a note to become due forfeits the entire interest, and can recover only the face of the note, less the interest charged or included therein. If that is collected in advance the person paying it or his legal representatives may, in an action in the nature of debt, recover twice the amount of interest paid. This must be done in the manner provided in the statute. *National Bank v. Deering*, 91 U. S. 29, 23 L. ed. 196; *Barnet v. National Bank*, 98 id. 555, 25 L. ed. 212. The usurious interest cannot be set off and applied in satisfaction of the note. *Driesbach v. National Bank*, 104 U. S. 52, 26 L. ed. 658.

In an action upon a note given to such a bank the maker cannot set off or obtain credit for usurious interest paid upon the renewal of it.

sive equity which the debtor must recognize and perform only when he asks equity. Accordingly, when he asks a favor in practice, by invoking the equitable power of the court by motion,²⁸ and when he appeals to a court of equity for relief against the usurious contract or the effect of any legal assertion of the debt, or to procure its aid to establish the fact of usury, as by discovery, he will be obliged to submit to the condition of paying the principal and lawful interest.²⁹ But where the maker was un-

Haseltine v. Central Bank, 183 U. S. 132, 46 L. ed. 118.

A national bank which makes a loan upon a note that embraces usury, which note is renewed from time to time, forfeits the entire interest. First Nat. Bank v. Grimes, 49 Kan. 219.

An agreement to pay usury for any part of the time that a note may run, whether by its terms or by indulgence, forfeits all interest, whether it accrues before or after the maturity of the note. Alves v. National Bank, 89 Ky. 126; Shafer v. First Nat. Bank, 53 Kan. 614; First Nat. Bank v. Stauffer, 1 Fed. 187; Danforth v. National State Bank, 48 id. 271, 1 C. C. A. 62, 17 L.R.A. 622; Maynard v. Hall, 92 Wis. 565 (construing the statute of Illinois).

²⁸ Beach v. Fulton Bank, 3 Wend. 573; Remer v. Shaw, 8 N. J. Eq. 355.

²⁹ Blaisdell v. Steinfeld, 15 Ariz. 155; Riley v. Hopkinson, 82 N. J. Eq. 469; Payton v. McPhaul, 128 Ga. 510; Garlick v. Mutual L. & B. Ass'n, 129 Ill. App. 402; Tenny v. Porter, 61 Ark. 329; Hiner v. Whitlow, 66 Ark. 121, 74 Am. St. 74; Scott v. Williams, 100 Ga. 540, 62 Am. St. 340; Bush v. Bank, 111 Ga. 664; Mason v. Pierce, 142 Ill. 331; Crawford v. Nimmons, 180 Ill. 143; Faison v. Grandy, 128 N. C. 438; Hill v. Alliance B. Co., 6 S. D. 160, 55 Am. St. 819; Parker v. Bethel H. Co., 96 Tenn. 252, 31

L.R.A. 706; Roberts v. Coffin, 22 Tex. Civ. App. 127; Dickenson v. Bankers' L. & I. Co., 93 Va. 498; Smith v. McMillan, 46 W. Va. 577; Greer v. Hale, 95 Va. 533, 64 Am. St. 814; Wenham v. Mallin, 103 Ill. App. 609; Bang v. Windmill Co., 96 Tenn. 361; Crim v. Post, 41 W. Va. 397; Livingston v. Tompkins, 4 Johns. Ch. 415, 8 Am. Dec. 598; Rogers v. Rathbun, 1 Johns. Ch. 367; Tupper v. Powell, id. 439; Fanning v. Dunham, 5 id. 122, 9 Am. Dec. 283; Fitzroy v. Gwillim, 1 T. R. 153; Mason v. Gardiner, 4 Bro. Ch. 436; Schermerhorn v. Talman, 14 N. Y. 93; Conner v. Myers, 7 Blackf. 337; Cooper v. Tappan, 4 Wis. 362; Platt v. Robinson, 10 id. 128; Miller v. Ford, 1 N. J. Eq. 358; Legoux v. Wante, 3 Har. & J. 184; Jordan v. Trumbo, 6 Gill & J. 103; McRaven v. Forbes, 6 How. (Miss.) 569; Noble v. Walker, 32 Ala. 456; Ruddell v. Ambler, 18 Ark. 369; Taylor v. Smith, 2 Hawks, 465; Pearson v. Bailey, 23 Ala. 537; McGeehe v. George, 38 Ala. 323; Wilson v. Hardesty, 1 Md. Ch. 66; Ballinger v. Edwards, 4 Ired. Eq. 449; Thomas v. Doub, 8 Gill, 1; Boyers v. Boddie, 3 Humph. 666; Hudnit v. Nash, 16 N. J. Eq. 550; Eslava v. Crampton, 61 Ala. 507; Cook v. Patterson, 103 N. C. 127; Eiseman v. Gallagher, 24 Neb. 79; Carver v. Brady, 104 N. C. 219.

But it is otherwise under some

successful in an action to enjoin the collection of a note because it was void for the want of consideration, and the transferee brought the note into court and by his cross-bill asked to have it enforced, it was adjudged void, it appearing that it was usurious.³⁰ By entering his appearance in a cause and consenting that judgment be entered against him a debtor waives the defense of usury. Such a judgment is not within a statute declaring that a usurious contract and any mortgage, pledge or other lien or conveyance executed to secure the performance of the same may be annulled and canceled.³¹ But it is otherwise as to a judgment confessed upon warrant of attorney or a judgment note which formed a part of the contract upon which the judgment was confessed, and by reason thereof was tainted with usury.³²

§ 314. **Who may take advantage of usury.** As usury is a defense personal to the debtor and those standing in relations of privity to him it is not an illegal element when the usurious debt becomes a principal in the undertaking of a third party, as between him and the creditor, upon a new consideration.³³ This

statutes. *Scott v. Austin*, 36 Minn. 460; *Exley v. Berryhill*, 37 Minn. 182; *Moore v. Beaman*, 112 N. C. 558, 564.

³⁰ *Bang v. Windmill Co.*, *supra*.

³¹ *Bell v. Fergus*, 55 Ark. 536.

³² *Brown v. Toell*, 5 Rand. 543; *Fanning v. Dunham*, *supra*; *Wardell v. Eden*, 2 Johns. Cas. 258; *Page v. Wallace*, 87 Ill. 84; *Hindle v. O'Brien*, 1 Taunt. 413; *Roberts v. Goff*, 4 B. & Ald. 92.

³³ *Sager v. Steinbrenner*, 99 Ark. 626; *Matthews v. Ormerd*, 140 Cal. 578; *Miller v. Parker*, 133 Ga. 187; *Anderson v. Oregon M. Co.*, 8 Idaho 418; *Bacon v. Iowa S. & L. Ass'n*, 121 Iowa 449; *Tidball v. Schmeltz*, 77 Kan. 440, 127 Am. St. 424; *Missouri R. E. Syndicate v. Sims*, 179 Mo. 679; *Terminal Bank v. Dubroff*, 66 N. Y. Misc. 100; *Biedler v. Malcolm*, 121 App. Div. (N. Y.) 245;

Industrial S. & L. Co. v. Hare, 216 Pa. 389; *Thomson v. Koch*, 62 Wash. 438; *Grubb v. Stewart*, 47 Wash. 103; *Chenoweth v. National B. Ass'n*, 59 W. Va. 653; *Harper v. Middle States L., B. & C. Co.*, 55 W. Va. 149; *Stuckey v. Same*, 61 W. Va. 74, 123 Am. St. 977, 8 L.R.A. (N.S.) 814; *Bank v. Sinclair*, 60 N. H. 100, 49 Am. Rep. 307; *Essley v. Sloan*, 116 Ill. 391; *Gathercole v. Young*, 61 N. H. 563; *Sullivan Sav. Inst. v. Copeland*, 71 Iowa 67; *Jeffries v. Allen*, 29 S. C. 501; *Cheney v. Dunlap*, 27 Neb. 401, 5 L.R.A. 465; *Log Cabin, etc. Ass'n v. Gross*, 71 Md. 456; *Griel v. Lehman*, 59 Ala. 419; *Lee v. Feamster*, 21 W. Va. 108, 45 Am. Rep. 549; *Palmer v. Call*, 2 McCrary, 522; *Burlington Mutual L. Ass'n v. Heider*, 55 Iowa 424; *Mason v. Searles*, 56 Iowa 532; *First Nat. Bank v. Bentley*, 27

principle is of general application; it will prevent deductions for usury to which, as between the creditor and the debtor, the latter is entitled to under various statutes, when such deductions are asked for or against other persons who have novated or paid the usurious debt at the debtor's request.³⁴ The rule that the right to plead usury is a privilege personal to the debtor does not embrace his sureties, guarantors, heirs, devisees and personal representatives; these are permitted to set up usury on the ground of privity or common interest.³⁵ An attaching creditor of the mortgagor is a privy in representation and may interpose the defense of usury against the claim by the mortgagee to the attached property.³⁶ "It would seem that an assignee under a deed of trust for the benefit of creditors, or an assignee in bankruptcy would fall within the exception and could plead usury to a debt which was entitled to participate in the assets conveyed to them on the ground of privity in estate."³⁷ Under a statute declaring that usurious contracts shall be deemed to be for an illegal consideration as to the excess beyond the principal sum the plea of usury to an action on negotiable paper brought by a *bona fide* holder for value, who acquired it before maturity,

Minn. 87; Pence v. Christman, 15 Ind. 287; Stephens v. Muir, 8 Ind. 352.

Where the debtor is insolvent and there is a fund in court to be distributed equity will allow one creditor to suggest usury as to a co-creditor, and will compel the usurious creditor to write off his usury and only give him his principal and legal interest. Brooks v. Todd, 79 Ga. 692.

The sole heir of a deceased borrower who has paid a usurious debt to release his inheritance may recover the usury paid. Pope v. Marshall, 78 Ga. 635.

³⁴ Tompkins v. Monticello C. O. Co., 153 Fed. 817; Lowe v. Walker, 77 Ark. 103; Brinkerhoff v. Foote, 1 Hoff. Ch. 261; Thurston v. Prentiss, 1 Mich. 193; Shirley v. Spencer, 9 Ill. 583. But see Totten v.

Cooke, 2 Metc. (Ky.) 275; Stevens v. Davis, 3 Metc. (Mass.) 211.

³⁵ Denton v. Butler, 99 Ga. 264; Parker v. Bethel H. Co., 96 Tenn. 252, 31 L.R.A. 706; Cole v. Hills, 44 N. H. 227; Loomis v. Eaton, 32 Conn. 550; Goodhue v. Palmer, 13 Ind. 568; Cramer v. Lepper, 26 Ohio St. 59, 20 Am. Rep. 756; Merchants' Exch. Nat. Bank v. Commercial Warehouse, 49 N. Y. 635; Ford v. Washington Nat. B. & L. Ass'n, 10 Idaho 30, 109 Am. St. 192; Osborne v. Fridrich, 134 Mo. App. 449. See Lemars B. & L. Ass'n v. McLain, 120 Iowa 527; Widell v. National Citizens' Bank, 104 Minn. 510.

³⁶ Coleman v. Cole, 158 Mo. 253.

³⁷ Parker v. Bethel H. Co., *supra*, citing Stein v. Swenson, 44 Minn. 218, 222; Nance v. Gregory, 6 Lea, 343.

cannot be sustained.³⁸ It is otherwise if one buys notes with knowledge of the payment of unlawful interest thereon.³⁹ The person who is the substantial debtor may plead usury.⁴⁰ It may be pleaded by the mortgagor though he has sold the mortgaged premises if he is liable for a deficiency judgment;⁴¹ and by a purchaser subject to the mortgage unless the usurious interest was deducted from the purchase price,⁴² and by the owner of mortgaged property pledged by one who had possession of it.⁴³ If a corporation is denied the plea of usury the disability attaches to its junior mortgagee as against a senior mortgage.⁴⁴

§ 315. **When contracts not void for usury.** In the statutes of several of the states and in some charters for commercial corporations there has been a simple prohibition of interest above a certain rate, but no provision that agreements and securities for such interest should be void. Under such legislation it has been made a question whether such agreements and securities are to be treated as wholly void,—whether the reservation of interest above the legal rate renders the whole contract, as an entire thing, illegal,—so that the principal as well as interest is to be regarded as involved in an unlawful venture, or whether such agreements are void only to the extent of the illegal interest. On this question there is some conflict of decision. In a case in the national supreme court, where usury in the transfer of a promissory note was complained of by the maker, the court said that the taking of interest by the bank, beyond the sum authorized by its charter, would doubtless be a violation of the latter, for which a remedy might be applied by the government; but as the act did not declare that it shall avoid the contract it was not perceived how the defendant could avail himself of this ground to defeat a recovery. The statute containing no

³⁸ *Schlesinger v. Gilhooley*, 189 N. Y. 1; *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 50 Am. St. 860, 29 L.R.A. 827.

³⁹ *Schlesinger v. Lehmaier*, 191 N. Y. 69, 123 Am. St. 591, 16 L.R.A. (N.S.) 626.

⁴⁰ *Faison v. Grandy*, 128 N. C. 438.

⁴¹ *Male v. Wink*, 61 Neb. 748; *Scull v. Idler*, 79 N. J. Eq. 466.

⁴² *Grove v. Great Northern L. Co.*, 17 N. D. 352, 138 Am. St. 707.

⁴³ *Keim v. Vette*, 167 Mo. 389; *Davis v. Tandy*, 107 Mo. App. 437.

⁴⁴ *Lembeck v. Jarvis T. C. S. Co.*, 70 N. J. Eq. 757.

express provision that usurious contracts should be utterly void, the contract was to be deemed valid, at least in respect to persons who were strangers to the usury.⁴⁵ In a later case that court held that a contract made in violation of the same charter fixing a limit of interest, where the usury was set up by the other party to the usurious contract, was void *in toto*. The decision was put upon the naked prohibition in the charter, expressly laying out of view the general statute on the subject of interest. It was so held void by a majority of the court on general principles. The reservation of interest in the contract at a rate the taking of which would be a violation of the charter vitiated the contract for both principal and interest and rendered it utterly void.⁴⁶ This decision was followed at the

⁴⁵ *Fleckner v. Bank*, 8 Wheat. 338, 5 L. ed. 631.

⁴⁶ *Bank v. Owens*, 2 Pet. 527. The language of the charter was: "The bank shall not be at liberty to purchase any public debt whatever; nor shall it take more than six per cent. per annum for or upon its loans or discounts." It was held that an agreement "corruptly and usuriously" to loan depreciated bills, taking therefor a note on time, bearing illegal interest, was a violation of the charter. Johnson, J., said: "To understand the gist of the question, it is necessary to observe that, although the act of incorporation forbids the taking of a greater interest than six per cent., it does not declare void any contract reserving a greater sum than is permitted. Most, if not all, the acts passed in England and in the states on the same subject (1829), declare such contracts usurious and void. The question, then, is whether such contracts are void in law, upon general principles." In a previous part of the opinion he said: "Some doubts have been thrown out whether, as the charter speaks only of *taking*, it can apply to a case in

which the interest has only been *reserved*, not received. But on that point the majority are clearly of opinion that reserving must be implied in the word taking, since it cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. . . . When the restrictive policy of a law alone is in contemplation, we hold it to be a universal rule that it is unlawful to contract to do that which it is unlawful to do." The contract being held to be within the prohibition, the opinion is that such contracts are void upon general principles. The authorities cited are wholly English, and unquestionably sound on both sides of the Atlantic. They may be distinguished, however, from the case decided in this important particular: the fundamental purpose for which the contracts in question, in the cases cited, were made, or to which they were ancillary, was illegal; *malum in se* or *malum prohibitum*. In the *Owens* case the principal purpose of the transaction—the loan and promise of interest—was lawful; making loans for interest was one of the main objects

circuit by a case decided by Taney, C. J., upon a simple constitutional prohibition of interest above a specified rate, which was exceeded in the contract that was the subject of the action.⁴⁷ The Maryland interest law, as modified by the act of 1845, prohibited, in the language of the statute of Anne, the taking of more than six per cent per annum, but by that act the lender was entitled, notwithstanding the contract exceeded that limit, to recover the principal and six per cent. This law was in force when the constitution of 1850 took effect. That instrument contained a clause in these words: "The rate of interest in this state shall not exceed six per cent per annum, and no higher rate shall be taken or demanded; and the legislature shall provide by law all necessary forfeitures and penalties against usury." Before any legislation under the constitution this case arose upon a bill of exchange to which a plea of usury was interposed. On demurrer, Taney, C. J., following the doctrine of the supreme court, held that the prohibition in the constitution was inconsistent with and abrogated the provision of the act of 1845 giving the lender the principal and six per cent interest. And he declared that, "as the constitution has forbidden the taking or demanding of more than six per cent, no contract made in this state can be enforced where a higher rate of interest is taken or demanded by the contract." "A court of justice cannot lend its aid to him to recover it (the money loaned), because the contract for the loan is one entire thing, and consequently is altogether invalid or void, and it would be contrary to the duty of a court of justice to assist a party in consummating an act which the law forbids." The absence of any penalty was held no argument in support of the action.⁴⁸ But the supreme

of the corporation; the illegality complained of was an incidental violation of the charter. There is the difference between the case decided and those cited to support it of an incident being impressed with the character of the principal, and the principal being infected by the vice of the incident.

⁴⁷ Dill v. Ellicott, Taney, 233.

⁴⁸ Dill v. Ellicott, Taney, 233.

A constitutional provision declaring contracts which provide for a rate of interest in excess of a named sum and which requires the legislature to provide penalties to prevent and punish usury is self-executing so far as to render a contract thereafter made for a prohibited rate invalid. *Watson v. Aiken*, 55 Tex. 536; *Humphill v. Watson*, 60 id. 679.

court of Maryland arrived at a different conclusion.⁴⁹ It, in effect, held that the absolute prohibition in the constitution was not inconsistent with the act of 1845 in respect to allowing the creditor to recover upon a usurious contract the principal and legal interest. No penalty, forfeiture or other punishment was prescribed. The question has also been decided in Indiana. Usury there was made an offense punishable on indictment by a fine of double the amount of the usury. The decision was based on the authority of the case cited from the supreme court of the United States.⁵⁰

⁴⁹ In *Bandel v. Isaac*, 13 Md. 202.

⁵⁰ *Fowler v. Throckmorton*, 6 Blackf. 326.

In other states, where usury has not been made a criminal offense, and contracts tainted with it not declared by statute to be utterly void, they have been held invalid only to the extent of the usury, or at most as to the contract for interest.

Alabama: *Saltmarsh v. Planters'*, etc. Bank, 17 Ala. 761; s. c. 14 Ala. 668. A later statute relieves from the payment of interest; *Barelift v. Fields*, 145 Ala. 264.

Arkansas: The statute declares securities tainted with usury to be void. *Jones v. McLean*, 18 Ark. 456. But as to the effect of usury in cases not within that statute, see *Alston v. Brashears*, 4 Ark. 422, where the principal of the usurious contract was held recoverable.

"The express contract being void, no implied obligation can arise from it. It cannot be divided into separate and distinct contracts, so that one obligation shall be given for the money actually loaned and another for the excessive interest. Each obligation is part of the same contract and both are void. Neither can a promise to pay any part of a usurious debt, for the same rea-

son, be enforced without consent so long as the original contract which supports it remains unrevoked. The taint of usury in the old contract infects the new promise. This is not true of usurious contracts to pay a pre-existing valid debt. That debt is not destroyed by the usury. It may be recovered on the strength of the contract which created it. But where the contract on which it depends in the beginning for existence is usurious, there never was anything to give it life, and to support an action for its enforcement. But if the debt be for money loaned and actually received by the debtor, there is an equitable and moral duty to pay it, which, while the law will give it no effect, may be made the consideration for a new promise. The parties can cancel and destroy the old contract, purge the consideration of usury, and make it the basis of a new obligation, and thereby bind the borrower, in law and equity, to pay the money actually received, and a legal rate of interest." *Garvin v. Linton*, 62 Ark. 370, citing *Hammond v. Hopping*, 13 Wend. 505, 511; *Early v. Mahon*, 19 Johns. 147, 10 Am. Dec. 204; *Miller v. Hull*, 4 Denio, 104; *Phillips v. Columbus City B. Ass'n*, 53 Iowa 719.

The constitution of Texas provides that all contracts for a greater rate of interest than ten per cent per annum shall be

Connecticut: A corporation having power to loan money under certain restrictions, having afterwards taken a note as security on terms which were, in respect to interest, a violation of the charter, it was held in a suit *on the note, with the money counts*, that although there could be no recovery on the note the money loaned, with the legal interest, might be recovered. *Philadelphia L. Co. v. Towner*, 13 Conn. 249. See *Sheldon v. Steere*, 5 Conn. 181.

Georgia: Contract void only to the extent of the usury. *Dillon v. McRae*, 40 Ga. 107.

Illinois: The statute which fixes the legal rate at six per cent. allows 'any person who shall pay or deliver any greater sum or value for any loan, discount or forbearance' to "recover threefold the amount of money so paid" from the person so receiving; but does not invalidate the contract reserving an illegal rate of interest. *Hansbrough v. Peek*, 5 Wall. 497, 18 L. ed. 520; *McGill v. Ware*, 5 Ill. 21; *Lucas v. Spencer*, 27 id. 15; *Mapps v. Sharpe*, 32 id. 13; *Cushman v. Sutphen*, 42 id. 256; *Conkling v. Underhill*, 4 id. 388; *Ferguson v. Sutphen*, 8 id. 547; *Hunter v. Hatch*, 45 id. 178.

Iowa: A contract tainted with usury is void only to the extent of the usury, and may be enforced for the residue. *Richards v. Marshman*, 2 G. Greene, 217; *Shuck v. Wight*, 1 id. 128; *Haggard v. Atlee*, id. 44; *Gower v. Carter*, 3 Iowa 244, 66 Am. Dec. 71; *Ficklin v. Zwart*, 10 Iowa, 387; *Drake v. Lowry*, 14 id. 125; *Garth v. Cooper*, 12 id. 364; *Wight v. Shuck*, *Morris*, 425; *Wilson v. Dean*, 10 Iowa 431.

Kentucky: An agreement to set

the hire of a negro woman worth £22 per year against the interest of £125 is so far void as to let in the borrower to redeem, but does not vitiate the whole contract. *Reed v. Lansdale*, *Hardin*, 6. But see *Richardson v. Brown*, 3 Bibb, 207; *Wells v. Porter*, 5 B. Mon. 416; *Denham v. Stone*, 7 J. J. Marsh. 176.

Michigan: The effect of usury is not to avoid the contract, but to reduce the amount; the usurer is entitled to recover the amount actually loaned and legal interest (*Thurston v. Prentiss*, *Walk*, Ch. 529; *Craig v. Butler*, 9 Mich. 21), which is construed to be the highest rate the law permits to be stipulated for. *Smith v. Stoddard*, 10 Mich. 148, 31 Am. Dec. 778.

Mississippi: Taking or reserving illegal interest is not a punishable offense nor does it render the contract into which it enters void; by statute it causes a forfeiture of all interest. *Wallace v. Fouché*, 27 Miss. 266; *Newman v. Williams*, 29 id. 212; *M'Alister v. Jerman*, 32 id. 142; *Brown v. Nevitt*, 27 id. 801.

Missouri: In *Farmers' & T. Bank v. Harrison*, 57 Mo. 503, *Lewis, J.*, said: "Hitherto . . . when the defense (of usury) was successful courts have habitually rendered judgment for the principal sum and ten per cent. interest, setting apart the interest to the county school fund;" and it was here held that the same rule would apply to a corporation restrained by its charter from taking interest above a specified rate, in actions by it upon contracts providing for a greater rate. The usury paid is deducted. *Seaver v. Ray*, 137 Mo. App. 78.

Nebraska: In equity the principal

deemed usurious, and the first legislature after this amendment is adopted shall provide appropriate pains and penalties to prevent the same. Such legislature enacted laws of the designated

and legal interest may be recovered. *Gund v. Ballard*, 73 Neb. 547.

Ohio: In *Bank v. Swayne*, 8 Ohio 257, is a history of the legislation of the state on the subject of interest. The act of 1799 fixed the rate at six per cent., but inflicted no penalty for taking or reserving a greater rate. It did not declare any such contract void, nor create any forfeiture of the principal sum, but forfeited the entire interest. It expressly provided that the lender might recover the principal after deducting payments on account of interest. The act of 1804 fixed the rate at six per cent., and provided as to persons taking more that "such persons shall forfeit the whole amount of the debt on which the illegal interest was charged or received," one-half to the informer prosecuting, and one-half to the county treasurer; said to be substantially, if not literally, the same as the Pennsylvania statute, and probably copied from it. Act of 1824: "All creditors shall be entitled to receive interest on all money after the same shall have become due, either on bond, bill, promissory note or other instrument of writing; on contracts for money or property; on all balances due on settlement between parties thereto; on all moneys withheld by unreasonable and vexatious delay of payment; and on all judgments obtained from the date thereof; and on all decrees obtained in any court of chancery for the payment of money from the day specified in the said decree for the payment thereof, or if no day be specified, then from

the day of entering thereof, until such debt, money or property is paid at the rate of six per cent. per annum and no more." Although this statute provided only that all creditors should be entitled to interest at six per cent. per annum *and no more* "on all money after the same shall become due," it was held and finally settled, up to 1850, that the rate could not be raised by agreement before or after due by reason of the prohibition in the act. *Hitchcock, J.*, said: "From 1804 to the present period (1838), there has been no time in which an individual might not recover the principal sum of money loaned, together with lawful interest, notwithstanding by the terms of the loan he was to have received a greater rate of interest." In this case, however, a like prohibition in the charter of a bank limiting its right to charge interest to a specified rate was held to render a contract exceeding this limit wholly void on the ground of its want of power to make it. For criticism on this distinction, see *McLean v. Lafayette Bank*, 3 McLean, 589; and *Farmers' & T. Bank v. Harrison*, 57 Mo. 503; *Lafayette Ben. Soc. v. Lewis*, 7 Ohio 81.

Pennsylvania: Usurious agreements not wholly void. The creditor is entitled to recover the sum loaned and legal interest. *Wycoff v. Longhead*, 2 Dall. 92; *Turner v. Calvert*, 12 S. & R. 46; *Kupfert v. Guttenberg B. Ass'n*, 30 Pa. 465; *Philadelphia, etc. R. Co. v. Lewis*, 33 id. 33, 75 Am. Dec. 574. See *Evans v. Negley*, 13 S. & R. 218.

character which were limited to written contracts. One of the courts of civil appeals has held that the penalty prescribed in the statute reaches a contract the written part of which stipulated only for lawful interest, while a contemporaneous parol contract provided for a rate in excess thereof.⁵¹ Another of these courts has declined to assent to such conclusion. "If it could be maintained that a contemporaneous oral agreement for usurious interest made in connection with a written instrument is included within the" statute, "it could not affect this case for the reason that the written contract was made prior to the verbal agreement and its validity could not be affected by the subsequent oral agreement." The failure of the legislature to include oral contracts simply necessitated a falling back on the constitution to obtain the rule to be followed in passing upon usurious oral contracts. "When we do this we merely have a provision declaring interest above a certain rate illegal, no penalty being attached for violation of the provision." Hence the contract as evidenced by the note was not affected by the oral agreement for usurious interest.⁵² An oral agreement to pay such interest on a note is merely void as to the excess over the lawful rate.⁵³

Though one who loans money upon a usurious agreement will not be entitled to any relief⁵⁴ it is otherwise with one who has purchased valid securities and subsequently, upon such an agreement, extended the time of payment, lent more money and took new securities. The taint of the subsequent illegal contract does not relate back to or affect the original contract.⁵⁵

All that is meant according to any legal usage by a statute which declares a usurious contract to "be void and of no effect for whole premium or rate of interest only" is that a court of law will not lend its aid to enforce the performance of a contract

⁵¹ *Dunman v. Harrison* (Tex. Civ. App.), 41 S. W. 499.

⁵² *Quinlan's Est. v. Smye*, 21 Tex. Civ. App. 156, citing this section.

⁵³ *Roberts v. Coffin*, 22 Tex. Civ. App. 127.

⁵⁴ *Tribble v. Nichols*, 53 Ark. 271, 22 Am. St. 190.

⁵⁵ *Humphrey v. McCauley*, 55 Ark. 143; *Nichols v. Pearson*, 7 Pet. 104, 8 L. ed. 624; *Tillman v. Thatcher*, 56 Ark. 534; *Rountree v. Robinson*, 98 N. C. 107.

which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited. Such a contract is not so far void that the repeal of the statute which forbade it, no saving clause being embodied in the repealing act, will not operate to cut off the defense of usury in an action upon it.⁵⁶

Subjecting the usurer to a fine, or to loss of all interest on the debt by a separate prosecution, does not of itself render the contract into which the usury enters wholly void. Where it is not declared void for usury by the statute, and there are no specific provisions for a different adjustment of the amount which may be recovered, the contract as to interest is held void when it stipulates for a rate forbidden by law; then the principal sum may be recovered with ordinary interest.⁵⁷ If a note is declared voidable only to the extent of the usury included in it an innocent purchaser for value, before maturity and without notice, is unaffected by the fact that an unlawful rate of interest is secretly included as principal.⁵⁸ Where usury is punished by the forfeiture of interest the counsel fee stipulated for in a note may, according to the federal circuit court for South Carolina, be recovered,⁵⁹ though the supreme court of the state had previously ruled otherwise on the ground that the debtor was only

⁵⁶ *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682.

⁵⁷ *Bunn v. Kinney*, 15 Ohio St. 40. By an act passed in 1850 parties were allowed to "stipulate for interest at any rate not exceeding ten per cent. yearly." In an action on a note at four months, which included interest at nearly twenty per cent., it was held usurious and void to the extent of interest above six per cent. from date. There was no mention of interest on the face of the note, except "after due;" the usury was included with the principal. The interest agreement implied by putting interest and principal together, in the amount for which the note was given, was enforced to the extent of six per cent. between its

date and maturity; for if the interest agreement were wholly void, no interest whatever could be recovered for that time.

A statute expressing that the taking of usurious interest shall be deemed a forfeiture of the entire interest makes void the agreement as to interest. *Ward v. Sugg*, 113 N. C. 489, 24 L.R.A. 280.

⁵⁸ *Hamilton v. Fowler*, 40 C. C. A. 47, 99 Fed. 18, citing *Bradshaw v. Van Valkenburg*, 97 Tenn. 316; *McBroom v. Scottish M. & L. I. Co.*, 153 U. S. 318, 38 L. ed. 729; *Norris v. Langley*, 19 N. H. 423; *Converse v. Foster*, 32 Vt. 828.

⁵⁹ *Union M. B. & T. Co. v. Haggood*, 98 Fed. 779; *Louisiana & A. R. Co. v. Rider*, 103 Ark. 558.

liable for the sum actually received.⁶⁰ The penal laws of a state will not be enforced by the courts of another state. Hence where the usury statute of a state declares that the usurer shall forfeit his right to interest a forfeiture of the principal will not be adjudged by the courts of another state in an action on the usurious contract because another statute of the first-mentioned state makes the taking of usury a misdemeanor and provides for the punishment of the guilty party by fine and imprisonment.⁶¹

In many cases the construction of such statutes has been influenced by antecedent legislation indicating some legislative policy. And the history of legislation upon this subject shows the progress and tendency of popular thought; the gradual subsidence and final disappearance of the old prejudice against not only interest, but usury. The common law is flexible enough to accommodate itself by degrees to deliberate popular convictions; and it has done so in respect to interest and usury. Very high rates of stipulated interest which transcend statutory limits are abated and brought to the standard which the law fixes; and when no limit is fixed by statute such stipulated rates are sometimes mitigated as the law mitigates penalties; but in both cases the excessive interest is treated as free from the taint of crime. Usury, as a crime, is rapidly disappearing from the statutes everywhere.

§ 316. Recoveries under usury statutes. Under statutes where the rates allowed by law have been exceeded in the contract, and the principal sum or a part of it remains collectible, various questions have arisen affecting the amount the creditor is entitled to recover. The forfeiture of interest or principal declared by statute for usury inures to the debtor, and may operate in reduction of the debt where such forfeiture is not exclusively to be adjudged in a separate proceeding, or to be adjudged in the creditor's suit to a public fund. The interest contract which violates a statute is of course wholly void;⁶² but

⁶⁰ Land M. Co. v. Gillam, 49 S. C. 345.

⁶¹ Waite v. Bartlett, 53 Mo. App. 378; Kendrick v. Kyle, 78 Miss. 278, 288.

⁶² Where a note was given in dis-

charge of other notes and a mortgage securing it was executed, only one of the notes being tainted with usury, the renewal and secured note was void only *pro tanto*. Smith v. Neeley, 2 Indian T. 651.

in many instances the statute goes further, and by way of penalty declares a forfeiture of all interest, or a forfeiture of double or treble the amount of the interest or usury and sometimes also a portion of the principal. If the forfeiture is to be worked out by a criminal proceeding or a *qui tam* action it is not to be deducted from the valid portion of the debt.⁶³ In Ohio, under the act of 1804, which provided for forfeiture of the whole debt, the creditor was entitled, nevertheless, to recover it from the debtor with legal interest; for the statute excluded him from the benefit of the forfeiture by awarding one-half to the informer and devoting the other half to the county treasury. So the Iowa act of 1839 abated the interest to the legal standard between the debtor and creditor and made the latter subject to a forfeiture to the county of the usurious part of the interest and twenty-five per cent interest thereon.⁶⁴

Under a statute in Indiana⁶⁵ which limited the rate of interest and provided that in actions upon contracts by which, directly or indirectly, a higher rate was contracted for, taken or reserved, the plaintiff, besides losing costs, should only recover the principal, deducting interest paid, notes containing a promise of such interest were, to the extent of it, without consideration. Whether it was openly expressed, stealthily added to the principal or taken in advance without reducing the sum stated in the note, there was, to the extent of the interest, a want of consideration.⁶⁶ Where, however, a note bearing usurious interest was given for a precedent debt the "principal" allowed to be recovered included not only the original principal, but such interest as had legally accrued thereon up to the time of giving the usurious note.⁶⁷

The Massachusetts act of 1825, as modified by the act of 1826, and the Illinois act of 1845 are similar in respect to the consequences to the creditor of usury in an action upon the usurious contract. The creditor must pay costs and forfeit threefold the

⁶³ Richards v. Marshman, 2 G. Greene 217.

⁶⁴ Ficklin v. Zwart, 10 Iowa 387; Drake v. Lowry, 14 id. 125; Sheldon v. Mickel, 40 id. 19.

⁶⁵ Gavin & Hord, 408, § 4.

⁶⁶ Musselman v. McElhenney, 23 Ind. 4, 85 Am. Dec. 445; Cross v. Wood, 30 Ind. 378; Hays v. Miller, 12 Ind. 187.

⁶⁷ Pratt v. Wallbridge, 16 Ind. 147.

amount of the whole interest reserved, discounted or taken; he is entitled to judgment and execution for the balance only which may remain due upon the contract or assurance after deducting the forfeiture. In the former state this statute has been regarded in her own courts in respect to these and other accompanying provisions as such a mitigation of the law previously in force that it is remedial rather than penal.⁶⁸ So that the debtor as plaintiff, seeking equitable relief by bill in equity to redeem by payment of amount equitably due upon the usurious debt, may claim the same benefit of the forfeiture and have the debt reduced by it as when he is defendant at law if the creditor asserts his rights under the contract by his answer.⁶⁹

In Illinois, however, there is no provision for recovering usury voluntarily paid; the right to deduct it from the debt on which it was paid in actions therefor is the only remedy,⁷⁰ unless the note containing the contract is assigned before maturity to an innocent purchaser and the amount stipulated for has been collected by him, in which event equity will require the original payee to restore the excessive interest.⁷¹ The statutes, through successive changes, are and have been penal by reason of the forfeiture of interest; and the debtor who seeks equity is required to do equity by paying principal and legal interest.⁷² But while the transaction remains unsettled and suit is brought for the recovery of the usurious debt, or any part of it, the debtor had a right, prior to 1867, to reduce it by applying all the usury paid. Where usury had been contracted for the statute was express that the creditor was entitled to recover only the principal due, or only the balance after deducting the

⁶⁸ *Hart v. Goldsmith*, 1 Allen 145; *Gray v. Bennett*, 3 Mete. (Mass.) 522.

⁶⁹ *Id.*; *Gerrish v. Black*, 104 Mass. 400; *Minot v. Sawyer*, 8 Allen 78; *Smith v. Robinson*, 10 Allen 130.

⁷⁰ *Reinback v. Crabtree*, 77 Ill. 182; *Saylor v. Daniels*, 37 Ill. 331, 87 Am. Dec. 250; *Farwell v. Meyer*, 35 Ill. 40; *Lucas v. Spencer*, 27 Ill. 15; *Parmelee v. Lawrence*, 44 Ill. 405; *Booker v. Anderson*, 35 Ill. 66;

McGuire v. Campbell, 58 Ill. App. 188; *Albeitz v. d'Arcambol*, 109 id. 505.

⁷¹ *Culver v. Osborne*, 231 Ill. 104, 121 Am. St. 302.

⁷² *Cobe v. Guyer*, 237 Ill. 568; *Garlick v. Mutual L. & B. Ass'n*, 236 Ill. 232; *Mapps v. Sharpe*, 32 Ill. 13; *Snyder v. Griswold*, 37 Ill. 216; *Cushman v. Sutphen*, 42 Ill. 256. But see *Johnson v. Thompson*, 28 Ill. 352.

forfeiture.⁷³ The usury received was considered as having been extorted by the creditor and should be applied in part payment of the principal of the debt.⁷⁴ If a usurious note is delivered to the maker and a new note is executed for a new principal, the time of payment being extended, and, intermediate the execution of the original note and the later one, the law in force when the former was executed is repealed and a new statute enacted declaring a different penalty for usury, the new note will be regarded as a new contract and be governed by the law in effect when it was made, it also being usurious.⁷⁵

§ 317. **Same subject.** Under those statutes, as under all others, the parties may free the debt of the usurious taint and rescue it from the frowns of the law. The courts do not shut the door in the face of the penitent.⁷⁶ The debt will usually be so divested of the vice with which usury infects a contract if the usury is deducted from the debt and a new contract made for the payment of so much of the original principal alone as remains unpaid, with only lawful interest.⁷⁷ But in Illinois the debt, so long as it remains against the the same debtor who has paid usury, would seem to be subject to a deduction for all the usury paid; merely striking out the usury from the debt unpaid and substituting a new agreement or new securities bearing lawful interest for the same debt will not suffice.⁷⁸ In the District

⁷³ *Driscoll v. Tannock*, 76 Ill. 154; *Reinback v. Crabtree*, 77 Ill. 182; *Farwell v. Meyer*, 35 Ill. 40.

⁷⁴ *Id.*

⁷⁵ *Purvis v. Woodward*, 78 Miss. 922; *Story v. Kimbrough*, 33 Ga. 21; *Webb v. Bishop*, 101 N. C. 99; *Watson v. Mims*, 56 Tex. 451. Compare *Hunter v. Hatch*, 45 Ill. 178. See § 370.

⁷⁶ *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. ed. 343; *Moseley v. Rambo*, 106 Ga. 597.

⁷⁷ *Sanford v. Kimz*, 9 Idaho 29; *Chadbourn v. Watts*, 10 Mass. 121, 6 Am. Dec. 100; *Clark v. Phelps*, 6 Mete. (Mass.) 296; *Smith v. Stoddard*, 10 Mich. 148, 81 Am. Dec. 778; *Collins I. Co. v. Burkam*, 10 Mich.

283; *Craig v. Butler*, 9 id. 21; *Barnes v. Hedley*, 2 Taunt. 184; *Kilbourn v. Bradley*, 3 Day 356, 3 Am. Dec. 273; *Postlethwait v. Garret*, 3 T. B. Mon. 345; *Fowler v. Garret*, 3 J. J. Marsh. 682.

⁷⁸ *Cobe v. Guyer*, 237 Ill. 568.

In *Mitchell v. Lyman*, 77 Ill. 525, a usury debt was, by a new agreement, so freed of usury as to subsequently bear legal interest; but it was the same debt, and so divested of its original character as to cut off the right to deduct the usury paid while in a usurious state. A person borrowed \$3,000, gave his note for that amount, payable in one year with interest at ten per cent.; but the lender retained out

of Columbia usurious interest cannot be made the subject of set-off or counter-claim unless within twelve months after suit brought for the principal claim.⁷⁹ In Michigan, where only the excess above the highest rate which may be stipulated for is usury and where only that excess can be abated, or, after having been paid, can be deducted in actions for the principal, this remedy of recoupment does not exist, if the parties have made new securities which include nothing but the actual loan and are not meant to be mere evasions;⁸⁰ nor if they have adjusted the debt by applying credits and payments so that usury contained in the items adjusted is not contained as an integral part of the debt in its final form.⁸¹

In Louisiana the borrower may recover so much of the usury

of the \$3,000 five per cent., so that the borrower actually received no more than \$2,850. At the end of the year all interest was paid, and a new note given for \$3,000 with interest at ten per cent., with personal security, and the mortgage which had been made to secure the first note discharged. In an action upon the second note, it was held that although the same debt was secured by the second as by the first note, and, therefore, was subject to be reduced by the interest paid on the first note, yet the last note was not usurious, and the plaintiff was entitled to interest upon it. This case was governed by the law of 1857, which provides that if any person or corporation shall contract to receive a greater rate of interest than ten per cent. upon any contract, *written or verbal*, such person shall forfeit the whole of the interest, and shall be entitled only to recover the principal sum. The language of this statute is peculiar.

In *Reinback v. Crabtree*, 77 Ill. 182, a loan of \$450 was made, and a note given calling for ten per cent. interest; there was also a

verbal agreement made at the same time to pay six per cent. more, and payment made pursuant to that agreement. This verbal agreement was held to make the transaction usurious, and that, although usurious interest once paid cannot be recovered back, it is settled in that state that this rule does not apply where the transaction has not been settled, and the lender brings his action for the balance. In such action the borrower may defend by claiming a credit for whatever usurious interest he has paid in the same transaction. *Saylor v. Daniels*, 37 Ill. 331, 87 Am. Dec. 250.

The fact that new notes have, from time to time, been given does not change the case. *Farwell v. Meyer*, 35 Ill. 40; *Parmelee v. Lawrence*, 44 Ill. 405; *Booker v. Anderson*, 35 Ill. 66.

⁷⁹ *Lawrence v. Middle States L. B. etc. Co.*, 7 D. C. App. Cas. 161.

⁸⁰ *Smith v. Stoddard*, 10 Mich. 148, 81 Am. Dec. 778.

⁸¹ *Collins Iron Co. v. Burkam*, 10 Mich. 283. See *Becker v. Headston*, 137 Mich. 478.

as was paid within twelve months of judicial demand or may avail himself of it by way of defense to an action.⁸² In Missouri the holder of a usurious note cannot recover interest during the pendency of an action on it; neither can he, after the court has purged it of usury, recover as on an account in the action on the note.⁸³ In Alaska double the usurious interest paid cannot be set off against the debt; it must be recovered in a separate action.⁸⁴

Statutes providing for a forfeiture of threefold the amount of the whole interest reserved or taken were in force in several states for many years. Under them the interest was computed, for the purpose of determining the amount of the forfeiture, on the basis of the contract, up to the time the amount due was ascertained by the verdict.⁸⁵ And in Massachusetts threefold the amount of the whole interest, usurious as well as lawful,⁸⁶ and in New Hampshire threefold the sum above the lawful interest,⁸⁷ was deducted. On usurious contracts in Iowa the creditor is entitled only to the principal; ten per cent is adjudged against the debtor for certain public funds; this is computed upon the amount of the contract up to the rendition of the judgment,⁸⁸ and in the same way against a surety.⁸⁹ Where there have been partial payments the computation should be made as between debtor and creditor;⁹⁰ and if the principal of a usurious debt has been paid and the action is brought for the usurious interest, on the defense of usury, the judgment for the penalty to the school fund cannot be rendered.⁹¹

In Virginia if the debtor has applied payments made upon a usurious contract to the interest or that has been done with his assent, the application will not be disturbed unless within one

⁸² *Huntington v. Westerfield*, 119 La. 615.

⁸³ *Citizens' Nat. Bank v. Donnell*, 195 Mo. 564.

⁸⁴ *Lorentzen v. Warner*, 3 Alaska, 218.

⁸⁵ *Parker v. Biglow*, 14 Pick. 436.

⁸⁶ *Brigham v. Marean*, 7 Pick. 40.

⁸⁷ *Gibson v. Stearns*, 3 N. H. 185.

See Revised St. N. H., ch. 290, § 3; *Divoll v. Atwood*, 41 N. H. 449.

⁸⁸ *Ficklin v. Zwart*, 10 Iowa 387, 77 Am. Dec. 108; *Drake v. Lowry*, 14 Iowa 125.

⁸⁹ *McIntosh v. Likens*, 25 Iowa 555.

⁹⁰ *Sheldon v. Mickel*, 40 Iowa 19; *Smith v. Coopers*, 9 Iowa 376.

⁹¹ *Easley v. Brand*, 18 Iowa 132.

year thereafter a suit be brought by the debtor for its recovery, in which he may set it off against the demand for which he is sued.⁹²

In West Virginia the residue of the debt may be recovered after crediting all the usury paid as partial payments upon the principal as of the time the usury was paid.⁹³ There may be a recovery of usurious interest after the debt has been fully discharged.⁹⁴

Where usury does not wholly invalidate the debtor's contract to pay the principal, but it is subject to be reduced by deduction of the usury, or interest paid or reserved, whether single or multiplied, the benefit of that defense is of course confined to actions upon the usurious contract or in some form for the collection of the usurious debt. The defense is available in suits for the foreclosure of mortgages, as well as in personal actions upon the contract.⁹⁵ The usurious debt, originally a gross sum, or made so by the consolidation of a series of transactions, is often divided to be paid by instalments secured in one instrument or in several. When so divided, and a part only is sued for, the residue being either paid, or for other reasons not in issue—perhaps belonging to another party—may the entire deduction to which the debtor is entitled for usury be made from the portion sued for? In Maine the debtor is entitled to an abatement of the usurious interest and to have such usury as he has paid on a debt deducted from the collectible portion when it is sued for.⁹⁶ In that state where a usurious debt is divided and separate notes given for it each note is held to contain the same proportion of the usury as the entire debt; and subject to abatement by application of a like proportion only of any usurious interest that had been paid on the whole debt.⁹⁷

⁹² *Crabtree v. Old Dominion B. & L. Ass'n*, 95 Va. 670, 64 Am. St. 818; *Munford v. McVeigh*, 92 Va. 446.

⁹³ *Lorentz v. Pinnell*, 55 W. Va. 114.

⁹⁴ *Harper v. Middle States L. B. & C. Co.*, 55 W. Va. 149.

⁹⁵ *Empire Trust Co. v. Coleman*,

85 Misc. (N. Y.) 312; *Madsen v. Whitman*, 8 Idaho 762; *Kohn v. Kelly*, 76 N. J. Eq. 132; *Metropolitan T. Co. v. Truax*, 67 N. Y. Misc. 588; *Minot v. Sawyer*, 8 Allen 78; *Cowles v. Woodruff*, 8 Conn. 35.

⁹⁶ *Loud v. Merrill*, 45 Me. 516.

⁹⁷ *Pierce v. Conant*, 25 Me. 33; *Darling v. March*, 22 Me. 184;

In New Hampshire usury was for a long time punished by obliging the creditor to lose three times the sum above the lawful interest taken, to be deducted from the sum found lawfully due. Where a usurious debt was secured by two notes and one had been paid, it was held in an action upon the other that the payment of one could not affect the defendant's right to the deduction allowed by the statute any more than if the whole sum had been put into one note and the amount paid had been indorsed upon it; the balance still due upon the last note is the balance of the money upon which the usurious interest was secured and paid, and to subject it only to a proportionate abatement would be an evasion of the spirit and letter of the statute.⁹⁸

In Texas if a note sued upon is usurious and was given as a renewal of another usurious obligation and embraced usury in the principal sum, there may be a recovery only of that part of the latter sum which would remain after deducting all interest embraced in the note, and, in addition, ten per cent on the principal thus ascertained, less the payments made upon the note. Any such payments should not be applied to existing usurious interest, but to the lessening of the legal demand. Payments made and directed to be applied to other notes should not be treated as payments on the note in suit unless they constituted a part of the same usurious contract and were executed for usurious interest. If they were executed alone for that purpose such payments should be applied to the extinguishment of the legal demand.⁹⁹ The right to recover double the amount of the usurious interest paid may be enforced under a pleading in re-convention in an action upon the contract without discharging the principal.¹ Under the act of 1907 there may be a recovery of double the amount of all the interest paid.² In Washington the principal of another note and interest thereon, given as a cover for usury, as well as interest on the note which represented the loan, in addition to double the amount of all the interest paid, is to be deducted. The statute does not permit the re-

Ticonic Bank v. Johnson, 31 Me. 414.

⁹⁸ *Farr v. Chandler*, 51 N. H. 545.

⁹⁹ *Sturgis Nat. Bank v. Smith*, 9 Tex. Civ. App. 540.

¹ *Rosetti v. Lozano*, 96 Tex. 57.

² *Baum v. Daniels*, 55 Tex. Civ. App. 273.

covery of attorney's fees.³ In Oklahoma the debtor may recover all the interest paid.⁴ Under a statute of North Carolina double the total amount of a usurious payment of interest may be recovered and not merely double the usurious part thereof; but this is not true where the payments of legal interest and usurious rates are made separately. In that case only double the amount of the usurious payment is recoverable.⁵ In Washington the statutory remedies of the borrower do not prevent the maintenance of an action in the nature of an assumpsit for money had and received to recover the interest paid in excess of that fixed by the law.⁶ A party who asks that a deed be declared a mortgage may be required, as a condition to receiving such relief, to forego the advantage of the penalties for usury and to submit to the payment of the principal with legal interest.⁷

SECTION 4.

AGREEMENTS FOR MORE THAN LEGAL RATE AFTER MATURITY.

§ 318. **Not usury, but penalty.** This subject has been, to a considerable extent, considered in the preceding pages, but attention has not been called to the distinct question of the effect of stipulating for rates of interest exceeding those allowed by law to be paid after maturity. The question may practically arise under statutes regulating interest in two ways: first, by providing that the interest on money shall be a given rate, and no more; second, by prescribing a general rate and that parties may agree on any other not exceeding a specified higher rate. Reserving a greater sum for interest before maturity than the rate fixed by statute or than is authorized to be stipulated for renders the contract usurious. But agreeing for the prohibited rates to be computed after maturity is not usury.⁸

The reason given is that the debtor can relieve himself by at

³ *Libert v. Unfried*, 47 Wash. 186.

⁴ *Melton v. Snow*, 24 Okla. 780.

⁵ *Taylor v. Parker*, 137 N. C. 418.

⁶ *Lee v. Hillman*, 74 Wash. 408.

⁷ *Holden L. & L. S. Co. v. Interstate T. Co.*, 87 Kan. 221, L.R.A.

1915B 492; *Walter v. Calhoun*, 88 Kan. 801.

⁸ *Carney v. Matthewson*, 86 Ark. 25; *Holmes v. Dewey*, 66 Kan. 441; *Taylor v. Buzard*, 114 Mo. App. 622; *Gay v. Berkey*, 137 Mich. 658;

once paying the debt; he is no longer bound to keep the money that it may earn interest for the creditor. By paying the debt

• *Keys v. Lardner*, 55 Kan. 331; *Pawtucket Mut. F. Ins. Co. v. Landers*, 5 Kan. App. 623; *Brown v. Cory*, 9 Kan. App. 702 (the rule has been changed by statute in Kansas); *Home F. Ins. Co. v. Fitch*, 52 Neb. 88; *Havemeyer v. Paul*, 45 Neb. 373, overruling *Richardson v. Campbell*, 34 Neb. 181; *Sanford v. Lichtenberger*, 62 Neb. 501; *Sumner v. People*, 29 N. Y. 337; *Green v. Brown*, 22 N. Y. Misc. 279; *Glidden v. Chamberlin*, 167 Mass. 486; *Law Trust Soc. v. Hogue*, 37 Ore. 544; *Ramsey v. Morrison*, 39 N. J. L. 591; *Crider v. San Antonio R. E. B. & L. Ass'n*, 89 Tex. 597; *Lloyd v. Scott*, 4 Pet. 225, 7 L. ed. 840; *Taylor v. Hiestand*, 46 Ohio St. 343; *Ward v. Cornett*, 91 Va. 676, 49 L.R.A. 550; *Scottish-Am. M. Co. v. Wilson*, 24 Fed. 310; *Stansbury v. Stansbury*, 24 W. Va. 634; *Chaffe v. Landers*, 46 Ark. 364; *Weyrich v. Hobleman*, 14 Neb. 432; *Barbour v. Tompkins*, 31 W. Va. 410 (if the agreement is made after interest has become due); *Lawrence v. Cowles*, 13 Ill. 577; *Gould v. Bishop Hill Colony*, 35 Ill. 324; *Davis v. Rider*, 53 Ill. 416, 85 Am. Dec. 368; *Witherow v. Briggs*, 67 Ill. 96; *Wilday v. Morrison*, 66 Ill. 532; *Cutler v. How*, 8 Mass. 257; *Call v. Scott*, 4 Call, 402; *Wilson v. Dean*, 10 Iowa 432; *Gower v. Carter*, 3 Iowa 244, 66 Am. Dec. 71; *Moore v. Hylton*, 1 Dev. Eq. 433; *Campbell v. Shields*, 6 Leigh 517; *Gambriel v. Doe*, 8 Blackf. 140, 44 Am. Dec. 760; *Fisher v. Otis*, 3 Pin. 78; *Wight v. Shuck*, Morris, 425; *Shuck v. Wight*, 1 G. Greene 128; *Fisher v. Anderson*, 25 Iowa 28, 95 Am. Dec. 761; *Jones v. Berryhill*, 25 Iowa 289; *Rogers v. Sample*, 33 Miss. 310, 69 Am. Dec.

349; *Roberts v. Trenayne*, Cro. Jac. 507; *Floyer v. Edwards*, 1 Cowp. 112; *Wells v. Girling*, 1 Brod. & Bing. 447; *Caton v. Shaw*, 2 Har. & G. 13.

Under the Tennessee statute which provides that "interest is the compensation which may be demanded by the lender from the borrower, or creditor from the debtor for the use of money," a rate in excess of that fixed by law is usurious, though it is not payable until after the maturity of the obligation. *Richardson v. Brown*, 9 Baxter, 242.

Where there is no restriction as to the rate of interest which may be contracted for, an increased rate may be collected after the obligation promising it has matured: it is not a penalty. If the increased rate is payable monthly the payee waives his right to it by accepting interest at the rate stipulated for before maturity for such time as the latter is accepted, but not for any subsequent time. *Thompson v. Gerner*, 104 Cal. 168, 43 Am. St. 81.

It is said by Simonton, Circuit Judge, in a recent case, that the principle seems to be this: If, from the contract, it appears that the parties, when making it, understood that the words of the note were not peremptory, but that the maker would be indulged provided he paid the increased rate of interest, this would be usury; but if the threat of increased interest was held out to enforce prompt payment, and if the increased rate was penalty for the default, it would not be usury. The note before the court contained these words: "with interest thereon, after maturity, until paid, at the rate of ten per cent. per annum,

the debtor can prevent its increase by the accumulation of interest. This reasoning overlooks the possibility that for want of money the debtor will be unable to avail himself of this relief; this is the very inability, with its distressing consequences, from which it is deemed humane and politic by statutes against usury to shield him. The right to stop interest by paying the principal, without the ability to make such payment, is just equivalent to the right a person has to borrow money when no person having it will lend to him. If the creditor's power over the necessities to extort oppressive terms at the lending is deserving of legal check, why limit that restriction to the period of credit? High rates of interest to commence at the end of that period are as likely to be oppressive as when applied before, and more likely to be assented to. But the further reason is given that higher than legal rates agreed to for interest after maturity are in the nature of a penalty, and therefore only the actual damages are recoverable; and as these damages are for the non-payment of money they are measured by the legal rate of

payable annually; value received." The court observed that the promise to pay interest after maturity at an unlawful rate was incorporated in, and formed part of, the original contract; that it was one of the terms of that agreement, and that the consideration was sufficient to all its terms; that the words "payable annually" express a contract on the part of the promisor, and its acceptance on the part of the promisee. The note was usurious. *Union M., B. & T. Co. v. Hagood*, 97 Fed. 360. The opinion in the foregoing case is quoted from in *Law Trust Soc. v. Hogue*, 37 Ore. 544, 557.

In South Carolina one who sues on a contract not originally usurious forfeits all interest by subsequently charging and receiving thereon interest at a rate in excess of that fixed by statute. *Ehrhardt v. Varn*, 51 S. C. 550.

A statute to the contrary was en-

acted in 1887 in Minnesota. *Chase v. Whitten*, 51 Minn. 485. It merely works a forfeiture of the interest reserved and does not render the contract void *in toto*. *Chase v. Whitten*, 62 Minn. 498.

In Missouri "a note bearing a lawful rate before maturity and an unlawful rate after that time, becomes usurious if forbearance is exercised and the unlawful rate is charged or exacted." *J. I. Case Threshing Mach. Co. v. Tomlin*, 174 Mo. App. 512.

A statute which defines interest as "the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or *detention* of money" changes the rule. "The detention of money arises in a case when a debt has become due and the debtor withholds its payment without a new contract giving him a right to do so." *Parks v. Lubbock*, 92 Tex. 635.

interest. The doctrine thus limited is correctly stated thus: An agreement to pay more than the legal rate of interest by way of penalty for not paying the debt is not usurious because the debtor may at any time relieve himself by paying it with lawful interest if he is able to do so; and even if he incurs the penalty, this may be reduced to the actual debt reckoned in the same manner.⁹ No agreement is valid for a greater rate of interest to be paid after maturity than may be legally stipulated to be paid before. This rule is founded upon principle and authority. Parties may contract absolutely or conditionally, as we have seen, for any rate within a statute fixing interest limits. When a rate above those limits is agreed to be paid before maturity it is usurious; not collectible; if it is agreed to be paid after maturity it is in the nature of a penalty and has no effect; then the legal rate will govern as though no agreement had been made.¹⁰ An increased rate of interest after the maturity of the

⁹ 3 Parsons on Cont. 116.

¹⁰ Shuck v. Wight, 1 G. Greene 128; Wight v. Shuck, Morris 425; Gower v. Carter, 3 Iowa 244, 66 Am. Dec. 71; Wilson v. Dean, 10 Iowa 432; Cutler v. How, 8 Mass. 257; Conrad v. Gibbon, 29 Iowa 120; Clark v. Kay, 26 Ga. 403; Claypool v. Sturgess, 10 Ohio St. 440; Taul v. Everet, 4 J. J. Marsh. 10; Jackson v. Shawl, 29 Cal. 267; Burnhisel v. Firman, 22 Wall. 170, 22 L. ed. 766; Bunn v. Kinney, 15 Ohio St. 40; Caton v. Shaw, 2 Har. & G. 13; Sexton v. Murdock, 36 Iowa 516; Pyke v. Clark, 3 B. Mon. 262; Brockway v. Clark, 6 Ohio 45; National L. Ins. Co. v. Hall, 34 Okla. 395.

In *Gower v. Carter*, *supra*, the action was brought on an agreement to pay a sum of money by a certain day, and more than legal interest afterwards, by way of penalty, if the debt be not punctually paid. Stockton, J., said: "The defendants' agreement to pay two and one-half

per centum per month, in default of payment of the promissory notes at maturity, is not essentially different from an agreement to pay a gross sum as such penalty. Nor do we perceive that either of the notes sued on is essentially different from a penal bond by which the obligor binds himself to pay the obligee a certain sum, with the condition appended, by which the first obligation is to be void on the payment of the lesser sum to the obligee by a day certain. The real nature and essence of the agreement is always disclosed by the condition of the bond or undertaking.

"In the present case the condition of the contract was to pay the note, with interest, by a certain day. If not paid punctually when due, the defendants promise to pay as a penalty for the default two and a half per centum per month from maturity until paid. Are the plaintiffs entitled to enforce this penalty against the defendants on their fail-

indebtedness cannot be collected from the purchaser of mortgaged property, who assumed the principal of the mortgage with

ure to pay the notes at their maturity? We must first remark, however, that on examination of the petition we find that it does not set forth any breaches on the part of the defendants, as on a penal bond. It does not aver what amount is claimed by plaintiffs as due from defendants, nor does it pray judgment for the amount of the penalty. We refer to this in connection with the question made by the defendants in their assignment of errors, viz.: whether the court should have rendered judgment for the penalty of two and a half per centum per month, and if not, for what amount should judgment have been rendered?

"The consideration of this question renders it advisable to inquire to some extent into the nature and history of actions for penalties sued on penal obligations. In an action of debt on a penal bond for condition broken, the amount which the plaintiff was entitled to recover was originally the penalty. The action could not be relieved against by payment or tender. This severe rule of the common law was only mitigated by the practice of the courts of chancery, which interposed and would not allow the creditor to take more than in conscience he ought. Sedgw. on Dam. 393. From the time that it became settled in equity that the condition of the bond was the agreement of the parties, the obligor was relieved from the penalty. Very soon arose the practice, enforced by legislation, requiring the plaintiff to assign breaches in his declaration, and the jury on the trial assessed such damages for the breaches assigned as the plaintiff on the trial might

prove. And it is enacted by the code of Iowa, section 1818, that in actions on penal bonds the petition must set forth the breaches, and the judgment rendered thereon must be for the actual damages only. It may therefore be laid down as a settled rule, that no other sum can now be recovered under a penalty than that which shall compensate the plaintiff for his actual loss. The penalty is in no sense the measure of compensation; and the plaintiff must show the particular injury of which he complains, and have his damages assessed by a jury. Such damages, it is further held, are not necessarily nominal, and the jury may give substantial damages if they see fit. Sedgw. on Dam. 396, 397.

"In the case of a loan of money, although in point of fact the creditor may suffer the most serious inconvenience for the want of punctual payment of his debt, as happens every day, and a subsequent payment of principal and interest may be a very inadequate compensation for the original disappointment, it may be stated as a general rule that a promise of paying a penalty beyond the amount of legal interest cannot be enforced. Pothier on Obligations, Appendix, 87. Where the penalty has been incurred, the ends of justice may be arrived at by reducing the penalty to the actual debt. 2 Parsons on Contracts, 393. The case of *Groves v. Groves*, 1 Wash. (Va.) 1, was an agreement for the payment of a debt at a certain day, and, if not paid punctually, then for the payment of a larger sum; the court held that a contract to pay a larger sum at a future day was not usuri-

interest thereon at a specified rate, even though the note secured by the mortgage bore an increased rate after maturity

ous, and that the increased sum should be considered as a penalty against which equity ought to relieve, on compensation being made. So in *Brockway v. Clark*, 6 Ohio 45, the supreme court of Ohio held that where a money-lender takes from a borrower an obligation for a greater amount than the money lent and stipulated interest, with an undertaking on his part to receive a less sum in discharge of the obligation, if punctually paid, equity may relieve against the excess as a penalty, on the same principle upon which parties are ordinarily relieved from penalties. The same was granted at law in *Massachusetts* in the case of *Cutler v. How*, 8 Mass. 257. After a verdict by the jury, for the plaintiff, assessing the damages, the court directed a certain amount of the penalty, which it deemed oppressive, to be deducted from the amount of the verdict, and judgment was entered on the verdict as amended.

"In *Shuck v. Wight*, 1 G. Greene 128, the note was for the sum of \$300, payable two years after date, and to bear interest after maturity, if not paid, at the rate of fifty per centum per annum. Suit being brought by the holder of the note to foreclose a mortgage given to secure its payment, the petition prayed judgment for the amount of the note with such interest as the court should deem just and proper. Judgment was given for the plaintiff for the amount of the note and interest at six per centum per annum. This judgment was affirmed by the supreme court (1 G. Greene 128), and we may consider that the principle was thereby settled so far as the authority of this court could

settle it, that the plaintiff was not entitled to judgment for the penalty of fifty per centum per annum, but for six per cent. only.

"In another class of cases where the parties have agreed upon a sum certain as the measure of damages, in order as far as possible to avoid all future questions as to the amount of damages which may result from the violation of the contract, and where a definite sum was named as settled and liquidated, if the construction of the phraseology would work oppression the use of the term 'liquidated damages' did not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties. No damages for the non-payment of money can ever be so liquidated between the parties as to evade the provisions of the law which fix the rate of interest. *Sedgw. on Dam.* 400. In *Orr v. Churchill*, 1 H. Black 232, Lord Loughborough said: 'There can only be an agreement for liquidated damages where there is an agreement for the performance of certain acts, the not doing of which would be injurious to one of the parties; or to guard against the performance of acts which if done would also be injurious. But in cases like the present, the law having fixed by positive rules the rate of interest, has bounded the measure of damages.' In the case of *Gray v. Crosby*, 18 Johns. 219, where a party covenanted on a certain contingency to pay to another a sum of money, with a proviso that if he failed or refused then he would pay a larger sum as liquidated damages, the supreme court of New York say: Such facts constitute no right to recover

unless the stipulation to pay it by the party who assumed the indebtedness is clear.¹¹

§ 319. **Same subject; when debtor relieved in Illinois.** In Illinois, however, this rule does not appear to be recognized. A remedy in equity has sometimes been abstractly acknowledged as one that might be available in case of an interest contract of an oppressive character.¹² While the statute limited the rate which might be stipulated for to ten per cent per annum a note was given to which was added this clause: "and if the same is not paid when due, to pay her twenty-four per cent interest thereon from the time the same is due until paid." The supreme court held, as it had done before and as it did repeatedly afterwards, that such agreements for interest are not usurious unless given on such short time as to induce the belief that they were designed to evade the statute against usury.¹³ Such contracts do not come within the rule that a greater sum is a penalty when it is made payable on failure to pay a smaller sum. Where that rule applies the greater sum becomes due at once, in case of non-payment at the day, and is strictly a penalty from which a court of chancery will relieve on slight grounds. The courts of that state, in common with other courts, pronounce such excessive interest a penalty to ensure punctuality, but it is not there strictly a penalty against which courts of chancery will relieve except for cogent reasons. On the contrary, these penalties are enforced for the full amount agreed to be paid.¹⁴

beyond the money actually due. Liquidated damages are not applicable to such a case. If they were they might afford a secure protection for usury, and countenance oppression under the forms of law."

¹¹ Hicks v. Elwell, 129 Ill. App. 561.

¹² Gould v. Bishop Hill Colony, 35 Ill. 324.

¹³ Id.; Lawrence v. Cowles, 13 Ill. 577; Smith v. Whitaker, 23 Ill. 367; Bishop Hill Colony v. Edgerton, 26 Ill. 54; Davis v. Rider, 53 Ill. 416; Wilday v. Morrison, 66 Ill. 532; Witherow v. Briggs, 67 Ill. 96; Bane v. Gridley, id. 388.

In a case in which thirty per cent.

per annum was stipulated to be paid after maturity the court, referring to its previous decisions, said it could hardly have decided all these cases without passing upon both of these questions, namely, whether such interest was of the nature of a penalty or usurious, and evidently did not regard a merely increased rate of interest in consequence of nonpayment at maturity as a penalty in the sense in which a gross sum is a penalty when it is to be paid at a particular day. Bane v. Gridley, 67 Ill. 388.

¹⁴ Downey v. Beach, 78 Ill. 53; Reeves v. Stipp, 91 Ill. 609.

SECTION 5.

INTEREST AS COMPENSATION.

§ 320. **Scope of section.** Under previous heads we have discussed interest resulting from or connected with agreements therefor. It is now proposed to consider the subject in a broader sense:—the liability for interest where there is no actual agreement to pay it, not only in connection with obligations *ex contractu* to pay the principal, but also where the liability is founded in tort. A liability for interest may result from a tacit agreement to pay it; and the law in many instances implies a duty to pay it on the principle of *quantum meruit*. It is also almost ¹⁵ invariably chargeable as damages in cases of default in the payment of a liquidated debt, and upon damages for violation of contracts where such damages are determinable by some certain standard. In cases of tort interest is allowed not only upon money, but the value of property wrongfully taken, converted, withheld,¹⁶ or lost by culpable neglect. It is recoverable, also, upon pecuniary elements of damage although the principal injury may involve a claim for unliquidated damages. Damages allowed as an equivalent of legal interest are actual and not punitive.¹⁷

§ 321. **Right not absolute.** It will appear more fully hereafter that the right to interest as compensation is not absolute, as it is where there are agreements made to pay it. In some jurisdictions the allowance of it is discretionary with the jury,¹⁸

¹⁵ *Hardwood Interior Co. v. Bull*, 24 Cal. App. 129.

A subscription for stock in a corporation, the amount subscribed being payable in fixed instalments, is not such a contract as interest is recoverable on as matter of right. *Frank v. Morrison*, 55 Md. 399. The jury may allow it. *Musgrove v. Morrison*, 54 id. 161.

Interest on a note given as a subscription to a railroad company and payable one year after the completion of the road, in the absence

of an agreement, is due only from the time payment is demanded. *Stevens v. Corbitt*, 33 Mich. 458.

¹⁶ *Nunn v. Lynch*, 89 Ark. 41, citing this section (on the value of premises in ejectment).

¹⁷ *Griswold v. Wentworth*, 85 Vt. 205.

¹⁸ *Shoop v. Fidelity & Deposit Co. of Maryland*, 124 Md. 130; *Occidental C. M. Co. v. Comstock T. Co.*, 125 Fed. 244; *District of Columbia v. Camden I. Works*, 15 D. C. App. Cas. 198, 222.

in others with the court,¹⁹ and in others it cannot be allowed in a numerous class of cases as interest, though the lapse of time between the origin of the cause of action and the time of trial may be considered by the jury in estimating the damages.²⁰ In cases where the right to recover interest is not absolute the plaintiff may properly be deprived of it if he has been guilty of laches in making his demand or in prosecuting his action, either for the time anterior to judgment or for such other period as the jury may find that his laches continued.²¹ A debtor is

¹⁹ *Eastfield S. S. Co. v. McKeon*, 208 Fed. 580; *Bethell v. Mellor & Rittenhouse Co.*, 135 Fed. 445; *The Scotland*, 118 U. S. 507, 30 L. ed. 153.

²⁰ See §§ 336, 1256.

A contractor in default is not entitled to interest on the sum recovered prior to his decree. *Filston F. Co. v. Henderson*, 106 Md. 335.

In the absence of a contract interest is recoverable only upon the subjects specified in the statute. *Hurlburt v. Dusenbury*, 26 Colo. 240; *Vietti v. Nesbitt*, 22 Nev. 390; *Thompson v. Tonopah Lumber Co.*, — Nev. —, 41 Pac. 69.

Interest can only be allowed by virtue of some contract express or implied, or by virtue of some statute, or on account of the default of the party liable to pay, and then it is allowed as damages for the default. *Matter of Trustees of New York & B. Bridge*, 137 N. Y. 95.

In Manitoba interest cannot be recovered before action brought unless there was a contract to pay it or the nature of the case is such that a contract may be implied, unless the money was payable by virtue of a writing and a demand was made with notice that interest would be claimed. *Nichol v. Goher*, 12 Manitoba 177, 182.

²¹ *Hilburn v. Mercantile Nat.*

Bank, 39 Colo. 189; *Arapahoe County v. Denver*, 30 Colo. 13; *Bethlehem v. Hemingway*, 14 Pa. Dist. 656; *Redfield v. Ystalyfera I. Co.*, 110 U. S. 174, 28 L. ed. 109; *Bann v. Dalzell*, 3 C. & P. 376; *Newell v. Keith*, 11 Vt. 214; *Adams Exp. Co. v. Milton*, 11 Bush, 49; *Bartels v. Redfield*, 27 Fed. 286, 23 Blatchf. 486; *Stewart v. Schell*, 31 Fed. 65; *United States v. Sanborn*, 135 U. S. 271, 34 L. ed. 112; *Brinkly v. Willis*, 22 Ark. 9; *Clark v. Hershy*, 52 id. 473; *Culmer v. Caine*, 22 Utah, 216, 230; *Jourolmon v. Ewing*, 26 C. C. A. 23, 80 Fed. 604; *Redfield v. Bartels*, 139 U. S. 694, 701, 35 L. ed. 310, 313; *Burroughs v. Abel*, 105 Fed. 366; *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. 372, 28 L.R.A. 231.

A party who claims damages for a tort, liability for which has been denied, may defer bringing an action until a pending case involving the same question is settled. *Frazer v. Bigelow C. Co.*, 141 Mass. 126.

A litigant who refused the relief tendered him in the court of original jurisdiction and contested the question at issue in the court of last resort may not, on finally obtaining what was refused, recover interest pending the delay. *Andrus v. Berkshire P. Co.*, 197 Fed. 1016.

In the absence of an agreement therefor the right to interest will

not liable for interest on money deposited with a third party because he contests the creditor's right thereto.²² In the absence of an agreement therefor there is no liability in an action at law for interest on the rescission of a contract for the sale of realty.²³

A valuable contribution to the discussion of some of the features of interest as compensation has recently been made by Justice Dodge of the supreme court of Wisconsin. After referring to the former disinclination to allow interest, except where it was specifically contracted for, he noticed the changes made in the terms of statutes, which formerly guardedly permitted express contracts for limited rates of interest; while now they allow its recovery upon the forbearance of any money, goods or things in action, as well as upon money due upon note or other contract. "Such a change in the statute is certainly significant, and may well justify a difference in states where it is in force as to the class of demands which draw interest without express agreement therefor." After noticing the conflict in several Wisconsin cases respecting the allowance of interest as compensation and the rule prevailing in New York, it was observed: The true principle, which is based on the sense of justice in the business community and on our statute, is that he who retains money which he ought to pay to another should be charged interest upon it. The difficulty is that it cannot well be said one ought to pay money unless he can ascertain how much he ought to pay with reasonable exactness. Mere difference of opinion as to amount is, however, no more a reason to excuse him from interest than difference of opinion whether he ought legally to pay at all, which has never been held an excuse. When one is held liable,

depend upon the nature of the obligation, the relations and circumstances of the parties. *Stonebraker v. Littleton*, 119 Md. 173.

Laches on the part of state officers in demanding payment of license fees from foreign corporations will not bar the right of the state to collect such fees and interest on them. *State v. Fricke*, 102 Wis. 107.

The state is not estopped from recovering interest on deposits of

public moneys received by its treasurer because of general knowledge of the custom of its treasurers to retain such interest to their own use, nor by the acquiescence of the state authorities for many years in such custom. *State v. McFetridge*, 84 Wis. 473, 523, 20 L.R.A. 223.

²² *Ogden v. Stevens*, 241 Ill. 556, 132 Am. St. 237.

²³ *Sill v. Burgess*, 134 Ill. App. 373.

say on a promissory note, to which his defense has raised a doubtful question of law, he must pay the interest with it, because, theoretically at least, there was a fixed standard of legal obligation, which, if correctly applied, would have made his duty clear. So if there be a reasonable standard of measurement by the correct application of which one can ascertain the amount he owes, he should equally be held responsible for making such application correctly and liable for interest if he does not. The New York courts have adopted as designation of such a standard "market value," and in a broad use of the term this is perhaps the safest test to apply. It must not, however be restrained to definite quotations on a board of trade, or to such degree of certainty that no difference of opinion could exist. If one having a commodity to purchase, or certain services to hire can by inquiring among those familiar with the subject learn approximately the current prices which he would have to pay therefor, a market value can well be said to exist, so that no serious inequity will result from the application of the foregoing rule to those who desire to act justly; especially in view of the other rule of law that a debtor can always stop interest by making and keeping good an unconditional tender, thus giving him a substantial advantage over a creditor, who has no such option.²⁴

The rate of interest allowed as compensation is that provided by law when the liability is established.²⁵

§ 322. **Tacit agreements to pay interest on accounts.** As will be presently seen more at large interest is not allowed upon open running accounts. Where there is no definite credit the parties deal upon the assumption,—by the debtor, that although he has no claim to forbearance, yet payment will be requested; and, on the part of the creditor, that the account has no time to run and will be paid on demand. Hence interest is not payable before demand for the same reason that it is never payable,

²⁴ *Laycock v. Parker*, 103 Wis. 161. See *Dady v. Condit*, 209 Ill. 488.

²⁵ *First Nat. Bank v. Fourth Nat. Bank*, 89 N. Y. 412; *Sanders v.*

Lake Shore & M. R. Co., 94 id. 641; *State v. Guenther*, 87 Wis. 673; *Willet v. Herrin*, — Tex. Civ. App. —, 161 S. W. 26.

except by agreement while the debtor has a right to retain the money; in such cases it is not payable on the ground of default until the creditor has put the debtor under a present duty to pay by rendering the account or requesting payment. Where by the custom of a place of a trade or of a particular dealer moneys owing on account are to carry interest after a certain period, whether demanded or not, persons who contract debts at that place, in that trade or to that dealer with notice of that custom at the time of contracting tacitly acquiesce in it and by a natural implication tacitly agree to the liability which it imposes.²⁶ And while, of course, notice of the existence of the

²⁶ *Davis Regulator Co. v. Phoenix I. Works Co.*, 17 Pa. Dist. 889; *Smith v. Butler*, 176 Mass. 38; *Wilmut v. Gardner*, [1901] 2 Ch. 548; *Anzerai v. Naglee*, 74 Cal. 60; *Hummel v. Brown*, 24 Pa. 310; *Watt v. Hoch*, 25 id. 411; *Newell v. Griswold*, 6 Johns. 45; *Barclay v. Kennedy*, 3 Wash. C. C. 350; *Loring v. Gurney*, 5 Pick. 15; *Raymond v. Isham*, 8 Vt. 258; *Consequa v. Fanning*, 3 Johns. Ch. 587; *Wood v. Smith*, 23 Vt. 706; *Esterly v. Cole*, 1 Barb. 235, 3 N. Y. 502; *Knight v. Mitchell*, 3 Brev. 506; *Wills v. Brown*, 3 N. J. L. *548; *Dickson v. Surginer*, 3 Brev. 417; *Black v. Reybold*, 3 Harr. 528; *Higgins v. Sargent*, 2 B. & C. 349; *McAllister v. Reab*, 4 Wend. 483; *Reab v. McAllister*, 8 id. 109; *Veiths v. Hagge*, 8 Iowa, 163; *Knox v. Jones*, 2 Dall. 193, 1 L. ed. 345; *Farmers' etc. Co. v. Mann*, 4 Robert. 356; *McKnight v. Dunlop*, 4 Barb. 36.

In *Meech v. Smith*, 7 Wend. 315, an action upon the account of a forwarding merchant, on the trial the plaintiff proved an account of about \$34 for the transportation of a quantity of flour by him for the defendant from R. to N. Y. in 1827. The plaintiff claimed interest on his account and offered to

prove the universal custom of forwarding merchants to charge interest upon such accounts; that such custom was well known to the defendant when he contracted with the plaintiff, and that he had settled several accounts of a similar description with the plaintiff in which interest was charged without objection. Exception was taken upon the rejection of this testimony. *Savage, C. J.*, said: "On the question of interest, I think the court erred. Interest is always properly chargeable where there is either an express or implied agreement to pay it. The facts offered to be proved are sufficient, in my judgment, to authorize a jury to infer that there was an agreement to pay interest; it was the uniform custom of all those engaged in the same business to charge interest; it was the custom of the plaintiff to charge it; he had charged it in former accounts against the defendant, and it had been paid without objection, before the contract was made on which this suit is brought. In *Trotter v. Grant*, 2 Wend. 415, there was no evidence that the defendant *knew* the plaintiff's custom to charge interest, nor had he ever settled an account in which interest

custom is essential, direct evidence of such notice is not required. It may as in other cases be implied from the cir-

was charged; there were in that case no sufficient facts from which an agreement to pay interest could be implied, and, the account being unliquidated, interest could not be recovered." See *Liotard v. Graves*, 3 Cal. 226; *Williams v. Craig*, 1 Dall. 313, 1 L. ed. 153; *Dodge v. Perkins*, 9 Pick. 368; *Rayburn v. Day*, 27 Ill. 46; *Harrison v. Handley*, 1 Bibb, 443; *Von Hemert v. Porter*, 11 Mete. (Mass.) 210; *Warren v. Tyler*, 81 Ill. 15.

In *Koons v. Miller*, 3 W. & S. 271, the court say: "The practice of the merchants of Philadelphia to charge interest on their accounts after six months has endured more than half a century; and it is so universal that their customers deal with them avowedly on the basis of it. It is so notorious as to be recognized abroad; as may be seen in *Bispham v. Pollock*, 1 MeLean, 411, in which the circuit court of the United States for the district of Indiana left its existence, as the existence of any foreign law must be left, to the jury. Its existence is so notorious at home, however, that we are bound to take notice of it as part of the law. That it has not been sooner recognized by judicial decision has arisen from the fact that it has not before been thought a subject of dispute; but the principle is as well known and observed in the collection of merchants' debts as any other custom peculiar to the state." To the same effect are *Watt v. Hoch*, 25 Pa. 411; *Adams v. Palmer*, 30 id. 346.

In *Fisher v. Sargent*, 10 Cush. 250, *assumpsit* was brought for goods sold and delivered. The plaintiffs were traders in Boston, and at

the trial offered testimony tending to prove a custom among merchants and traders there to charge interest on their accounts after a credit of four or six months; but offered no evidence as to the credit given in this particular transaction, or that payment had been demanded. The jury were instructed that they might, upon this evidence, allow interest after six months—to which exceptions were taken. These were overruled. *Bigelow, J.*, said: "Ordinarily, in the absence of any evidence of usage, or of a special agreement between the parties, interest cannot be recovered upon an open running account for goods sold and delivered, when there was no specific term of credit agreed upon between the parties. This is the general rule; but it may be varied by proof of the usage of a particular trade or business to charge interest after the expiration of a certain period. In such cases, parties having knowledge of the usage are presumed to contract with reference to it, and will be as much bound by it as if it entered specially into the agreement of bargain and sale. Such usage may be shown by proof of the practice among merchants and traders generally in a town or city, or by evidence of the mode of dealing in a particular branch or class of trade. It is undoubtedly true that in order to render the usage of a particular trade or place binding upon a party, so as to make it part of a contract, it must be made to appear that it was known to the party who is to be affected by it. But this knowledge may be established by presumptive as well as direct evidence.

circumstances of the case, such as the general notoriety of the custom, impelling a conviction of notice. In the absence of

"It may be inferred from the uniformity and long continuance of the usage; from the fact that a party has for some time been in the particular trade to which it relates; from the previous dealings between the parties, or from any other facts tending to show its general notoriety. Whether such facts exist in any particular case is a proper question for a jury. In the case at bar there was evidence tending to prove the usage, and its knowledge by the defendant, from which it was competent for the jury to infer a contract to pay interest on the articles as charged by the plaintiff."

In *Adriance v. Brooks*, 12 Tex. 279, Hemphill, C. J., said: "the act of 1840 undertook to regulate the subject of interest; and unlike the English statute of 37 Henry 8, it gave an affirmative and not an indirect and negative sanction to its allowance. It differed also from the English statute by dividing interest into two classes, viz.: that which is allowed by law, and that which may be agreed upon by the parties; and there was the further distinction, not known to the earlier English statutes, that the contracts on which the law provided that interest should be recovered, or in which the parties might stipulate for interest, should be written contracts. But though provision is made for recovery of interest on written contracts, yet there is no prohibition of a stipulation for the payment of interest on a verbal agreement, or on a contract not in writing. And if such an agreement be not criminal, or contrary to good morals or public policy, it

would seem that it should be binding. And accordingly, in *Pridgen v. Hill*, 12 Tex. 374, a suit on an account upon which the party had agreed to pay interest, it was held that such agreement was valid and might be enforced in law. In the previous cases of *Cloud v. Smith*, 1 Tex. 102; *Close v. Fields*, 2 id. 232; *Crook v. McGreal*, 3 id. 487; *Davis v. Thorn*, 6 id. 486; *Wetmore v. Woodhouse*, 10 id. 33, the question of a verbal, distinct, positive agreement to pay interest on a debt acknowledged to be due was not presented; and although there are expressions in the opinions in those cases which would seem to restrict the recovery of interest to debts on written contracts, and such is the general rule under the statute, yet we deem it no departure from the principle of those decisions, with reference to the facts then before the court, to hold, when a new fact is presented, viz.: an agreement to pay interest, that it shall be enforced, though it be not in writing; nor the debt on which it was stipulated, in writing; such agreement not being prohibited by law, nor subversive of sound policy or good morals. . . . But the subject is one which may be, and as we have seen, has been, regulated by statute. This has provided for the stipulation and recovery of interest on written contracts. And, on the grounds stated, we have also supported verbal agreements to pay interest. But this case is neither upon a written contract, nor was there any agreement to pay interest. The ground upon which it is claimed is the fact that the defendant had previously paid interest on similar

any agreement the price of goods is payable on their delivery,²⁷ and if the purchaser is notified on the face of each bill sent him that the terms are thirty days his assent thereto will be implied if he has kept silent. "The fact that in subsequent statements interest was not charged was evidence that the plaintiff was then willing to waive its legal right to interest; but in the absence of a settlement upon the statement it would not deprive it of its right in this suit to recover interest according to the terms of the original contract."²⁸

This interest is a part of the debt, a compensation for forbearance, not damages for withholding money due. A tacit agreement is of the same nature and force as an actual one, but not being expressed, it is, of course, to be established by circumstances. Contracting a debt with a custom in view which contemplates the payment of interest before steps have been taken to liquidate an account or to obtain payment affords one example of such intent. Dealing with knowledge of such a custom, making no objection to it, or proceeding after objection without any waiver of the custom by the creditor, is a consent to pay interest as the custom requires.²⁹ And a continuance of the dealing after paying one account containing such interest is to furnish by this circumstance additional evidence of such consent in the subsequent transaction.³⁰ Whether there is in a given case such an agreement is for the jury.³¹ Though an ac-

counts. This we deem insufficient. Had the contract been in writing, the statute would have allowed interest; or had he verbally agreed to pay, we would not have permitted him to violate his engagement. Thus far we will go beyond the cases expressly provided for by the statute. But we will not go further, and scrutinize the acts of the parties to judge whether an implied obligation to pay interest, as an incident of the debt, has been created."

²⁷ *Chester v. Jumel*, 125 N. Y. 237, 254.

²⁸ *Lambeth R. Co. v. Brigham*, 170 Mass. 518.

²⁹ Where a statute does no more

than prohibit a recovery of interest beyond the legal rate on a contract not in writing, interest in excess of that rate may be included in an account stated and recovered. The rate, being known and assented to by the debtor and not being in violation of positive law, affords a sufficient consideration for the promise involved in such an account. *Auzerais v. Naglee*, 74 Cal. 60; *Marye v. Strouse*, 6 Sawyer, 205.

Failing to object to accounts rendered, which included interest, is ground for its recovery. *Johnson v. Milmine*, 150 Ill. App. 208.

³⁰ *Thomas v. Turner*, 157 Ill. App. 16; *Warren v. Tyler*, 81 Ill. 15.

³¹ See *Ayers v. Metcalf*, 39 Ill.

count consisting of items of debit and credit is an unliquidated, running account, which will not carry interest in the absence of an agreement, yet from the time of the last item on the debit side of such an account, it must be regarded as closed, and an implied agreement exists to pay interest on the balance due thereafter.³² But if statements of account for goods sold do not include interest, and if the debtor has made payments from time to time, interest cannot be recovered on the balance due prior to the commencement of suit.³³ A statute requiring a settlement of accounts before liability for interest shall exist does not apply to accounts stated monthly and assented to by the debtor.³⁴

The custom to which reference has been made is an evidentiary fact to show the intention of the parties. It has no other effect. It does not alter the law. It derives all its force from being sanctioned and adopted by the parties. It can have no validity to bind the debtor to pay interest or fix a rate or mode of computation; nor will his acquiescence or tacit consent bind him to a liability which he could not by express agreement legally assume.³⁵ It is a legal usage of merchants to cast interest on the items of their mutual accounts and strike a balance at the end of the year and make that balance the first item of principal for the ensuing year; but the law does not make it binding on the debtor except under a specific agreement after the mutual dealings are passed.³⁶ A learned English text writer³⁷ says: "Where parties have acquiesced in a course of dealing in which interest was exacted, they will be assumed to

307; *Fisher v. Sargent*, 10 Cush. 250; *Cole v. Trull*, 9 Pick. 325.

³² *Bell v. Mendenhall*, 78 Minn. 57, 67.

³³ *Ryan D. Co. v. Hvamsahl*, 92 Wis. 62.

³⁴ *McCuish v. Smail*, 13 S. D. 397.

³⁵ Where parties accept the custom of banks to charge eight per cent. on overdrafts, and close their account, including such charges, by giving their note they are bound to pay the rate of interest charged. But where a note is given the bank

cannot collect more than seven per cent. on such overdrafts, as no custom of the bank can contravene the law forbidding the collection of more than seven per cent. unless there is an agreement in writing to pay eight. *Loan & Exch. Bank v. Miller*, 39 S. C. 175.

³⁶ *Von Hemert v. Porter*, 11 Mete. (Mass.) 210; *Marrs v. Southwick*, 2 Port. 351; *Jones v. Ennis*, 18 Hun 452.

³⁷ *Mayne on Dam.* (8th ed.), pp. 187, 188.

have contracted to pay it.³⁸ And in this way even compound interest may be charged as long as the accounts remain open.³⁹ But although compound interest may be charged by means of half-yearly rests, where such a practice is assented to, it is not sufficient to show that such has been the usage of the plaintiff without proving that the defendant was acquainted with it.⁴⁰ *A fortiori* not where compound interest had been allowed under a mistaken belief that it was stipulated for by the document under which the debt was due.⁴¹ And even in the case of merchants' accounts where this system prevails, the plaintiff can recover no more than the principal upon the *last* balance, in which there is no new account, and no new transaction, however long it may be before the action is brought to recover the balance, and the jury cannot give interest, still less compound interest, upon the balance;⁴² and the same rule applies between banker and customer. Accounts which are made up with yearly or half-yearly rests, while the relationship continues, only bear simple interest from the time it is terminated by death or otherwise."⁴³

Where accounts are settled without charging interest the settlement will not be opened for the purpose of allowing it, in the absence of a mistake.⁴⁴ Transactions anterior to it and included therein are not interest-bearing.⁴⁵

§ 323. Interest where payment unreasonably and vexatiously delayed. Under some statutes interest is due on any instrument

³⁸ *Ex parte Williams*, 1 Rose 399; *Willmot v. Gardner*, [1901] 2 Ch. 548.

³⁹ *Bruce v. Hunter*, 3 Camp. 467; *Newell v. Jones*, 4 C. & P. 124; *Eaton v. Bell*, 5 B. & Ald. 34; *Ferguson v. Fyffe*, 8 Cl. & F. 121; *Mosse v. Salt*, 32 Beav. 269.

⁴⁰ *Dawes v. Pinner*, 2 Camp. 486n; *Moore v. Voughton*, 1 Stark. 487. And see *Williamson v. Williamson*, L. R. 7 Eq. 542, where acquiescence in a banker's charge of 500*l.* for a half-year's commission on an over-drawn account was held not to entitle the banker to make

the same charge as of right in the subsequent half years; also *Crosskill v. Bower*, 32 Beav. 86.

⁴¹ *Daniel v. Sinclair*, 6 App. Cas. 181.

⁴² *Attwood v. Taylor*, 1 M. & G. 301; *Waring v. Cudliffe*, 1 Ves. 99; *Ex parte Bevan*, 9 Ves. 223; *Ferguson v. Fyffe*, 8 Cl. & F. 121.

⁴³ *Per Lord Selborne, C.*, *Barfield v. Loughborough*, L. R. 8 Ch. 7.

⁴⁴ *Martin v. Beckwith*, 4 Wis. 219; *Hodges v. Hosford*, 17 Vt. 614; *Chandler v. People's Sav. Bank*, 61 Cal. 410.

⁴⁵ *Chandler v. Bank*, *supra*.

in writing, on the settlement of accounts from the day of liquidating them between the parties and ascertaining the balance, and on money withheld by an unreasonable and vexatious delay of payment. Interest is not allowable under the last clause by reason of the debtor's mere delay or his defense of a suit to collect the debt. To make the delay unreasonable and vexatious he must throw obstacles in the way of the creditor or by some means induce him to postpone the commencement of proceedings for the collection of his demand.⁴⁶ An exception seems to be made against an officer who refuses to pay over funds in his hands and compels the bringing of a suit therefor.⁴⁷ One is not liable for interest under that clause because he refuses to perform a condition in a contract which is open to question as to its meaning,⁴⁸ nor because he refuses to pay in good faith with an honest belief in his non-liability.⁴⁹ A contractor for a public

⁴⁶ *Howell v. Empire State Surety Co.*, 183 Ill. App. 220; *F. J. Lewis Mfg. Co. v. Cobe*, 189 Ill. App. 466; *Whittemore v. People*, 227 Ill. 453; *O'Meara v. Cardiff C. Co.*, 154 Ill. App. 321; *Kempton v. People*, 139 id. 563; *Espert v. Ahlschlager*, 117 id. 484; *Imperial H. Co. v. Claffin Co.*, 175 Ill. 119; *Kelley v. Caffrey*, 79 Ill. App. 278; *Pieser v. Minkota M. Co.*, 94 id. 595; *Hatterman v. Thompson*, 83 id. 217; *Nixon v. Cutting F. P. Co.*, 17 Mont. 90; *Carson v. Neatheny*, 9 Colo. 212; *Keys v. Morrison*, 3 Colo. App. 441; *Mueller v. Northwestern University*, 195 Ill. 236, 257; *West Chicago A. Works v. Sheer*, 104 Ill. 586. See further, *Bedell v. Janney*, 9 id. 193; *Hitt v. Allen*, 13 id. 596; *Kennedy v. Gibbs*, 15 id. 406; *Newlan v. Shafer*, 38 id. 379; *McCormick v. Elston*, 16 id. 204; *Aldrich v. Dunham*, id. 403; *Daniels v. Osborn*, 75 id. 615; *Jas- soy v. Horn*, 64 id. 379; *Chapman v. Burt*, 77 id. 615; *Devine v. Edwards*, 10 id. 138.

A general allegation of vexations

and unreasonable delay is insufficient as against a demurrer or motion, but is not so defective that evidence cannot be received; it will support a judgment for interest. *Keys v. Morrison*, *supra*, 259.

Withholding payment merely to force a compromise is cause for awarding interest. *Borden v. Fraser*, 118 Ill. App. 655.

A defense upon purely technical grounds constitutes unreasonable and vexatious delay. *Chicago B. Co. v. McLester*, 165 Ill. App. 114. Compare *Osgood v. Poole*, id. 63.

⁴⁷ *Jefferson County v. Lineberger*, 3 Mont. 231. *Contra*, *Whittemore v. People*, *supra*.

⁴⁸ *Uhrich v. Livergood*, 25 Ill. App. 640; *O'Heron v. American B. Co.*, 177 Ill. App. 405.

⁴⁹ *Grollman v. Montgomery Ward & Co.*, 181 Ill. App. 598; *Roberts-M. Pub. Co. v. Wise*, 140 Ill. App. 443; *Billingheimer v. Scott*, 145 id. 395; *Gillespie v. Fulton*, 161 Ill. App. 248; *Franklin County v. Layman*, 145 Ill. 138; *Felt v. Smith*, 62 Ill. App. 637.

improvement is not entitled to interest where the delay in payment arises from the fact that the special assessments out of which it is to be made are not collected as soon as they should be.⁵⁰ Where one party constantly claimed a sum largely in excess of what was equitably due and was refused payment of any amount approaching that to which he was entitled, there was such delay as justified the allowance of interest on the aggregate sum due from the time the master's report was filed.⁵¹ By requiring the creditor to comply with a condition not required by law the debtor becomes liable for interest.⁵² If there has been unreasonable and vexatious delay in paying a just claim the debtor cannot be relieved by paying anything less than interest on it from the time it became due.⁵³ If the facts creating a liability to pay at a specified time are not denied and no testimony is offered to show the ground for refusal the court will determine whether the case is within the statute.⁵⁴ Stockholders of an insolvent corporation who have paid a judgment against them are not liable for interest on their share of the amount remaining unpaid by other stockholders from the time of such judgment; their liability dates from the time demand was made for the balance by motion for a further judgment.⁵⁵

§ 324. **Quantum meruit claim to interest.** Where one person requests another to perform service, supply goods or pay money, and the request is complied with, nothing further being said or done to indicate his intentions, it is a very simple transaction; the law interprets it according to the ethics of fair dealing; the request, acceded to, imports an agreement so definite and so certain to be understood by both parties in the same sense that they deem it quite superfluous to state it. And when a remedy is sought on such transactions the common law requires in

⁵⁰ *Vider v. Chicago*, 164 Ill. 354.

⁵¹ *Thomas v. Peoria, etc. R.*, 36 Fed. 808, per Harlan, J.

The Colorado statute allowing interest in such a case has been repealed. *Young v. Kimber*, 44 Colo. 448, 28 L.R.A.(N.S.) 626.

⁵² *American F. & M. Co. v. Lindsay C. Co.*, 129 Ill. App. 548.

⁵³ *Chicago v. Tebbetts*, 104 U. S. 120, 26 L. ed. 655; *Barker v. Turnbull*, 51 Ill. App. 226.

⁵⁴ *Sanderson v. Read*, 75 Ill. App. 190.

⁵⁵ *First Nat. Bank v. Cooper*, 91 Neb. 624.

pleading no greater certainty or particularity. The party making the request, by necessary intendment, promises the party complying with it to pay him so much as he reasonably deserves. For benefits conferred upon request, or enjoyed under various circumstances which are tantamount to a request, there is a legal duty to make compensation; this is measured by the standard of reciprocal justice. The party in whose favor such duty is implied is legally entitled to recover so much as he reasonably deserves. Interest is in many cases allowed upon this principle. It is almost an axiom in American jurisprudence that he who has the use of another's money, or money he ought to pay, should pay interest on it.⁵⁶ A bank which pays the money of a depositor upon his check bearing a forged indorsement is liable for interest from the time of payment though the depositor received no interest on his deposits,⁵⁷ if he is bound to make sufficient additional deposits to keep his account intact.⁵⁸ The claim of corporate directors for interest on a sum due them as remuneration for services, payable out of the net profits of the concern, will be disallowed if they have acted in bad faith in transferring money from the suspense account to the profit account.⁵⁹ Where an employee may elect to sue his employer's estate on a *quantum meruit* or in damages for the breach of the agreement to compensate for his services in a specified manner the right to interest does not accrue until the choice is made, and if the action is brought on the *quantum meruit* interest runs only from the time the claim is filed against the estate.⁶⁰

⁵⁶ *Loomis v. Gillett*, 75 Conn. 298; *Fitzpatrick v. McGregor*, 133 Ga. 332, 25 L.R.A. (N.S.) 50; *Burke v. Claughton*, 12 D. C. App. Cas. 182; *Momsen v. Atkins*, 105 Wis. 557; *Laycock v. Parker*, 103 Wis. 161; *Healy v. Fallon*, 69 Conn. 228; *Port Royal v. Graham*, 84 Pa. 426; *Jones v. Williams*, 2 Call, 102; *Fasholt v. Reed*, 16 S. & R. 266; *Miller v. Bank*, 5 Whart. 503, 34 Am. Dec. 571; *Rapelie v. Emory*, 1 Dall. 349, 1 L. ed. 170; *Lewis v. Bradford*, 8

Ala. 632; *Perrin v. Parker*, 126 Ill. 201, 9 Am. St. 571, 2 L.R.A. 336; *Goodnow v. Litchfield*, 63 Iowa 275; *Goodnow v. Plumb*, 64 Iowa 672.

⁵⁷ *Corn Exch. Bank v. Nassau Bank*, 91 N. Y. 74, 43 Am. Rep. 655.

⁵⁸ *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa 530, 2 Am. Neg. Rep. 349, 63 Am. St. 399.

⁵⁹ *In re Peruvian G. Co.*, [1894] 3 Ch. 690.

⁶⁰ *Pelton v. Smith*, 50 Wash. 459.

§ 325. **Allowed on money loaned.** Interest on money loaned is recovered not on the ground that it is due the lender and the borrower is in default for not repaying from the moment of receiving it, but on the principle that the use of money is worth the legal rate of interest and therefore money borrowed should bear interest from the date of the loan.⁶¹ This rule applies where cash is loaned by a corporation to one of its stockholders although there may be in the treasury undeclared dividends due the borrower in excess of the sum loaned.⁶² A bailee of money for safe-keeping is chargeable with interest if the owner permits him to use it in his business.⁶³ In Massachusetts if there is no contract to pay interest on money borrowed, and in the absence of usage, fraud, or an earlier demand, interest will be allowed from the date of the writ only.⁶⁴ Money

⁶¹ *Morrow v. Frankish*, 4 Boyce (Del.) 534; *Clark v. Smallwood*, 156 Fed. 409; *Magruder v. Ericson*, 146 Ky. 89; *In re Barr*, 234 Pa. 294; 1 Am. Lead. Cas. 518; *Butler v. Butler*, 10 R. I. 501; *Hodges v. Hodges*, 9 id. 32; *Reid v. Rensselaer G. Factory*, 3 Cow. 393; *Rensselaer G. Factory v. Reid*, 5 id. 589.

In England the rule is not to give interest on money lent. Lord Ellenborough said no case had occurred in fifty-two years in which, upon a simple contract of lending, without any agreement for the payment of the principal at a certain time, or for interest to run immediately, or special circumstances from which a contract for interest was to be inferred, had interest ever been given.

In *Harris v. Benson*, 2 Str. 910, it is said that interest had never been allowed for money lent without a note. In *Robinson v. Bland*, 2 Burr. 1077, it was held that interest was recoverable on money lent from the time when it was agreed to be paid. Some American cases recognize the same doctrine. *Mur-*

ray v. Ware, 1 Bibb 325, 4 Am. Dec. 637; *Bell v. Logan*, 7 J. J. Marsh. 593. But see *Chaney v. Cooke*, 5 T. B. Mon. 248.

⁶² *Seattle T. Co. v. Pitner*, 18 Wash. 401.

⁶³ *Gravenstine's Est.*, 18 Phila. 9.

⁶⁴ *Gay v. Rooke*, 151 Mass. 115, 21 Am. St. 438, 7 L.R.A. 322.

In *Hubbard v. Charlestown Branch R. Co.*, 11 Mete. (Mass.) 124, Shaw, C. J., said: "The only question now raised on this bill of exceptions is whether the defendants were chargeable with interest upon the amount overdrawn by them from the time of such overdraft. The court are of the opinion that the direction of the judge was not correct in point of law, when he instructed the jury that if the amount was actually paid to the defendants then the jury should add interest from the time of the overdraft, without instructing them to take into consideration the other circumstances of the case. If money were fraudulently or wrongfully obtained from a bank, it might be recovered back with interest. *Wood v. Robbins*, 11

voluntarily placed in the hands of a person for an illegal purpose is not loaned, and the person who placed it cannot recover interest until its return is demanded.⁶⁵ There has been some divergence of opinion as to the right of the holder of bonds issued by counties to recover interest thereon after the exercise of the reserved right to declare them due, no means being provided for giving constructive notice of the exercise of such right. One of the federal courts has held that after the publication of notice that the bonds will be paid has been given, the holder without knowledge of such notice may not recover interest.⁶⁶ But the Mississippi court, declining to follow this case, has ruled in favor of the holders of the bonds.⁶⁷

§ 326. **Allowed on money paid.** From the date of the payment of money by one person for the benefit of another, at the latter's express or implied request, the debt is of the same nature as a loan and the right to interest is based upon the same reason. The cases on this point are numerous. Where three persons were interested in a cargo sent abroad, money paid for general average was held to bear interest from the time it was advanced. Interest was deemed demandable in every case where one man had used or been benefited by the application of the money of another, paid under such circumstances as to imply a request. It would be inequitable to

Mass. 504, 6 Am. Dec. 182. Perhaps the evidence might have been properly left to the jury to find whether the money was wrongfully drawn or not. But we think an overdraft on a bank is not necessarily wrongful; it may be made in conformity with some mutual agreement or understanding. A draft on a bank, by one who has no funds, or beyond his funds, and a payment made in pursuance of it, constitute a loan of money; and supposing it to be made without any stipulation for interest at the outset, it does not necessarily draw interest until neglect or refusal of payment, after demand made,

or some other default. * * * In general, when there is a loan without any stipulation to pay interest, and when one has the money of another, having been guilty of no wrong in obtaining it, and no default in returning it, interest is not chargeable." See *Etheridge v. Binney*, 9 Pick. 272; *Dodge v. Perkins*, id. 368; *Hunt v. Nevers*, 15 id. 500, 26 Am. Dec. 616.

⁶⁵ *Baldwin v. Zadig*, 104 Cal. 594; *Parker v. Otis*, 130 Cal. 322.

⁶⁶ *Stewart v. Henry County*, 66 Fed. 127.

⁶⁷ *Hinds County v. National L. Ins. Co.*, 104 Miss. 104, 43 L.R.A. (N.S.) 1146.

allow interest only from the time when the principal was demanded, in such a transaction happening in a foreign country, where it is long before the plaintiff can be advised of his having a claim (this language is not to be regarded as a limitation upon the right to interest in such cases because a demand is not necessary), and longer still before he can know exactly what he is entitled to demand.⁶⁸ It is, therefore, a general rule that interest is recoverable on money paid by one person for the benefit of another at his request, express or implied.⁶⁹ It may be recovered by a surety who pays his principal's debt.⁷⁰ Though a surety discharge a debt bearing a high rate of conventional interest he is not entitled to charge his principal thereafter the same, but only the legal rate,⁷¹ and that rate

⁶⁸ *Sims v. Willing*, 8 S. & R. 103; *Gibbs v. Bryant*, 1 Pick. 118; *Isley v. Jewett*, 2 Mete. (Mass.) 168; *Weeks v. Hasty*, 13 Mass. 218.

⁶⁹ *Pollard v. American F. M. Co.*, 139 Ala. 183 (on taxes paid by mortgagee on mortgaged property); *Hall v. O'Connell*, 52 Ore. 164; *Wright v. Conservative I. Co.*, 49 Ore. 177 (on taxes paid by mortgagee before foreclosure); *Graham v. Merchant*, 43 Ore. 294; *Savings Bank v. Sprunt*, 86 S. C. 8; *Wolfinger v. Thomas*, 22 S. D. 57, 133 Am. St. 900; *Fuhrman v. Power*, 43 Wash. 533 (interest on taxes paid at the legal rate, not at the rate fixed by statute as a penalty upon delinquent taxes); *Harris v. Mercur*, 202 Pa. 318; *Allen v. Fairbanks*, 45 Fed. 445; *Gibbs v. Bryant*, *Weeks v. Hasty*, *supra*; *Liottard v. Graves*, 3 Cai. 226; *Milne v. Rempubliam*, 3 Yeates 102; *Hastie v. De Peyster*, 3 Cai. 190; *Thompson v. Stevens*, 2 N. & McC. 494; *Buckmaster v. Grundy*, 8 Ill. 626; *Aikin v. Peay*, 5 Strobb. 15, 53 Am. Dec. 684; *Blaney v. Hendricks*, 2 W. Black. 761; *Trelawney v. Thomas*, 1 H. Black. 304; *Craven v. Tickell*,

1 Ves. 60; *Chamberlain v. Smith*, 1 Mo. 718; *Gillet v. Van Rensselaer*, 15 N. Y. 397; *Morris v. Allen*, 14 N. J. Eq. 44; *Cobbey v. Knapp*, 28 Neb. 158; *Semi-Tropic Spiritualists' Ass'n v. Johnson*, 163 Cal. 639; *Kastor Adv. Co. v. Elders*, 170 Mo. App. 490.

It may be recovered on an excessive payment made by a receiver after an adjudication finding it to be so. *Harrigan v. Gilchrist*, 121 Wis. 127.

⁷⁰ *Newman v. Newman*, 29 Mo. App. 649; *Sims v. Gondelock*, 7 Rich. 23; *Sollee v. Mengy*, 1 Bailey 620; *Miles v. Bacon*, 4 J. J. Marsh. 458; *Breckinridge v. Taylor*, 5 Dana 114; *Knight v. Mantz*, Ga. Dec. 22 *Winder v. Diffenderfer*, 2 Bland 166.

A statute providing that when a bond, bill or note shall not be paid by the principal according to its terms and shall be paid by the "surety," that the principal shall refund the amount or value with interest thereon, does not include joint debtors. *McGee v. Russell*, 49 Ark. 104.

⁷¹ *McGee v. Russell*, *supra*; *Memphis, etc. R. Co. v. Dow*, 120 U. S.

governs where a tenant in common redeems from a foreclosure against his cotenants.⁷² So a surety obtaining contribution from a co-surety is entitled to interest.⁷³ But if the plaintiff has securities from the principal in his hands for the payment of the debt, which were expected to yield the means therefor, the co-surety is entitled to notice of any deficiency. His liability extends only to a moiety of the deficiency; as that is contingent, both as to time and amount, he should not be charged with interest until he is at least informed that he is a debtor.⁷⁴ Such information would be manifestly essential to make out an equitable title to charge interest; such a notice would place the co-surety at once in default if he did not then pay his contribution; such notice is necessary to establish his consent to accept forbearance. A party paying money for another cannot recover for interest paid which accrued in consequence of his own negligent delay in making the payment.⁷⁵ An agent or factor is also entitled to interest on advances for his principal.⁷⁶ An insurer who pays a loss to insured and takes an assignment of the claim for damages against one who negligently destroyed the property insured may recover interest on the sum paid,⁷⁷ as may an insurer who has paid a loss on a policy which would have been canceled but for the negligence of a third party.⁷⁸ A taxpayer who has paid more than his share of the public expense is entitled to interest on the excess.⁷⁹

287, 30 L. ed. 595; *Bushong v. Taylor*, 84 Mo. 660; *Newman v. Newman*, *supra*; *Smith v. Johnson*, 23 Cal. 63. See *Fisk v. Brunette*, 30 Wis. 102.

⁷² *Wettlauffer v. Ames*, 133 Mich. 201, 103 Am. St. 449.

⁷³ *Ilseley v. Jewett*, 2 Mete. (Mass.) 168; *Aikin v. Peay*, 5 Strobb. 15, 53 Am. Dec. 684.

⁷⁴ *Goodloe v. Clay*, 6 B. Mon. 236.

⁷⁵ *Somers v. Wright*, 115 Mass. 292.

⁷⁶ *Taylor v. Knox*, 1 Dana 391; *Cheeseborough v. Hunter*, 1 Hill (S. C.) 400; *Smetz v. Kennedy*, *Riley*

218; *Walters v. McGirt*, 8 Rich. 287; *Howard v. Behn*, 27 Ga. 174.

A factor who guaranties his principal the cost of goods consigned and who furnishes the principal money to secure part payment of their value is not entitled to interest thereon; but if there is guaranty, and the advancement is made as a loan, the factor will be entitled to interest. *Wittkowski v. Harris*, 64 Fed. 712.

⁷⁷ *Texarkana, etc. R. Co. v. Hartford Ins. Co.*, 17 Tex. Civ. App. 498.

⁷⁸ *Providence W. Ins. Co. v. Western U. Tel. Co.*, 153 Ill. App. 118.

⁷⁹ *Boston & M. R. v. State*, 63

§ 327. **Same subject.** Where one of two parties, having contiguous tenements, refused to unite with the other in erecting a new party-wall or to contribute anything to the expense, he denying the right of the plaintiff to prostrate the old wall or to charge him with any portion of the cost of the new, the court held him liable; the expense was an equitable charge on the wall and on the owner for the time being. The question being raised whether the plaintiff was entitled to interest and from what time, the chancellor said it was a case of money expended for the use of the defendant and upon every sound principle the plaintiff ought to receive interest after a moiety of the joint expense had been demanded and refused; adding that it is the settled law of the state that money received or advanced for the use of another carries interest after a default in payment, and it is a very reasonable and just rule. Interest was claimed from the time of the advance of the money to build the wall; it was allowed from the date of the demand and refusal on the general principle that a party is liable for interest after a default; and by implication it was considered that the plaintiff was not entitled, on any other principle, to interest from the date when it had been advanced.⁸⁰ The defendant could not be considered as in default until demand; he was under no duty to repay moneys expended by the plaintiff against his will for the common benefit until informed of the amount and an opportunity thus given to discharge the indebtedness. The principal claim was not one which the debtor acknowledged; it was, however, maintained against him;⁸¹ but

N. H. 571; *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 336, 348; *Chicago v. Northwestern Mut. L. Ins. Co.*, 120 Ill. App. 497 (payment under protest of unjust water rates).

⁸⁰ *Campbell v. Mesier*, 6 Johns. Ch. 21.

In such a case interest is due from the date of default in paying the sum due under the contract, the party against whom it is claimed having bound himself to

pay one-half the value of the wall at the time he used it. *Huston v. de Zeng*, 78 Mo. App. 522.

A mortgagor is not liable for interest on advance payments made by the mortgagee to his counsel on account of services to be rendered in the foreclosure proceedings. *Pollard v. American F. M. Co.*, 139 Ala. 183.

⁸¹ *Campbell v. Mesier*, 4 Johns. Ch. 334, 8 Am. Dec. 570.

subsequently the doctrine on which it was founded was doubted and overruled.⁸² Senator Colden,⁸³ referring to this case, said: "The circumstances of that case were very peculiar. The defendant was liable to contribute to the rebuilding of a party-wall. He not only refused to contribute, but forbade the prostration of the old wall. The complainant erected a new one at a much greater expense than the re-establishment of the old one required. It could not be ascertained till the new wall was appraised and it was estimated what it would have cost to restore the old wall how much the defendant ought to have paid. When the appraisement and estimate were made and the extent of the defendant's liability was thereby settled the complainant demanded the amount. The chancellor decided that the defendant should pay interest from that time. Here was a case very different from an advance of specific sums of money. It is true the demand is considered in the court of chancery as a demand for money advanced; but it was more like a demand for unliquidated damages, which never carries interest. The defendant could not have discharged the principal till after the appraisement and estimate had settled how much he was liable to contribute to the party-wall."⁸⁴

⁸² *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Sherred v. Cisco*, 4 Sandf. 480.

⁸³ In *Reusselaer G. Factory v. Reid*, 5 Cow. 598.

⁸⁴ The case of *Reusselaer G. Factory v. Reid* raised the question whether cash advances made by an agent, charged in an account not reported to his principal, but where the circumstances indicated that the latter must have known that the advances were made, should bear interest. The case was very thoroughly considered. Senator Colden, in the prevailing final opinion, said generally of the subject of interest: "As often as the question of interest has been before a court, the judges seem to have considered it as depending on general equitable princi-

ples; and, in most instances, to have decided each case in reference to its particular circumstances, without attempting to give any rule which might be generally applicable." And again: "However it may be with respect to money lent, or as to money had and received, or in regard to merchandise sold and delivered; or, however it may be where advances are made in pursuance of an express agreement in which nothing is said about interest, I think the above authorities will admit of no other conclusion than that it is now a well established general rule of law, that where a person advances money for the use of another, under an implied authority, he who makes the advance is entitled to interest from

Interest may likewise be allowed on money advanced by trustees for the benefit of the trust. The law requires of trustees diligence and good faith; and they will not be entitled to interest on advances made necessary by their defaults. As a general rule an administrator is not entitled to interest on money advanced by him beyond the funds of the estate in his hands because it is in his power to put himself in cash from the estate and it is not his duty to advance his own funds for its benefit.⁸⁵ If, however, such special circumstances exist as to justify advances by him and he makes them judiciously he will be entitled to interest.⁸⁶ Where the advance by an administrator or other like trustee is meritorious, or where an executor for the benefit of the estate has paid his own money for taxes, necessary expenses, repairs, and debts which carried interest he is entitled to interest.⁸⁷ A trustee is not obliged, when the exigencies of his trust require advances, to raise money at a loss to himself. When property is in his hands as security and he is restricted by its nature and situation from selling it, and, to keep it in good order, must borrow money he may resort to banks or other usual modes of raising it upon his credit. And in such cases he is entitled to full indemnity.⁸⁸ But the right of a trustee to

the time it is made." In the exhaustive dissenting opinion of Senator Spencer he says: "Probably the rule of easiest application would be this: where money has been lent, advanced or expended by request, and under an agreement to pay at a specific time, or where it has been had and received under a like agreement, then the allowance of interest may be safely referred to the principle of an implied contract to pay interest on default; and so, also, where the money is not to be refunded at a particular time, but a default arises from a demand or notice, the same principle will apply. But where no time of payment is fixed, and where the duty to pay arises from the relative situation of the parties, it seems it should be

referred to a jury to determine whether damages shall be given by the allowance of interest."

⁸⁵ *Storer v. Storer*, 9 Mass. 37; *Evarts v. Nason's Est.*, 11 Vt. 122.

⁸⁶ *Rix v. Smith*, 8 Vt. 365.

⁸⁷ *Mann v. Lawrence*, 3 Bradf. Sur. 424; *Liddell v. McVickar*, 11 N. J. L. 44, 19 Am. Dec. 369; *Jennison v. Hapgood*, 10 Pick. 79; *Hayward v. Ellis*, 13 Pick. 272. See *Aldridge v. McClelland*, 36 N. J. Eq. 288.

⁸⁸ In *Bärrell v. Joy*, 16 Mass. 221, compound interest was allowed a trustee under the circumstances stated in the text, as a mode of compensation for the interest he was obliged to pay to provide himself with the necessary means to keep the trust property in good order.

interest will cease whenever the funds of the estate are sufficient to pay the debt.⁸⁹

The general rule that interest can be allowed only by virtue of contract, express or implied, or by virtue of some statute, or on account of the default of a party liable to pay when it is allowed as damages for the default has some exceptions, at least in courts of equity. Where an instrument of compromise was made under the authority of a court by the receiver of an insolvent bank with its trustees, who had been sued for waste and mismanagement of its assets, which instrument transferred to the trustees certain real estate of the bank in consideration of their paying a certain percentage of its debts, gave them a power of sale and provided that they should be reimbursed for their outlay before accounting to the receiver for any surplus, they were entitled on such accounting to interest on advances made for the debts of the bank and upon their expenses incurred in the management of the property before a sale of it was made by them, although the instrument was silent as to interest. Such allowance was justified by the nature of the transaction or by usage and custom, and was a proper exercise of equitable discretion.⁹⁰

§ 328. Quantum meruit claim to interest between vendor and purchaser. Where a purchaser obtains possession of the land purchased while the contract is pending such possession may oblige him to pay interest when otherwise he would be entitled to retain the purchase-money without being so liable. Before the time fixed for payment he is not liable to pay interest unless it is required by the contract. It frequently happens, however, that when the time arrives for payment the seller is not prepared to fulfill the concurrent condition of making title; on that account the purchaser would be under no obligation to part with his money; and being in no default, interest could not be

In a note the reporter says: "The trustee in this case could only claim an indemnity, and ought not to be allowed compound interest unless he could show that he was in the discharge of his duty obliged to pay it." *Evertson v. Tappen*, 5

Johns. Ch. 517. See *Lessee of Dilworth v. Sinderling*, 1 *Bin.* 494.

⁸⁹ *Sebring v. Keith*, 2 *Hill (S. C.)* 340.

⁹⁰ *Woerz v. Schumacher*, 161 *N. Y.* 530, 37 *App. Div. (N. Y.)* 374.

exacted; but if he has taken and enjoys the possession while the vendor is precluded from demanding the money on account of the state of the title and he finally makes title so as to have a right to performance of the contract of purchase, he will be entitled to interest on the purchase-money if the purchaser had possession of the estate.⁹¹ This rule, however, is not absolute; it rests upon equitable grounds, and is subject to the modifying effect of other equitable circumstances for the consideration of a chancellor in equity or of a jury at law.⁹² Where the con-

⁹¹ Minard v. Beans, 64 Pa. 411; Lang v. Moole, 31 N. J. Eq. 413; Breckenridge v. Hoke, 4 Bibb 272; Cleveland v. Burrill, 25 Barb. 532; Cullum v. Branch Bank, 4 Ala. 21, 37 Am. Dec. 425; Selden v. James, 6 Rand. 465; Rutledge v. Smith, 1 McCord Ch. 399; Boyce v. Pritchett, 6 Dana 231; Hepburn v. Dunlop, 1 Wheat. 179; Brockenbrough v. Blythe, 3 Leigh 619; Steenrod v. Railroad Co., 27 W. Va. 1. See vol. 1, Warvelle on Vendors (2d ed.), § 180.

McKenna v. Sterrett, 6 Watts 162, was an action for purchase-money on tender of title; purchaser in possession. Rogers, J.: "At the time of the contract both parties were aware that Sterrett had no title; notwithstanding which McKenna was to take immediate possession, as appears from that clause which stipulates that if McKenna is deprived of the property Sterrett will pay him for all the improvements, either in buildings or otherwise. With a full knowledge of all the facts Sterrett agrees to sell McKenna ten acres of land, with the allowance, for \$45 per acre, and Sterrett agrees to give him a clear title. The payments are to be one-half in hand, *as soon as he makes him a right for the ten acres of land*, and the remaining half in three yearly payments. Now, not-

Suth. Dam. Vol. I.—65.

ing can be clearer than that until tender of title the vendor is not entitled to payment of the purchase-money; and it is a general principle that interest is not demandable of right until the debt is due, except in pursuance of the terms of an express contract; and no contract is here alleged. But the argument is that the vendor took possession, and as he enjoys the profits he ought to pay interest. And this is true in ordinary cases, where a time is fixed for the payment of the purchase-money; but the right to take immediate possession was part of the contract; and the vendees having taken possession cannot affect the construction of that clause in the agreement on which the debt is only recoverable after a clear title is made. A different construction would render the vendor careless of obtaining and tendering a title, as he would be sure of legal interest from the time the vendee took possession. Why this extraordinary delay took place we have not been informed; but there is nothing which leads us to believe that it arose from the fault of the vendee. The court are therefore of opinion that interest is only demandable from the time of the tender of the title." See Beeson v. Elliott, 1 Del. Ch. 368.

⁹² Letcher v. Woodson, 1 Brock.

tract gave the vendee possession and placed on the vendor certain duties which were conditions precedent to the right to receive the purchase-money, there being no stipulation respecting interest, and mutual advantage resulted from the immediate possession given the vendee, and the delay in completing the sale was due solely to the wilful and excuseless conduct of the vendor, his right to interest was denied in a suit for the specific performance of the contract.⁹³ A vendee may avoid liability

212; *Brockenbrough v. Blythe*, 3 Leigh 619. See *Davis v. Parker*, 14 Allen 104.

In *Dias v. Glover*, Hoff. Ch. 71, it was held that though the general rule is to allow interest from the time when the contract should have been fulfilled and to give the purchaser the rents and profits, yet if the vendor caused the delay and interest exceeded the rent the purchaser should be permitted to elect to pay the interest or relinquish his right to the rents.

In *Selleck v. Tallman*, 11 Daly 141, judgment was given the plaintiff for the specific performance of a contract to sell land he had bargained for for the purpose of making improvements upon it. No rent or other profits were derivable from it in the condition it was in. He was kept out of possession and sustained large damages which could not be compensated. The vendor was charged with interest and taxes accruing prior to the delivery of his deed.

⁹³ *Atehison, etc. R. Co. v. Chicago, etc. R. Co.*, 162 Ill. 632, 654, 35 L.R.A. 167. In this case the right to interest in suits for specific performance was thus expounded: First, where the contract contains no provision as to possession or interest, if the vendee takes possession he must pay interest from that date. *Calcraft v. Roebuck*, 1 Ves. 221;

Fludyer v. Cocker, 12 id. 25; *Powell v. Martyr*, 8 id. 146; *Ballard v. Shutt*, 15 Ch. Div. 122; *Attorney-General v. Christ Church*, 13 Sim. Ch. 214; *Rytledge v. Smith*, 1 MeCord 231; *Wilson v. Herbert*, 76 Md. 489; *Boyle v. Roward*, 3 Desauss. 555; *Bostwick v. Beach*, 103 N. Y. 414; *Phillips v. South Park Com'rs*, 119 Ill. 626; *Steenrod v. Railroad Co.*, 27 W. Va. 1; *Stevenson v. Maxwell*, 2 N. Y. 408; *Binks v. Lord Rokeby*, 2 Swanst. 223; *Gibson v. Clark*, 1 V. & B. 500; *Rhys v. Dare Valley R. Co.*, L. R. 19 Eq. 93; *Lang v. Moole*, 31 N. J. Eq. 413; *Cleveland v. Burrill*, 25 Barb. 532; *Huntley v. Lyons*, 5 Munf. 342, 7 Am. Dec. 685; *Monroe v. Taylor*, 8 Hare 51; *Phillips v. Silvester*, L. R. 8 Ch. 173; *Railroad v. Gesner*, 20 Pa. 240; *Pomeroy on Contracts*, sec. 430. Second—where the contract contains no provision as to possession, but provides a date for performance and for the payment of interest thereafter, if either party is in wilful default equity will refuse to enforce the terms of the agreement for the benefit of the defaulting party. *De Visme v. De Visme*, 1 Maen. & G. 336; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477, 75 id. 271; *Jones v. Mudd*, 4 Russ. Ch. 122; *Monk v. Huskinson*, id. 122, note a; *Leggett v. Metropolitan R. Co.*, L. R. 5 Ch. 716; *Lofland v. Maull*, 1 Del. Ch. 359; *Riley v.*

for interest if he is unable to pay on account of the default of the vendor by setting aside the purchase-money and notifying the latter that it is awaiting his acceptance.⁹⁴ A vendor who conveys wild land to which he has no title cannot claim interest on the purchase price on the subsequent accrual of title by the act of a third party for any time anterior to that event, though the vendee was in possession, the benefits resulting to him therefrom being produced by his own improvements.⁹⁵

Where there has been wilful and vexatious delay by the fault or gross laches of the vendor, in consequence of which the purchase-money has lain idle and unproductive, it may be left to the jury to say whether he shall receive interest.⁹⁶ On the rescission of a contract of sale where the vendee has been in possession, in the absence of proof to the contrary, his use of the land will in equity be deemed equivalent to that of the price paid and interest ought not to be given.⁹⁷ So where the vendor in a verbal contract refuses to perform it the vendee is entitled, in addition to the purchase-money paid, to receive interest thereon only from the time the former asserts his rights.⁹⁸

Streetfield, 34 Ch. Div. 388; *Tewart v. Lawson*, 3 Sm. & G. 307; *King v. Ruckman*, 24 N. J. Eq. 556. Third—where the contract provides a time for performance, with a provision for prior possession and an express agreement for interest from a day named, and the vendor merely neglects or is unable to perform, in such case the vendee shall have the rents and profits and pay interest from the time fixed by the contract. *Birch v. Joy*, 3 H. of L. Cas. 565; *Brockenbrough v. Blythe*, 3 Leigh 619; *McKayer v. Melvin*, 1 Ired. Eq. 73; *Baxter v. Brand*, 6 Dana 296; *Cowper v. Bakewell*, 13 Beav. 421.

⁹⁴ *Steenrod v. Railroad Co.*, 27 W. Va. 1; *Bostwick v. Beach*, 103 N. Y. 414; *Calcraft v. Roebuck*, 1 Ves. 221; *Roberts v. Massay*, 13 id. 561; *Kershaw v. Kershaw*, L. R. 9 Eq. 56.

If a note for the purchase price of land is payable at a designated bank, and the maker is ready at the agreed time and place to pay it, but is unable to do so because the note is not in the bank's possession, he is not liable for interest subsequently accruing unless he realized it from the use of the money. *Cheney v. Libby*, 134 U. S. 68, 33 L. ed. 818.

⁹⁵ *Toms v. Boyes*, 59 Mich. 386.

⁹⁶ *McCormick v. Crall*, 6 Watts 207; *Kester v. Rockell*, 2 W. & S. 365; *Stevenson v. Maxwell*, 2 Sandf. Ch. 274, 2 N. Y. 408.

⁹⁷ *Talbot v. Seabee*, 1 Dana 56; *Wickliffe v. Clay*, id. 585.

The vendee will be allowed interest only from the time he gave up the possession. *Ankeny v. Clark*, 1 Wash. 549.

⁹⁸ *Fox v. Longly*, 1 A. K. Marsh. 388.

Whether the vendee be entitled to have the consideration refunded upon rescission of the sale or to damages on the basis of the sum paid for a total or partial breach of the covenants for title, interest will be withheld for so much of the time as he enjoyed the possession without liability for *mesne* profits.⁹⁹ The doctrine is that possession is equivalent to interest on the consideration; and where the bargain is given up or the title fails and the purchase-money must be refunded interest will not be added in either case to a purchaser who has had possession unless there is a liability to the superior owner for rents and profits, and then only to the extent of that liability.¹ The reason assigned is if the occupant shall recover interest on the value of the land when he has obtained the equivalent of that interest in the use thereof he will have received and his vendor will have lost more than the value of what was given for it; and

⁹⁹ *Staats v. Ten Eyck*, 3 Cai. 111, 2 Am. Dec. 254; *Pitcher v. Livingston*, 4 Johns. 1, 4 Am. Dec. 229; *Bennet v. Jenkins*, 13 Johns. 50; *Baldwin v. Munn*, 2 Wend. 399, 20 Am. Dec. 627; *Dimmick v. Lockwood*, 10 Wend. 142; *Caulkins v. Harris*, 9 Johns. 324; *Kane v. Sanger*, 14 id. 89; *Baxter v. Ryerss*, 13 Barb. 267; *Flint v. Steadman*, 36 Vt. 216; *Rich v. Johnson*, 2 Pin. 88, 52 Am. Dec. 144; *Noonan v. Ilsley*, 21 Wis. 138; *Patterson v. Stewart*, 6 W. & S. 527, 40 Am. Dec. 586; *Fernander v. Dunn*, 19 Ga. 497, 65 Am. Dec. 607; *Harding v. Larkin*, 41 Ill. 413; *Thompson v. Jones*, 11 B. Mon. 365; *Hale v. New Orleans*, 13 La. Ann. 499; *Bach v. Miller*, 16 id. 44; *Clark v. Parr*, 14 Ohio, 118, 45 Am. Dec. 529; *Whitlock v. Crew*, 28 Ga. 289; *Collier v. Cowger*, 52 Ark. 322.

¹ *Point Street I. Works v. Turner*, 14 R. I. 122; *Crockett v. Gray*, 39 Kan. 659; *Ware v. Lippincott*, 45 N. J. Eq. 320; *Whitlock v. Crew*, 28 Ga. 289.

If a *bona fide* purchaser in possession is allowed the value of his

improvements as against the owners of the land he will not be entitled to interest thereon. *Boykin v. Annum*, 28 S. C. 486, 13 Am. St. 698.

Where the purchaser of chattels gave his note to the seller for part of the price and a chattel mortgage to a third party who loaned him money to make a cash payment, the understanding being that the sale might be rescinded within sixty days, the seller was not liable to such third party for interest during the time the other retained possession. *Kildea v. Washington L. Co.*, 22 Wash. 385.

Where the son and one of the executors of decedent had bought from the latter a farm on credit, and an agreement was made between the former and the other executor and others interested in the estate for a return of the farm on condition that the value of the improvements should be paid the purchaser before making distribution of the estate, the latter was denied interest on their value because for years he had, as executor, neglected

as the occupant is liable to the evictor for *mesne* profits for the period of limitation preceding the eviction, for that period he should not be entitled to interest on the consideration which he paid for the land.² This doctrine is further illustrated by the case of a tenant by the curtesy conveying in fee with warranty. The grantee has been held entitled to recover from his estate on the covenant only the purchase-money, with interest from the time of his death.³ So where an eviction is only by the claim of a tenant in dower the measure of damages is the present value of an annuity equal to interest at the legal rate on one-third of the consideration money for the time the tenant in dower has a probable expectation of life according to approved tables of life annuities.⁴ The purchaser must sometimes submit to equitable terms when in default in order to obtain relief by specific performance. In such cases, in order fully to indemnify the seller, the court, according to the circumstances, may decree a larger amount of interest than such vendor could recover as plaintiff, as by compounding the interest with rests at short intervals.⁵ When a vendee has a right to recover a deposit of a part or the whole of the purchase-money because of the vendor's inability to make title he can also recover interest from the time it was paid though there was no express agreement to pay it,⁶ or after a demand for the return of the

to pay the interest or debt, it not appearing that he could not have done so. *Sutton's Est.*, 13 Pa. Super. Ct. 492.

² *Cogswell v. Lyon*, 3 J. J. Marsh. 40. In this case the deed was avoided, although the entire consideration had been paid, on the ground of fraud on creditors, and the court say: "As a general proposition, it is plainly just and reasonable that the vendee, after losing the benefit of his purchase, should be restored to the price which he gave, and its annual interest. But if he shall have already received the interest or its equivalent in the enjoyment of the profits of the land, he has no

right, in conscience, to compel the vendor to pay it again. And surely, if he must have the interest, the vendor should have rents. But in equity the interest on the price and the use of the land are considered equivalent, and, therefore, there need be no account of the profits, as they should be set off against the interest." See *Bartlett v. Blanton*, 4 J. J. Marsh. 426.

³ *House v. House*, 10 Paige 158.

⁴ *Wager v. Schnyder*, 1 Wend. 533.

⁵ *Cleveland v. Burrill*, 25 Barb. 532; *Morris v. Hoyt*, 11 Mich. 10.

⁶ *Flinn v. Barber*, 64 Ala. 200; *Bennett v. Latham*, 18 Tex. Civ. App. 403.

deposit.⁷ One who buys land under a decree stipulating that deferred payments are to bear interest is liable for interest though he gave no notes and understood that the price was to be taken out of his share of the estate.⁸ If the plaintiff in an action to recover money paid demands that it be deposited in court subject to his order and it is so deposited, and, pursuant to his motion, it is directed to remain on deposit the money is, in legal effect, paid into court and the plaintiff can recover no greater rate of interest than it earned.⁹ On the breach of an oral agreement to convey or devise real estate to one who has made advances on the faith thereof there may be a recovery of simple interest from the dates of the several advances.¹⁰

§ 329. **Interest allowed from time when money ought to be paid.** Interest is imposed by law as damages for not discharging a debt when it ought to be paid. In this country the principle has long been settled that if a debt ought to be paid at a particular time and is not then paid through the default of the debtor, compensation in damages equal to the value of money, which is the legal interest upon it, shall be paid during such time as the party is in default.¹¹ The important practical in-

⁷ *Hellman v. Merz*, 112 Cal. 661.

⁸ *McNairy v. McNairy*, 1 Tenn. Cas. 329.

⁹ *Warren v. Banning*, 140 N. Y. 227.

¹⁰ *Morrissey v. Morrissey*, 180 Mass. 480.

¹¹ *Blair v. Clayton E. Co.* (Del.) 77 Atl. 740; *Harnish v. Miles*, 111 Ill. App. 105 (interest bearing note indorsed "no interest to be charged" draws interest after maturity); *Chicago & S. R. Co. v. McEwen*, 35 Ind. App. 251; *Morrow v. Pike County*, 189 Mo. 610; *Leggat v. Gerrick*, 35 Mont. 91, 8 L.R.A.(N.S.) 1238; *Campbell v. Kimball*, 87 Neb. 309; *Dame v. Wood*, 75 N. H. 38; (see s. c. 73 N. H. 222, 70 L.R.A. 133); *Sieger v. Sieger*, 209 Pa. 65 (as between tenants in common); *Johnston v.*

Green, 102 Va. 373; *Mann v. Roberts*, 126 Wis. 142; *Larson v. Anderson*, 122 Minn. 39; *Empire State S. Co. v. Moran*, 71 Wash. 171; *Bennett v. Federal C. & C. Co.*, 70 W. Va. 456, 40 L.R.A.(N.S.) 588; *Padley v. Catterlin*, 64 Mo. App. 629, citing the text; *McCuish v. Smail*, 13 S. D. 397, citing the text; 1 Am. Lead. Cases, 498; *Day v. Brett*, 6 Johns. 24; *Hunt v. Juks*, 1 Hayw. 173, 1 Am. Dec. 555; *Coughlin v. McElroy*, 74 Conn. 397; *Leffel v. Piatt*, 126 Mich. 443; *Sullivan v. Nicolin*, 113 Iowa 76, 83; *Mullally v. Dingman*, 62 Neb. 702; *Happy v. Prickett*, 24 Wash. 290; *Broughton v. Mitchell*, 64 Ala. 210; *Flinn v. Barber*, id. 200; *Milton v. Blackshear*, 8 Fla. 161; *Bishop Hill Colony v. Edgerton*, 26 Ill. 54; *Cheek v. Waldrum*, 25 Ala. 155; *Purdy v.*

quiry, therefore, in each case in which interest is in question is, what is the date at which this legal duty to pay, as an absolute present duty, arose. This date does not always coincide with that at which the demand is legally due and suable. Where a sum certain is payable at a particular time, either immediately after the debt is contracted or in the future, the debtor should pay at that time; otherwise, he is at once in default and liable for interest.¹² In such cases it is his duty to pay at the

Philips, 11 N. Y. 406; *People v. New York*, 5 Cow. 331; *Dodge v. Perkins*, 9 Pick. 368; *Williams v. Sherman*, 7 Wend. 109; *Ten Eyck v. Houghtaling*, 12 How. Pr. 523; *Van Rensselaer v. Jewett*, 2 N. Y. 135; *Maltman v. Williamson*, 69 Ill. 423; *Swett v. Hooper*, 62 Me. 54; *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267; *French v. French*, 126 Mass. 360; *McMahon v. New York*, etc. R. Co., 20 N. Y. 463.

In the last case the court held that interest may be charged on the ground of the debtor's default although the amount of the demand neither has been nor can readily be ascertained.

A debtor is not excused from paying when the money is due where the contract under which it is claimed fixes the price of the work, though the amount of material furnished under it was uncertain and the claim was disputed in good faith. *City of Louisville v. Henderson*, 11 Ky. L. Rep. 796.

It is not cause for excusing the debtor that the parties disagreed as to the principal sum due and that their respective contentions were judicially disallowed. It was the debtor's duty to ascertain the amount of his obligation. *Toronto v. Toronto R. Co.*, 7 Ont. L. R. 78, ruled under sec. 113 of the Judicature Act.

Where the evidence shows a demand for payment within the required period but fails to show on what particular day the demand was made interest will run from the last day of such period. *Arizona Life Ins. Co. v. Lindell*, 15 Ariz. 471.

¹² *Cummins' Est.*, 143 Cal. 525; *Mullenary v. Burton*, 3 Cal. App. 263; *Denver P. B. Co. v. Young*, 49 Colo. 498; *Douley v. Bailey*, 48 Colo. 373; *Doyle v. Nesting*, 37 Colo. 522; *Parsons v. Utica C. Mfg. Co.*, 80 Conn. 58; *Parker v. Gortatowsky*, 129 Ga. 623; *Cicero v. Hall*, 240 Ill. 160; *Concord A. H. Co. v. O'Brien*, 228 Ill. 360; *Bauer v. Hindley*, 22 Ill. 319; *Goodall v. Eldorado*, etc. R. Co., 143 Ill. App. 328; *Bauer v. Jerohman*, 124 Ill. App. 151; *Sieberts v. Spangler*, 140 Iowa 236; *Flynn v. American B. & T. Co.*, 104 Me. 141, 19 L.R.A.(N.S.) 428, 129 Am. St. 378; *Bell v. Jordan*, 102 Me. 67; *Sampson v. Commonwealth*, 202 Mass. 326; *Childs v. Krey*, 199 Mass. 352; *Rowland v. Maddock*, 183 Mass. 360; *Union T. Co. v. Preston Nat. Bank*, 144 Mich. 106; *Bank Com'rs v. New Hampshire B. Co.*, 74 N. H. 292; *People v. Freeman*, 110 App. Div. (N. Y.) 605; *Shaul v. Board of Education*, 108 App. Div. (N. Y.) 19; *Helene v. Corn Exch. Bank*, 96 App. Div. (N. Y.) 392; *Morrison Mfg. Co. v. Fargo S.*

very time when the debt is legally and technically due. Numerous cases applying this rule will be found in the notes. It

& T. Co., 16 N. D. 256; Wallace's Est., 13 Pa. Dist. 155; Stude v. Koehler (Tex. Civ. App.), 138 S. W. 193; Guffey P. Co. v. Hamill, 42 Tex. Civ. App. 196; Dunnett v. Gibson, 78 Vt. 439; Sun v. Makainai, 14 Hawaii 495; Enslow v. Ennis, 155 Iowa 266; Grayson v. Marshall (Tex. Civ. App.), 145 S. W. 1034; Butler-H. Co. v. Virginia R. Co., 113 Va. 28; Allen v. Central Counties L. Co., 21 Cal. App. 163; Diamond M. Co. v. Silberstein, 165 Cal. 282; Meyer v. Buckley, 22 Cal. App. 96; Council v. Hixon, 11 Ga. App. 818; Taylor v. Scott, 178 Ill. App. 487; Smolikowski v. Laibe, 170 Ill. App. 181; Myers v. Bender, 46 Mont. 497; Siebert v. Dunn, 157 App. Div. (N. Y.) 387; Martin v. Ede, 103 Cal. 157; Macomber v. Bigelow, 126 Cal. 9; Hines v. Miller, 126 Cal. 683; Ryland v. Heney, 130 Cal. 426; Healy v. Fallon, 69 Conn. 228; Hartshorn v. Byrne, 147 Ill. 418; Luetgert v. Volker, 153 Ill. 385; Crumrine v. Estate of Crumrine, 14 Ind. App. 641; Willey v. St. Charles H. Co., 52 La. Ann. 1581, 1602; Donahue v. Partridge, 160 Mass. 336; Hazelet v. Holt County, 51 Neb. 716; Myers v. Bolton, 157 N. Y. 393; Haight v. Price, 10 App. Div. (N. Y.) 470; Kelley v. Phoenix Nat. Bank, 17 App. Div. N. Y. 496; Irlbacker v. Roth, 25 App. Div. (N. Y.) 290; Wasatch M. Co. v. Crescent M. Co., 7 Utah 8; Land, L. & L. Co. v. Oneida County, 83 Wis. 649; Laycock v. Parker, 103 Wis. 161; Richmond & I. C. Co. v. Richmond, etc. R. Co., 15 C. C. A. 289, 68 Fed. 105, 34 L.R.A. 625; District of Columbia v. Metropolitan R. Co., 8 D. C. App. Cas. 322; Hawkins v. Citizens' Inv. Co.,

38 Ore. 544; McCullough v. Newlove, 27 Ont. 627; Elkin v. Moore, 6 B. Mon. 462; Rensselaer G. Factory v. Reid, 5 Cow. 587, 611; Robinson v. Bland, 2 Burr. 1086; Farquhar v. Morris, 7 T. R. 124; Purdy v. Phillips, 11 N. Y. 406; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Peoria M. & F. Ins. Co. v. Lewis, 18 Ill. 553; Hunt v. Jucks, 1 Hayw. 173, 1 Am. Dec. 555; Milton v. Blackshear, 8 Fla. 161; Wenman v. Mohawk Ins. Co., 13 Wend. 267; Cheek v. Waldrum, 25 Ala. 152; Bishop Hill Colony v. Edgerton, 26 Ill. 54; Royal v. Miller, 3 Dana 55-58; Newlan v. Shafer, 38 Ill. 379; Putnam v. Lewis, 8 Johns. 389.

Where money becomes payable on the happening of a contingency interest will be allowed only from such time. *Bellevue Mills Co. v. Baltimore Trust Co.*, 214 Fed. 817.

Liability for interest on the price bid for land at an official sale continues until the arrival of the time fixed by the court for the payment thereof, notwithstanding an intermediate confirmation of the sale by the orphans' court. *Ross's Est.*, 18 Pa. Dist. 429.

The time for making payments being fixed in thirty-three days after completion of a contract is not extended by a clause therein making the contractor liable for damages occasioned by his work and the fact that actions were pending against him to recover damages so caused. *Donahue v. Partridge*, *supra*.

A contract by a city to pay for street paving when assessments shall be collected, and if that is not done at the end of two years the amount then unpaid to become due, does not carry interest prior to the end of

is upon the ground stated that statutes which give a preference to one class of creditors over another in the distribution of an

two years. *Booth v. Pittsburgh*, 154 Pa. 482.

Interest is not allowed with the same liberality in England as in this country. In *Mayne on Damages* (8th ed.), p. 190 et seq., it is said: "Formerly it was thought, where a sum of money was agreed to be paid on a particular day, that on default interest from that day might be recovered without any express or implied contract to that effect. *Blancy v. Hendricks*, 2 W. Bl. 761, 3 Wils. 205; *Shipley v. Hammond*, 5 Esp. 114; *Chalie v. Duke of York*, 6 Esp. 45; *De Havilland v. Bower Bank*, 1 Camp. 50; *Mountford v. Willes*, 2 B. & P. 337. But this doctrine has now been overruled. *Gordon v. Swan*, 12 East 419; *Higgins v. Sargent*, 8 B. & C. 348; *Page v. Newman*, 9 B. & C. 378; *Foster v. Weston*, 6 Bing. 709; *Cook v. Fowler*, L. R. 7 H. of L. 27, 43 L. J. (Ch.) 855. See the cases reviewed in London, etc. R. Co. v. South Eastern R. Co., [1893] App. Cas. 429. It has, however, been always held that where, by an award, money is made payable on a certain day, interest ought to be allowed from that day, if payment was demanded at the place appointed. *Pinhorn v. Tuckington*, 3 Camp. 468; *Churche v. Stringer*, 2 B. & Ad. 777; *Johnson v. Durant*, 4 C. & P. 327. I cannot, on principle, explain this exception. Many apparent exceptions to the rule that interest is only recoverable in the cases just mentioned may be explained by distinguishing between interest recovered as part of the debt and interest recovered as damages for its detention. For instance, interest on a deposit may be re-

covered, if laid as special damage in an action for breach of an agreement to sell an estate. *De Bernales v. Wood*, 3 Camp. 258; *Farquhar v. Farley*, 7 Taunt. 592. So it may be allowed as damages in an action on a mortgage deed after the day of default (*Dickenson v. Harrison*, 4 Price 282; *Atkinson v. Jones*, 2 A. & E. 439; *Price v. Great Western R. Co.*, 16 M. & W. 244); or upon a contract to pay money upon a particular day (*Watkins v. Morgan*, 6 C. & P. 661); or upon a covenant to indemnify a surety. *Petre v. Duncombe*, 20 L. J. (Q. B.) 242, 2 Lown., M. & P. 107. Where a written security is given for the payment of money on a particular day, with interest up to that day at a fixed rate, a claim for subsequent interest would be a claim for damages at the discretion of the tribunal before which the demand is made, and not for interest due as a matter of law. The former rate might, but need not be, adopted in assessing the damages. *Cook v. Fowler*, L. R. 7 H. of L. 27-32. Where a mortgage deed provided for interest at ten per cent. up to the time fixed for payment, but contained no covenant for interest after that date the court held that subsequent interest could only be awarded as damages, and refused to grant more than five per cent. In *re Roberts*, 14 Ch. Div. 49; *Mellersh v. Brown*, 45 id. 225. And it is laid down as a general rule, that although it be not due *ex contractu*, a party may be entitled to damages in the form of interest where there has been long delay under vexatious and oppressive circumstances in the payment of what is due under the contract.

estate are construed to include interest on the claims of the preferred class although the assets are not sufficient to pay all

Hillhouse v. Davis, 1 M. & S. 169; Arnott v. Redfern, 3 Bing. 353. Where a person under a contract of purchase enters into possession of property which produces a profit, such as machinery, and then declines to carry out his purchase, the vendor is entitled to interest on the value of the property by way of damages. Marsh v. Jones, 40 Ch. Div. 563.

"Interest cannot be recovered as such in an action against the vendor of an estate, the sale of which has gone off, for the recovery of a deposit which has been lying idle (Bradshaw v. Bennett, 5 C. & P. 48; Maberley v. Robins, 5 Taunt. 625); though it may be recovered as special damages for breach of the contract if so laid. De Bernales v. Wood, 3 Camp. 258; Farquhar v. Farley, 7 Taunt. 592. But the principal and auctioneer stand on a different footing; and in an action against the latter to recover the deposit paid to him interest cannot be recovered even as damages, unless, perhaps, after a demand and refusal on the contract being rescinded. Lee v. Munn, 8 Taunt. 45. Not even when the auctioneer has made interest upon the money while in his hands and although he was requested by one of the parties, before the completion of the contract, to invest it. Harrington v. Hoggart, 1 B. & Ad. 577. Interest is not due as such in an action for money secured on mortgage, after day of default, without covenants to pay interest, but may be recovered as damages. Nor in an action for money lent unless there has been a usage to that effect (Calton v. Bragg, 15 East 223; Shaw v. Picton, 4 B. &

C. 723); or for money had and received (Walker v. Constable, 1 B. & B. 306); even though by the course of dealing between the defendant and the person from whom the money was received to the plaintiff's use the sum would have borne interest; for no right passed to the plaintiff but a right to demand the sum actually in the defendant's hands. Frühling v. Schroeder, 2 Bing. N. C. 79. And it makes no difference that the money has been obtained by fraud (Crockford v. Winter, 1 Camp. 124). Nor in actions for money paid (Carr v. Edwards, 3 Stark. 132; Hicks v. Mareco, 5 C. & P. 498); or on an account stated (Nichol v. Thompson, 1 Camp. 52n; Charlie v. Duke of York, 6 Esp. 45; Blaney v. Hendricks, 2 W. Bl. 761. *Contra*, Abbot, C. J., 2 B. & C. 349); or for goods sold, even though to be paid for on a particular day. Gordon v. Swan, 12 East 419. Mountford v. Willes, 2 B. & P. 337, merely decides that if the jury allow interest—which they clearly may do as damages—the court will not disturb their verdict, though it is otherwise where the payment was to be made by bill. Nor in an action for work and labor (Trelawney v. Thomas, 1 H. Bl. 303; Milson v. Hayward, 9 Price 134); nor on money lying with a banker (Edwards v. Vere, 5 B. & Ad. 232); nor upon a policy of insurance (Kingston v. McIntosh, 1 Camp. 518; Bain v. Case, 3 C. & P. 496); nor are annuitants entitled to interest on the arrears of their annuities. Earl of Mansfield v. Ogle, 4 De G. & J. 41; Booth v. Coulton, 30 L. J. (Ch.) 378; Blogg v. Johnson, L. R. 2 Ch. 225. See

creditors.¹³ Interest should be allowed on claims against a national bank during the period between the time it is placed in the hands of a receiver and the closing up of its affairs before appropriating the surplus to the stockholders.¹⁴ An insolvent debtor who has paid money on an unlawful preference is liable for interest from the time an action was begun to recover it.¹⁵ A residuary legatee is liable for interest on his indebtedness to the testator until such time as his legacy is payable.¹⁶

A building and loan society which refuses to pay the sum to which a member has given notice of his withdrawal is entitled, is liable for interest at the legal rate notwithstanding the by-laws deny that the stock draws interest after notice of withdrawal is given.¹⁷ Under a statute providing for the allowance of interest on all moneys after they become due on any bond, bill, note or other written instrument interest may be recovered upon the amount found due on an accounting under a written contract for the payment of a specified per cent. of the amount of certain articles though the contract is silent as to interest.¹⁸ Interest may be recovered from one who has secretly received money belonging to another, the statute allowing interest "on money received to the use of another and retained without the owner's knowledge."¹⁹ A written subscription to the capital stock of a corporation is an instrument in writing, and draws

Marsh v. Jones, 40 Ch. Div. 563. Interest is not recoverable as such in an action upon a foreign judgment, where the subject of the claim is not one which would bear interest in this country. *Doran v. O'Reilly*, 3 Price, 250; *Atkinson v. Lord Braybrooke*, 4 Camp. 380. But it may be left to the jury to say whether the plaintiff has used proper means to find out the defendant and enforce the judgment; and if they find for him, they may give such interest as they wish—as damages it would appear. *Bann v. Dalzell*, 3 C. & P. 376; *McClure v. Dunkin*, 1 East 436."

¹³ *Carey's Est.*, 15 Pa. Dist. 527;

Dickinson's Est., 14 id. 4; *Shultz v. Weaver*, 11 S. & R. 182; *Chamneys v. Lyle*, 1 Bin. 327.

¹⁴ *Chemical Nat. Bank v. Bailey*, 12 Blatch. 480.

¹⁵ *Capital Nat. Bank v. Wilkerson*, 36 Ind. App. 467.

¹⁶ *Leask v. Hoagland*, 136 App. Div. (N. Y.) 658.

¹⁷ *Enterprise B. & L. Soc. v. Balin*, 12 Colo. App. 304; *Kellenberger v. Oskaloosa Nat. B. L. & I. Ass'n*, 129 Iowa 582.

¹⁸ *Dick Co. v. Sherwood L. F. Co.*, 157 Ill. 325.

¹⁹ *Currier v. Kretzinger*, 162 Ill. 511, aff'g 58 Ill. App. 288.

interest after a call has been made.²⁰ The acceptance of a written order for the payment of money is such an instrument in writing and when the uncertainty as to the amount due under it is removed, interest is to be computed from the time of acceptance.²¹ One who claims property as his own, and, by consent of the court in which the title is being litigated, sells it and retains the proceeds, subject to the court's order, is not an indifferent custodian of the money and is presumed to have used it; hence he is liable for interest.²² A creditor of an insolvent corporation is equitably entitled to interest upon a dividend payable to him from the date of the order directing its payment, where that has been delayed by an unsuccessful contest by the receiver.²³ A mortgagee who forecloses under a power of sale is liable for interest on the surplus retained by him if there is nothing to prevent its payment.²⁴ The liability for interest of one who has collected and retained money in which others have an equal interest with him does not depend upon whether he has received interest.²⁵ Under a statute providing that interest may be allowed "on money lent or money due on the settlement of accounts from the day of such settlement of accounts between the parties, and ascertaining the balance due," interest is recoverable on a claim for wages from the time of the acknowledgment of the correctness of the account by the debtor's assignee.²⁶ A party who has undertaken to do work is not entitled to interest until it is completed in accordance with his contract.²⁷ A party who has money in his possession, the title to which is in litigation, is liable for interest if he files an interpleader without paying the money into court.²⁸ A recognizance is a promise

²⁰ *McCoy v. World's Col. Expos.*, 186 Ill. 356, 78 Am. St. 288, aff'g 87 Ill. App. 605.

²¹ *Elgin, etc. R. Co. v. Northwestern Nat. Bank*, 165 Ill. App. 35.

²² *Kenton Ins. Co. v. First Nat. Bank*, 93 Ky. 129; *Albers v. Norton*, 147 Ky. 751.

²³ *Citizens' Sav. Bank v. Vaughan*, 115 Mich. 156; *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 155, 28 L.R.A. 231, 59 Fed. 372; *Armstrong*

v. Exch. Nat. Bank, 133 U. S. 433, 33 L. ed. 747.

²⁴ *Perkins v. Stewart*, 75 Minn. 21.

²⁵ *Bates v. Hamilton*, 144 Mo. 1, citing this section.

²⁶ *Knatz v. Wise*, 16 Mont. 555.

²⁷ *Associated Artists v. Clement*, 142 Wis. 490.

²⁸ *C. K. of Hall Co. v. Lloyd*, 14 Ohio C. C. 30.

to pay a certain sum of money, and interest is due thereon after the condition is broken.²⁹ A person who illegally receives or obtains possession of money belonging to another is presumed to have made use of it and will be liable for interest unless he shows that he did not use it.³⁰ If a contract provides for the exchange of property or the payment of its value the party who disables himself so that he cannot deliver the property is chargeable with interest from the time of so doing.³¹ A foreign insurance company which does business in a state without paying the required license fee is liable for interest thereon.³² Interest on money due on a compromise agreement should be allowed only from the time it was made.³³ A stockholder of a corporation who has been denied the right to purchase stock from the estate of a deceased stockholder in accordance with a mutual agreement of stockholders is entitled to the dividends declared subsequent to the accrual of the right to purchase and the estate is entitled to legal interest on the agreed purchase price.³⁴ A demand note is due forthwith upon delivery and interest may be recovered as damages for its nonpayment.³⁵ A claim against an estate draws interest from the time it was disallowed.³⁶

§ 330. No interest on penalties nor statutory liability for riots.

Interest is not allowed on statutory penalties;³⁷ but it may be recovered on so much of the judgment as is for the damages.³⁸ where a constable who failed to return an execution within the time prescribed by statute was declared liable for the amount then due and ten per cent. damages, it was held interest could

²⁹ *Kinney v. State*, 14 Ohio C. C. 91.

³⁰ *Southern R. Co. v. Greenville*, 49 S. C. 449; *North Troy School Dist. v. Troy*, 80 Vt. 16.

³¹ *First Nat. Bank v. Lynch*, 6 Tex. Civ. App. 590.

³² *Travelers' Ins. Co. v. Fricke*, 99 Wis. 367, 41 L.R.A. 557; *State v. Fricke*, 102 Wis. 107.

³³ *Nelson v. Stewart*, 174 Mich. 127.

³⁴ *Lindsay's Est.*, 210 Pa. 224.

³⁵ *Van Vliet v. Kanter*, 65 N. Y. Misc. 48.

³⁶ *Clark v. Maedermott*, 82 Conn. 572.

³⁷ *Louisville & N. R. Co. v. Melton*, 146 Ky. 242; *Blodgett v. Park*, 76 N. H. 435; *Davenport v. McKee*, 98 N. C. 500; *People v. Gold & S. Tel. Co.*, 98 N. Y. 67; *Thomas v. Weed*, 14 Johns. 255; *Hopper v. Chicago, etc. R. Co.*, 91 Iowa 639, 650; *Blair v. Sioux City, etc. R. Co.*, 109 Iowa 369.

³⁸ *Boyd v. Randolph*, 91 Ky. 472.

not be added.³⁹ Before judgment the penalty allowed for taking or receiving usurious interest does not bear interest.⁴⁰ A judgment imposing a fine is not interest-bearing.⁴¹ Interest is not recoverable under a statute which makes a county or municipality liable to the owner of property for damages resulting thereto from a riot;⁴² but it may generally be recovered on stipulated damages.⁴³

§ 331. **When allowed on penalty of bonds.** There has been some question in actions upon penal bonds, where the damages for breach of the condition equal or exceed the penalty, whether recovery beyond the penalty can be had by adding interest from the date of the breach, where such damages are of such a nature as to bear interest.⁴⁴ But the American courts are now nearly agreed that interest on the penalty in such cases may be recovered.⁴⁵ It is not, however, recoverable upon a bail bond

³⁹ *Trouer v. Sharp*, 4 J. J. Marsh. 79.

⁴⁰ *Baum v. Daniels*, 55 Tex. Civ. App. 273; *Columbia Nat. Bank v. Bletz*, 2 Penny. (Pa.) 169; *Higley v. First Nat. Bank*, 26 Ohio St. 75, 20 Am. Rep. 759; *First Nat. Bank v. Turner*, 3 Kan. App. 352.

⁴¹ *State v. Steen*, 14 Tex. 396.

⁴² *Weir v. Allegheny County*, 95 Pa. 413.

⁴³ *Little v. Banks*, 85 N. Y. 267; *Winch v. Mutual Ben. Ice Co.*, 86 id. 618; *French v. French*, 126 Mass. 360. *Contra*, *Devereux v. Burgwin*, 11 Ired. 490 (not even from date of the writ).

⁴⁴ See *Hellen v. Ardley*, 3 C. & P. 12; *Lonsdale v. Church*, 2 T. R. 388; *Brangwin v. Perrott*, 2 W. Bl. 1190; *Clark v. Bush*, 3 Cow. 151; *McClure v. Dunkin*, 1 East 436; *Francis v. Wilson*, Ry. & M. 105; *Harris v. Clap*, 1 Mass. 308; *United States v. Arnold*, 1 Gall. 348; *Fairlie v. Lawson*, 5 Cow. 424; *Fraser v. Little*, 13 Mich. 195.

⁴⁵ *Johnson v. Norton*, 159 Fed. 361, 86 C. C. A. 361; *American S.*

Co. v. Pacific S. Co., 81 Conn. 252, 19 L.R.A. (N.S.) 83; *Goff v. United States*, 22 App. D. C. 512; *Bent v. Stone*, 184 Mass. 92; *Bassett v. Fidelity & D. Co.*, 184 Mass. 210; *Maddox v. Rader*, 9 Mont. 126; *Jefferson County v. Lineberger*, 3 Mont. 246, 35 Am. Rep. 462; *Frink v. Southern Exp. Co.*, 82 Ga. 33, 3 L.R.A. 482; *Burt v. Delano*, 4 Cliff. 618; *Stern v. People*, 102 Ill. 540; *Leighton v. Brown*, 98 Mass. 516; *United States v. Curtis*, 100 U. S. 119, 25 L. ed. 571; *School Dist. v. Dreutzer*, 51 Wis. 153; *State v. Sooy*, 39 N. J. L. 539, 555; *Clark v. Wilkinson*, 59 Wis. 543; *Brunswick v. Snow*, 73 Me. 177; *Burchfield v. Haffey*, 34 Kan. 42; *Harris v. Clap*, *supra*; *Brainard v. Jones*, 18 N. Y. 35; *Hughes v. Wickliffe*, 11 B. Mon. 202; *Carter v. Thorn*, 18 id. 613; *Bank v. Smith*, 12 Allen 243, 90 Am. Dec. 144; *McGill v. Bank of United States*, 12 Wheat. 511, 6 L. ed. 711; *Ives v. Merchants' Bank*, 12 How. 159, 13 L. ed. 936; *Warner v. Thurlo*, 15 Mass. 154.

conditioned for the appearance of a person to answer a criminal offense,⁴⁶ and so under the New York code as to other bonds to secure the performance of acts other than to pay money.⁴⁷

§ 332. **Interest against government.** It has been established as a general rule in the practice of the federal government that interest is not allowed on claims against it, whether they originate in contract or in tort, or whether they arise in the ordinary business of administration or under private acts of relief passed by congress on special application. The only recognized exceptions are where the government stipulates to pay interest and where it is given expressly by an act of congress either by the name of interest or by that of damages,⁴⁸ and when the cause

Compare *Blewett v. Front St. C. R. Co.*, 49 Fed. 126. See §§ 477, 478.

The principal's liability for interest is not affected by the penal sum named in the bond. *United States v. Walker*, 128 Fed. 1012.

Interest may not be recovered on the penalty stipulated for in a bond. *White v. Manning*, 46 Tex. Civ. App. 298, following, but doubting, *Hawthorne v. State* (Tex. Civ. App.), 87 S. W. 841.

⁴⁶ *United States v. Broadhead*, 127 U. S. 212, 32 L. ed. 147.

⁴⁷ *Beers v. Shannon*, 73 N. Y. 292; *Polhemus P. Co. v. Hallenback*, 46 App. Div. (N. Y.) 563.

⁴⁸ *Treat v. Farmers' L. & T. Co.*, 185 Fed. 760, 108 C. C. A. 98; *Pennell v. United States*, 162 Fed. 75; *Trigg v. Bueyrus*, 104 Va. 79; *Scully v. United States*, 197 Fed. 327; *United States v. Bayard*, 127 U. S. 251, 32 L. ed. 159; *Tillson v. United States*, 100 U. S. 43, 47, 25 L. ed. 543, 544; *Wrightman v. Same*, 23 Ct. of Cls. 144; *Baxter v. Same*, 2 C. C. A. 411, 51 Fed. 671; *United States v. Barber*, 20 C. C. A. 616, 74 Fed. 483; *Walton v. United States*, 61 Fed. 486; *District of Columbia v. Johnson*, 165 U. S. 330, 41 L. ed. 734; *United States v. Ver-*

dier, 164 U. S. 213, 41 L. ed. 407. See *Pacific Coast S. Co. v. United States*, 33 Ct. of Cls. 36.

For cases in which interest has been allowed on liquidated claims, see *United States v. McKee*, 91 U. S. 442, 23 L. ed. 326; *Erskine v. Van Arsdale*, 15 Wall. 75, 21 L. ed. 63; *The Nuestra Senora de Regla*, 108 U. S. 92, 27 L. ed. 662.

Where, under a statute, the court grants a certificate that there was probable cause for the acts done by an officer of the United States, for which judgment was rendered against him, the government is not liable for interest on the judgment prior to the granting of such certificate. *United States v. Sherman*, 98 U. S. 565, 25 L. ed. 235.

A case appealed from the board of general appraisers under the act of June 10, 1890, is practically a suit against the United States and the importer cannot recover interest. *Marine v. Lyon*, 10 C. C. A. 315, 62 Fed. 153.

In actions against the government in the court of claims, interest prior to judgment cannot be allowed claimants; but sec. 966, R. S. of U. S., requires it to be allowed to the government against claimants

is submitted to the courts in the manner pursued by private litigants.⁴⁹ The same rule is applied in England,⁵⁰ Canada,⁵¹ and in some of the states.⁵² A state is not bound to pay interest on its bonds after their maturity unless its consent to do so is shown by an act of its legislature or by a contract which its officers were authorized to enter into.⁵³ The right to interest does not attach to a judgment against the federal government unless by virtue of an act of congress.⁵⁴ If the statute providing for interest on judgments does not except counties they are liable therefor when judgment is rendered against them on contract obligations.⁵⁵ And under a statute providing that creditors shall be allowed to receive interest, when there is no agreement as to the rate thereof, at the rate of eight per cent. for all moneys after they become due on any bond, bill, promissory note or other instrument in writing a county is liable for interest on coupons from its bonds. The court, very properly, took a distinction between the governmental and contractual powers of a county. "It had incurred an indebtedness, and, needing money to pay the same, had proceeded to borrow it. In the exercise of powers of this character, as distinguished from

under all circumstances to which that section applies and without regard to equities which might be considered between private parties. *United States v. Verdier, supra.*

Sec. 1091, R. S. of U. S., which regulates the recovery of interest against the government, does not extend to a case brought in the court of claims under a special statute and resting on a treaty which provides for the payment of interest. *Western Cherokee Indians v. United States*, 27 Ct. of Cls. 1; *Blackfeather v. United States*, 28 id. 447.

⁴⁹ *Ex parte Republic of Columbia*, 195 U. S. 604, 49 L. ed. 338.

⁵⁰ *In re Gosman*, 17 Ch. Div. 771.

⁵¹ *Ross v. King*, 32 Can. Sup. Ct. 532 (on duties illegally demanded.)

⁵² *Montezuma County v. Wheeler*, 39 Colo. 207; *Marshall v. State*, 105

Me. 103 (unless the consent to be sued provides that interest may be recovered); *Ohio v. Board of Public Works*, 36 Ohio St. 409; *Attorney-General v. Cape Fear N. Co.*, 2 Ired. Eq. 444; *Young v. State*, 36 Ore. 417, 47 L.R.A. 548.

Consent to pay interest means simple interest. *Ute Indians v. United States*, 45 Ct. of Cls. 440.

⁵³ *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336; *Sawyer v. Colgan*, 102 Cal. 283; *Carr v. State*, 127 Ind. 204, 11 L.R.A. 370, 22 Am. St. 624; *Davis v. State*, 121 Cal. 210; *Hawkins v. Mitchell*, 34 Fla. 405.

⁵⁴ *United States v. Sherman*, 98 U. S. 565, 25 L. ed. 235.

⁵⁵ *Nevada County v. Hicks*, 50 Ark. 416.

governmental powers, the municipality is not entitled to invoke for its protection any immunity pertaining to it as a sovereign or governing body.⁵⁶ Some authorities take the view that counties are not liable for interest by virtue of general statutes fixing liability therefor unless they are specified therein.⁵⁷ Thus, it has been ruled that a statute expressing that "every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest from that day," does not apply to counties.⁵⁸ In Illinois the same rule prevails as to counties and is extended to townships and other municipalities.⁵⁹ A claim arising against a county upon a statute and not *ex contractu* does not carry interest unless the act so provides.⁶⁰ If a funding statute does not provide for interest on bonds issued by a county after their maturity they will not bear it.⁶¹ County warrants or papers which are essentially such do not everywhere bear interest; neither are they judgments or contracts so as to come within a statute allowing interest;⁶² and so of school district warrants.⁶³ Under a statute providing that no interest shall be

⁵⁶ Board of Com'rs of Ouray County v. Geer, 47 C. C. A. 450, 108 Fed. 478.

⁵⁷ Seton v. Hoyt, 34 Ore. 266, 43 L.R.A. 634, 75 Am. St. 641.

⁵⁸ Hopkins v. Contra Costa County, 106 Cal. 556, overruling Davis v. Yuba County, 75 Cal. 452, which held that coupons on county bonds, after due, bore interest from the time payment was demanded.

⁵⁹ Madison County v. Bartlett, 2 Ill. 67; Pike County v. Horsford, 11 Ill. 170; Pekin v. Reynolds, 31 Ill. 529.

Interest is not recoverable there on coupons from county bonds after their maturity, they being silent as to interest. Graves v. Saline County, 43 C. C. A. 414, 104 Fed. 61.

⁶⁰ State v. Spinney, 166 Ind. 282; Garland County v. Hot Spring Suth. Dam. Vol. I.—66.

County, 68 Ark. 83; Clay County v. Chickasaw County, 64 Miss. 534; Beals v. Supervisors, 28 Cal. 449.

⁶¹ Soher v. Supervisors, 39 Cal. 134.

⁶² Isenhour v. Barton County, 190 Mo. 163 (in favor of one holding as assignee by blank assignment). Anderson v. Issaquena County, 75 Miss. 873, 896. *Contra*, Williams v. Shoudy, 12 Wash. 362; State v. Stout, 43 Wash. 501.

It was ruled in Williams v. Shoudy, *supra*, that if county warrants issued for an indebtedness illegally incurred are ratified by the voters at a special election, the warrants carry interest from the date their payment was refused.

⁶³ Andrews Co. v. Delight S. C. Dist., 95 Ark. 26.

recovered on such warrants they do not carry interest after payment refused.⁶⁴ Interest cannot be collected on void county warrants.⁶⁵

In Kentucky the rule is that the ordinary appropriations for working roads, supporting the poor, etc., and such as do not arise from contract, but by reason of the control of the county over its funds and the subject to which they are to be applied, bear no interest against a county; but this doctrine does not apply where a county voluntarily assumes a debt; in such a case if responsible parties liable to the creditor are released from liability, the consideration is sufficient to bind the county for both principal and interest.⁶⁶ The liability of counties for interest on default in making contractual payments is the same as that of individuals.⁶⁷ The disallowance of a legal claim is cause for allowing interest from the time thereof.⁶⁸ In Pennsylvania counties are liable for interest on fees withheld from public officers.⁶⁹ In New York the exemption from liability for interest in favor of the state and counties does not appear to be recognized. In a case decided in 1899, in which the state had withheld water used for operating a mill, it was held liable for the loss of profits resulting, if they could be shown with the requisite certainty; otherwise, for the value of the use of the water to the plaintiff, and also for interest on the award of the court of claims during the time payment thereof was delayed by litigation instituted by the state.⁷⁰ The older cases were less strict in exempting government from liability for interest;⁷¹ but they generally held that, in the absence of an express

⁶⁴ *Alexander v. Oneida County*, 76 Wis. 56.

⁶⁵ *Coles County v. Goehring*, 209 Ill. 142.

⁶⁶ *Washington County Court v. McKee*, 12 Ky. L. Rep. 102.

⁶⁷ *Morris v. Bell County*, 20 Ky. L. Rep. 1912.

⁶⁸ *State v. Will*, 54 Wash. 453.

⁶⁹ *Koch v. Schuylkill County*, 12 Pa. Super. Ct. 567.

⁷⁰ *Lakeside P. Co. v. State*, 45 App. Div. (N. Y.) 112, 55 App. Div. (N. Y.) 208. See *Sayre v. State*, 123 N. Y. 291, as explained in *Wilson v. Troy*, 135 N. Y. 96, 105, 31 Am. St. 817, 18 L.R.A. 449.

⁷¹ *Respublica v. Mitchell*, 2 Dall. 101, 1 L. ed. 307; *People v. Canal Com'rs*, 5 Denio 401; *Canal Com'rs. v. Kempshall*, 26 Wend. 404; *Thorn-dike v. United States*, 2 Mason 1.

agreement to pay it, a demand was necessary to entitle the creditor to it.⁷²

The liability of municipal and *quasi*-municipal corporations for interest, except on express contracts, depends very largely upon their charters and the general statutes of the state of which they are parts. No rule can be deduced from the adjudications which can be relied upon outside of the jurisdiction in which the particular case was decided. The reason usually given for exempting counties from such liability does not apply to cities and villages, though it has some application to towns. Cities and villages are not arms of the government in the way or to the extent counties and towns are. Their corporate capacity and powers are not imposed upon them in the first instance, but are usually sought after. They are agencies of their citizens, rather than of the state. Unless they are exempted from liability for interest there appears to be no good reason why the statutes governing that subject should not be applicable to them, especially as to contracts for public works. There is a tendency to this view, as the appended note will show.⁷³ It has been said

⁷² Attorney-General v. Cape Fear N. Co., 2 Ired. Eq. 444; Milne v. Republican, 3 Yeates 102; Adams v. Beach, 6 Hill 27; Auditor v. Dugges, 3 Leigh 241; Pawlet v. Sandgate, 19 Vt. 62; United States v. Hoar, 2 Mason 314; State v. Mayes, 28 Miss. 709.

⁷³ A claim which has been audited against a county does not bear interest until judgment is rendered upon it. Wheeler v. Newberry County, 18 S. C. 132.

Interest is not allowable upon a claim against a county until a warrant has been presented and indorsed "not paid for want of funds." Grant County v. Lake County, 17 Ore. 453. See Territory v. Board of Com'rs, 8 Mont. 396, 7 L.R.A. 105.

County warrants which are payable in the order of their registration and are silent as to interest and time of payment do not bear in-

terest. Ashe v. Harris, 55 Tex. 49.

If a warrant is not paid on presentment a right of action then accrues and interest may be recovered on the original indebtedness from the time suit was brought. Mahanoy v. Comry, 103 Pa. 362; Snyder v. Boviard, 122 id. 442, 9 Am. St. 118.

For a violation of its duty as a lessee a city is liable for interest on the resulting damages. Allegheny v. Campbell, 107 Pa. 530, 52 Am. Rep. 478.

A municipal officer has no authority to bind the municipality to pay compound interest on an account unless it is expressly given him. St. Louis G. L. Co. v. St. Louis, 11 Mo. App. 55, 77.

As to the liability of a town which has acquired property of another town, by virtue of a statute, to pay interest on the value thereof or for

that the general interest laws are applicable to a city in default in paying a contractor. This law is general in its terms, and

delay, see *Needham v. Wellesley*, 139 Mass. 372.

The successful bidders for city bonds are not entitled to interest on a deposit made as a bonus even after a demand therefor, the bonds proving to be invalid. *Denver v. Hayes*, 28 Colo. 110.

A county is not liable for interest on the purchase-money of lands sold by its officer, through whose mistake the deed issued was void, until demand made for the return thereof. *Rice v. Ashland County*, 114 Wis. 130, 137.

Where money is lawfully collected by special assessment for a street improvement and paid to the treasurer the city is not liable for interest upon it because it is withheld from the contractor. *Hoblit v. Bloomington*, 87 Ill. App. 479; *Vider v. Chicago*, 164 Ill. 354.

In the absence of an agreement a municipality is not chargeable with interest on claims against it except where money has been wrongfully obtained by it and illegally withheld. *Peoria v. Fruin-B. C. Co.*, 169 Ill. 36; *Danville v. Danville W. Co.*, 180 Ill. 235; *Schoenberger v. Elgin*, 164 Ill. 80.

In Kentucky a city is liable for interest on a contract for labor, the price of which was fixed and the time for its completion, no stipulation as to interest being made. *Louisville v. Henderson*, 11 Ky. L. Rep. 796. This is the rule in Minnesota. *Moran Mfg. & C. Co. v. St. Paul*, 65 Minn. 300. And in Missouri: *Neosho City W. Co. v. Neosho*, 136 Mo. 498. And in New York: *Sweeny v. New York*, 173 N. Y. 414.

If a contractor is to be paid out of assessments the city has a rea-

sonable time after the completion of the work in which to make and collect them, and is not liable for interest before that. *Keigher v. St. Paul*, 69 Minn. 78.

Unreasonable and negligent delay in issuing interest-bearing assessment certificates to a contractor is attended with liability for interest. *Turner Imp. Co. v. Des Moines*, 155 Iowa 592; *Commercial Nat. Bank v. Portland*, 24 Ore. 188, 41 Am. St. 854.

In New York the liability of cities for interest in actions for torts is governed by the same rule as that of individuals. *Wilson v. Troy*, 135 N. Y. 96, 31 Am. St. 817, 18 L.R.A. 449.

In Oregon a distinction is made between the liability of counties and cities on the ground that the former are involuntary arms of the government; cities are liable for interest on their debts to the same extent as individuals. *Shipley v. Hacheney*, 34 Ore. 303. City warrants draw interest from the time they are presented and stamped "not paid," notwithstanding they are retained by the treasurer and others are issued in lieu of them, these being dated and indorsed as were the original. *Monteith v. Parker*, 36 Ore. 170, 78 Am. St. 767.

In Pennsylvania interest is payable on municipal claims due in instalments as each instalment becomes due. *South Chester Borough v. Garland*, 162 Pa. 91.

In Tennessee a city is not liable for interest upon an implied contract if its power to contract must be exercised in writing. *Gas L. Co. v. Memphis*, 93 Tenn. 612.

In Louisiana a city which collects

applies to cities as well as natural persons. Justice is best promoted by the adoption of a uniform rule applicable to all. It is the duty of a city to provide the necessary means to defray the expenses of constructing improvements. Unless it is stipulated to the contrary the work is ordinarily to be paid for as accepted. If the work is not to be paid for at that time it is the result of a contract to extend the time. In the absence of any contract that payment shall be delayed the city will be

school taxes and fails to pay them over, but uses the money for its own purposes, is liable for interest to judgment creditors of the school board. *New Orleans v. Fisher*, 34 C. C. A. 15, 91 Fed. 574.

In Washington the practice of paying interest on municipal warrants has the force of law and they bear interest at the legal rate from the time payment is refused for lack of funds. *Seymour v. Spokane*, 6 Wash. 362. But there is no general liability on the part of cities for either principal or interest on warrants issued on account of street improvements in the absence of a contract on the part of the city or the collection and misappropriation of the funds from the local assessment. *Potter v. Whatcom*, 25 Wash. 207, overruling *Philadelphia M. & T. Co. v. New Whatcom*, 19 Wash. 225. To the same effect is *Tacoma B. P. Co. v. Sternberg*, 26 Wash. 84.

A township is liable for interest on money advanced for its benefit by one of its officers. *White River School Tp. v. Dorrell*, 26 Ind. App. 538. But town orders do not bear interest in the absence of a statute to that effect. *Mueller v. Cavour*, 107 Wis. 599.

If a proposition to issue bonds has been submitted to the electors of a city the officers cannot vary the terms of the proposition as to in-

terest, as by making it payable semi-annually, the notice of the election stating that interest was to be paid annually. *Skinner v. Santa Rosa*, 107 Cal. 464, 29 L.R.A. 512.

A claim against a city does not bear interest prior to its presentation. *South Yuba W. Co. v. Auburn*, 16 Cal. App. 775.

A county is liable for interest on the funds of a town in its possession from the time they are demanded. *Spooner v. Washburn County*, 124 Wis. 24.

Interest upon vouchers issued to contractors against a special improvement ceases on the collection of money applicable to their payment. *Chicago v. Hurford*, 238 Ill. 552. If such money is diverted to other purposes it bears interest at the legal rate from the time when it might have first been demanded, rather than from the time it was diverted. *Conway v. Chicago*, 237 Ill. 128.

A city must pay interest on vouchers representing its liability on a special assessment though the statute does not so provide. *Chicago v. People*, 215 Ill. 235.

Liability for interest on the construction of a local improvement follows liability for the principal; if the funds are diverted, the delinquent property purchased by the city or the sum of their cost is assessed as public benefits the city

liable for interest like any other debtor. Any other rule is fraught with injustice and if once established would exclude men of scanty means from taking such contracts, as the delay in payment and loss of the use of the money might, and in many cases would, cause a serious loss which, to one not possessed of ample means, could result in bankruptcy. In its business transactions a city should be required to conform to the ordinary rules and all exemptions claimed which would work injustice should be denied.⁷⁴

§ 333. Judgments bear interest. In nearly all the states and territories are statutes which provide that judgments shall carry interest in a greater or smaller class of actions and suits, the tendency of legislation being to diminish the number of exceptions.⁷⁵ These statutes do not give a judgment the nature of a contract except when they provide that the rate of interest on a judgment shall be that which the parties have stipulated for. In such a case a change in the statute after a contract has been made for the payment of an agreed rate of interest does not, according to some courts, affect the liability or rights of the parties thereto.⁷⁶ This view is not in conformity with

must pay interest. *Chicago v. Union T. Co.*, 138 Ill. App. 245.

An action does not lie on a municipal warrant without a demand or facts excusing it. *Farmers' Bank v. Wickliffe*, 129 Ky. 679.

Interest must be paid on money illegally exacted. *Chicago v. Northwestern Mut. L. Ins. Co.*, 218 Ill. 40, 1 L.R.A.(N.S.) 770, aff'g 120 Ill. App. 497; *Chicago v. McGovern*, 226 Ill. 403.

Interest on special assessment vouchers ceases when the property owner has paid the city. *Wilmette v. People*, 214 Ill. 107.

Interest follows vouchers issued in payment of a local improvement. *Chicago v. People*, 116 Ill. App. 564.

⁷⁴ *Murphy v. Omaha*, 33 Neb. 402; *Dale v. Scranton*, 231 Pa. 604; *Appleton W. W. Co. v. Appleton*, 136

Wis. 395; *Chicago v. Conway*, 138 Ill. App. 300, 320; *Barber A. P. Co. v. Chicago*, 139 id. 121; *Shawnee v. Freauff*, 36 Okla. 280.

In New York a municipality is not liable for interest though the amount due is liquidated until payment is demanded. *O'Keefe v. New York*, 176 N. Y. 297. The same rule applies where the claim is against a department of the municipal government. *Smith v. Board of Education*, 208 N. Y. 84.

⁷⁵ A city may be exempted from liability for interest on a judgment pending an appeal in condemnation proceedings. *Brunn v. Kansas City*, 216 Mo. 108.

⁷⁶ *Bond v. Dolby*, 17 Neb. 491; *Corley v. McKeag*, 57 Mo. App. 415.

A default judgment awarding interest at ten per cent. is erroneous

the weight of authority. It is said that when a contract creditor elects to merge the rights accruing to him because of the breach of the contract in a judgment interest as agreed upon ceases and the judgment will bear such interest as is prescribed by statute. The right to change the rate exists where the statute in force when the contract was made fixed the rate for judgments at the contract rate.⁷⁷ There is also a disagreement in the courts concerning the effect of statutes changing the rate of interest on judgments. In New York a judgment is regarded as an obligation of record, interest on which is given as damages for delay in performing the contract or duty which it enforces. Hence, when the rate of interest thereon is reduced by law a judgment previously rendered cannot carry a higher rate than is fixed by the amendatory act after it takes effect,⁷⁸ although the judgment so rendered was based upon a contract which provided for the payment of the stipulated rate until it was discharged.⁷⁹ On the other hand, it is said that judgments are sometimes expressly declared to be contracts;⁸⁰ and that it is unquestionably true that a judgment partakes of the nature of a contract sufficiently to supersede the original contract or cause of action both as to principal and interest. The original contract or cause of action becomes merged both as to principal and interest. A debt and the liability for interest thereon, as provided by statute at the date of the judgment, are obligations binding upon the debtor till the judgment is reversed or satisfied; and the legislature cannot alter the rate of interest to which a creditor is entitled

if it was not shown what the contract was. *Titus v. Larsen*, 18 Wash. 145.

⁷⁷ *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494, 75 Am. St. 935; *Morley v. Lake Shore, etc. R. Co.*, 146 U. S. 168, 36 L. ed. 928; *Palmer v. Laberee*, 23 Wash. 409.

⁷⁸ *O'Brien v. Young*, 95 N. Y. 428 (two judges dissenting); *Wells, Fargo & Co. v. Davis*, 105 N. Y. 670. See *Whitman v. Citizens' Bank*, 110 Fed. 503, 49 C. C. A. 122 for the rule

where the judgment is for the enforcement of the statutory liability of a stockholder. *Contra*, *Cox v. Marlatt*, 36 N. J. L. 389, 13 Am. Rep. 454.

⁷⁹ *Taylor v. Wing*, 84 N. Y. 471.

Under a decree providing for the payment by the estate of a decedent of the contract rate of interest only such rate can be collected. *Friend v. Engel*, 43 Ill. App. 386.

⁸⁰ *Cox v. Marlatt*, *supra*; *Johnson v. Butler*, 2 Iowa 535.

upon his pre-existing judgment.⁸¹ Retrospective effect will not be given a statute changing the rate of interest on judgments unless its terms are very clear.⁸² A statute allowing interest on a judgment for injury to the person has been applied to a judgment where the cause of action arose before the statute was enacted.⁸³ Where judgments bear the contract rate of interest and that rate is void because contrary to the usury statute the judgment will bear the same rate it would have borne if there had been no contract.⁸⁴ In Nebraska a plaintiff who sues on an usurious contract is not entitled to costs or interest on any judgment he may recover.⁸⁵ In Texas the rule is to the contrary at least where the suit is to recover the penalty for the usury.⁸⁶ The rate of interest designated in a statute for judgments to bear cannot be varied by the parties to the contract sued upon.⁸⁷ The rate of interest fixed for tax bills by a city charter governs the rate a judgment rendered thereon shall bear.⁸⁸ Except as they are subject to legislative control to the extent indicated, judgments are debts of record, having like

⁸¹ *Butler v. Rockwell*, 17 Colo. 290, 17 L.R.A. 611. See *Seton v. Hoyt*, 34 Ore. 266, 43 L.R.A. 634, 75 Am. St. 641; *Shipley v. Hacheney*, 34 Ore. 303; *Meyer v. Brooks*, 29 Ore. 203, 54 Am. St. 790; *Morley v. Lake Shore, etc. R. Co.*, *supra*.

⁸² *Braner v. Portland*, 35 Ore. 471, 480; *Missouri Pac. R. Co. v. Patton* (Tex. Civ. App.), 35 S. W. 477; *Louisville & N. R. Co. v. Sharp*, 11 Ky. L. Rep. 811 (Ky. Super. Ct.)

⁸³ *Wagers v. Irvine*, 103 Ky. 544.

⁸⁴ *Finney v. Moore*, 9 Idaho 284; *Shafer v. First Nat. Bank*, 53 Kan. 614. See *Brown v. Marion Nat. Bank*, 92 Ky. 607.

⁸⁵ *Interstate S. & L. Ass'n v. Strine*, 58 Neb. 133.

⁸⁶ *Baum v. Daniels*, 55 Tex. Civ. App. 273.

⁸⁷ *Le Breton v. Stanley C. Co.*, 15 Cal. App. 429; *Thrasher v. Moran*, 146 Cal. 683; *Haas v. Chicago Soc.*,

20 Ill. 248; *Moore v. Holland*, 16 S. C. 15; *Neil v. Bank*, 50 Ohio St. 193; *Banford v. Howard*, 1 New Bruns. Eq. 241. See *Deshler v. Holmes*, 44 N. J. Eq. 581, as to the right to have interest paid in excess of the judgment credited on the principal.

In Nebraska the prescribed rate governs unless the contract stipulates for a rate in excess of it. *Portsmouth Sav. Bank v. Yeiser*, 81 Neb. 343.

It is presumed that the rate governing in the state in which the contract is to be discharged is the same as in that in which the action is pending. *Schofield v. Palmer*, 134 Fed. 753.

⁸⁸ *Barber A. P. Co. v. Hayward*, 248 Mo. 280; disapproving *Same v. Field*, 134 Mo. App. 668. But see *Granite B. P. Co. v. Park View R. & I. Co.*, 168 Mo. App. 468.

incidents as other debts, including that of bearing interest,⁸⁹ though they are silent on the question.⁹⁰ This quality is given

⁸⁹ *Watson v. McManus*, 223 Pa. 583; *Shannon v. Cohlhepp*, 37 Pa. Super. 241 (agreement to pay judgment in goods; interest due on balance unpaid); *Benkard v. Babcock*, 27 How. Pr. 391.

Interest, unless payable by the express terms of a contract to pay it, is recoverable, not by virtue of the contract to pay it, but in the nature of damages for the nonpayment of the debt, and a judgment stands in the same position in this respect as a debt where there is no contract to pay interest. It is doubtful if a judgment can properly be said to be a contract, but if it can be so said, such contract is merely to pay the amount of the judgment and cannot be extended so far as to include an agreement to pay interest as a part of the contract. If the amount of the judgment is accepted, the interest thereon being waived and the judgment satisfied, the right thereafter to recover interest is gone. *Brady v. Mayor*, 14 App. Div. (N. Y.) 152; *Cutter v. Mayor*, 92 N. Y. 166.

A decree awarding preliminary alimony is a money decree and bears interest. *Harding v. Harding*, 180 Ill. 592, aff'g 79 Ill. App. 621.

In California (§ 1504, Civil Code) a claim against the estate of a deceased person which has been passed upon on the final settlement of the administrator's account and ordered paid has the effect of a judgment against the estate and bears interest from the date of the settlement regardless of whether the original was interest-bearing. *Olivera's Est.* 70 Cal. 184; *Glenn's Est.*, 74 Cal. 567. And so in Texas. *Finley v. Carothers*, 9 Tex. 517, 60 Am. Dec. 186.

But until an allowed claim against a decedent's estate is ordered paid it does not become a judgment within the contemplation of § 1920 of the Civil Code prescribing interest on judgments. In *re Bell's Estate*, 168 Cal. 253.

And an allowance for the services of an attorney for a deceased administrator made in an equity suit for an accounting between the administrator *de bonis non* and the deceased administrator, for the use and benefit of the attorney, does not bear interest. In *re Blythe*, 103 Cal. 350.

The return of commissioners on claims against an estate is not a judgment, and a rate of interest fixed thereon does not affect the contract between the parties. *Bowers v. Hammond*, 139 Mass. 360. Neither is an award of dower. *Stunz v. Stunz*, 131 Ill. 210; *Field v. Field*, 117 Ill. App. 307, aff'd 215 Ill. 496. This view has been qualified by holding it does not draw interest until an election has been made to take the award or the balance due thereon in cash. *Turner v. Fell*, 142 Ill. App. 458. In Pennsylvania interest or damages equivalent thereto follows a decree making a widow's exemption a charge upon the realty. *Balmforth's Est.*, 14 Pa. Dist. 55.

An order of court affirming the assessment of damages resulting from taking property for public use is a judgment. *Beveridge v. Park Com'rs*, 100 Ill. 75; *Cook v. South Park Com'rs*, 61 id. 115; *Epling v. Dickson*, 170 Ill. 329; *King v. Brown*, 31 Pa. Super. 50.

⁹⁰ *McNeill v. Railroad*, 138 N. C. 1. See cases cited in note 92 *infra*.

them on common-law principles in actions based upon the fact of the wrongful detention of money. The interest, however, is not collectible on execution, either as such or as damages, unless authorized by statute,⁹¹ or it is so specified in the judgment.⁹² In the absence of a statute authorizing the collection of interest upon execution that which accrues between the rendition and collection of a judgment is lost; or in other words, since such interest is allowed as damages it can only be obtained by suit. The very sum in the judgment is the amount to be collected by execution unless a statute exists authorizing the officer to compute and collect interest.⁹³ *Indebitalus assumpsit* will not lie for that purpose.⁹⁴ And the claim for it will be extinguished by collection or payment of the principal to which it is inci-

⁹¹ Perkins v. Fourniquet, 14 How. 328; Michaux v. Brown, 10 Gratt. 612.

⁹² Interest cannot be collected on a money judgment unless it so directs. Anderson's Succession, 33 La. Ann. 581. But a recovery of it is not prevented because the record entry of the judgment does not show that it was allowed. Nevada County v. Hicks, 50 Ark. 416; Amis v. Smith, 16 Pet. 303, 311.

Where every judgment in a civil action bears the rate of interest which the cause of action bore, although the judgment is silent concerning it, a judgment-creditor may have the record corrected to show the rate. Evans v. Fisher, 26 Mo. App. 541.

A judgment against a corporation is an unliquidated demand when the defendant's property has been placed in the hands of a receiver; it is not enforceable as a judgment against the receiver's funds and does not bear interest against them. The fact that it was rendered by consent is immaterial, and so is the fact that an order has been made directing the receiver to pay it, but with-

out specifying the sum due. Ex parte Brown, 18 S. C. 87.

Though a decree makes no provision for the payment of interest thereon it may be recovered as damages for the detention of the money due under it. Stuart v. Hurt, 88 Va. 343.

⁹³ Perkins v. Fourniquet, *supra*; Michaux v. Brown, *supra*; Solon v. Virginia, etc. R. Co., 14 Nev. 405.

Under a statute providing for interest on any judgment recovered before any court the clerk may issue execution for the amount of the principal sum with legal interest regardless of whether the judgment expressed the rate of interest or not. Nevada County v. Hicks, 50 Ark. 416; Amis v. Smith, *supra*; Crook v. Tull, 111 Mo. 283; Burke v. Caruthers, 31 Cal. 467. *Contra*, Hastings v. Johnson, 1 Nev. 613; Solon v. Virginia & T. R. Co., 14 Nev. 405.

The federal courts will follow the decisions of the state court on this question. Moran v. Hagerman, 69 Fed. 427.

⁹⁴ Beedle v. Grant, 1 Tyler, 423.

dent.⁹⁵ Some cases are to be found which deny that judgments bear interest unless by virtue of a statute.⁹⁶ Considering the hostility of the early common law to interest it is easy to maintain on its principles any proposition adverse to its recovery. But on the principle, now universally admitted, that on all liquidated sums interest may be recovered after the date when it was the duty of the debtor to pay, judgments will carry interest. And it is generally held that interest is recoverable both on judgments and decrees,⁹⁷ at least on the latter so far as they

⁹⁵ See § 372.

After a judgment providing for the payment of the legal rate of interest has been satisfied the creditor cannot collect the contract rate though it was his right to have the judgment provide for it. *Rice v. Hulbert*, 67 Iowa 724.

⁹⁶ *Marietta I. W. v. Lottimer*, 25 Ohio 627; *Neil v. Bank*, 50 id. 193; *Perkins v. Fourniquet*, 14 How. 328, 14 L. ed. 441; *Homer v. Kirkwood*, 25 Miss. 96; *Easton v. Vandorn*, Walk. (Miss.) 214; *Sewell's Case*, 37 Mo. 448; *Williamson v. Broughton*, 4 McCord 123. See *Harrington v. Glenn*, 1 Hill (S. C.), 53; *Thomas v. Wilson*, 3 McCord 105; *Lambkin v. Nance*, 2 Brev. 99; *Todd v. Botchford*, 86 N. Y. 517.

A judgment cannot draw interest in the absence of a statute authorizing it although it be rendered upon a contract. *Reece v. Knott*, 3 Utah 451.

Interest was refused on a judgment the amount of which was doubled by interest, a portion of it being compounded. *Downs v. Allen*, 22 Fed. 805.

In the District of Columbia judgments for personal torts do not bear interest. *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 7 Am. Neg. Cas. 359, 37 L. ed. 284.

⁹⁷ *Schwarz v. Harris*, 209 Fed. 1000; *Wadleigh v. Phelps*, 149 Cal.

627; *McMillan v. Warren*, 59 Fla. 578; *O'Neill Mfg. Co. v. Woodley*, 118 Ga. 114; *Ruddy v. McDonald*, 244 Ill. 494; *Healy v. Protection Mut. F. Ins. Co.*, 213 Ill. 99, aff'g 107 Ill. App. 632; *Smyth v. Stoddard*, 203 Ill. 424, 96 Am. St. 314; *Bommaricus v. New Orleans R. & L. Co.*, 123 La. 615 (from its date only); *Smullin v. Wharton*, 86 Neb. 553; *Lincoln v. Lincoln St. R. Co.*, 67 Neb. 469; *Cutter v. Gudebrod*, 190 N. Y. 252; *Brown v. Rogers*, 80 S. C. 289; *Eau Claire Nat. Bank v. Chippewa Valley Bank*, 124 Wis. 520, 109 Am. St. 966 (judgment against garnishee); *Beall v. Silver*, 2 Rand. 401; *Roan v. Drummond*, 6 Rand. 182; *Clarke v. Day*, 2 Leigh 172; *Marshall v. Dudley*, 4 J. J. Marsh. 244; *Mercer v. Beall*, 4 Leigh 189; *Laidley v. Merrifield*, 7 id. 346; *Klock v. Robinson*, 22 Wend. 157; *Nunnellee v. Morton*, Cooke 21; *Gwinn v. Whittaker*, 1 Harr. & J. 754; *Sayre v. Austin*, 3 Wend. 496; *Smith v. Todd*, 3 J. J. Marsh. 306; *Hodgdon v. Hodgdon*, 2 N. H. 169; *Hudson v. Daily*, 13 Ala. 742; *Hopkins v. Shepard*, 129 Mass. 600; *Florsheim v. Illinois T. & S. Bank*, 192 Ill. 382, aff'g 93 Ill. App. 297; *Higgins v. Same*, 193 Ill. 394, aff'g 96 Ill. App. 29; *Stenger v. Carrig*, 61 Neb. 753.

In *Administrator of Pinekney v. Singleton*, 2 Hill (S. C.), 52, it was

are *in personam* and binding upon the debtor's property, and rendered without reference to the sale of particular portions of

said: "At common law no interest could be collected upon an execution under a judgment; but interest was recoverable in an action of debt on judgment, and by commencing such an action the plaintiff obtains an inchoate right to the interest which cannot be defeated by a subsequent payment. And, therefore, where an action of debt on judgment was commenced against an administrator suggesting a *devastavit*, although the administrator after suit brought paid the amount of the judgment and costs with interest on the original cause of action, it was held that the plaintiff might still go on to recover the interest on the entire amount of the judgment (including the principal and interest), and the court will not preclude him from this right by ordering satisfaction to be entered on the judgment."

In *Crawford v. Simonton*, 7 Port. 110, Collier, J., reviewed the authorities and stated the law: "Damages in lieu of interest are allowed at common law for a default to pay money or deliver property, upon the principle that the creditor should be compensated for the want of punctuality in his debtor in keeping him out of the use of the money or property. *McWhorter v. Standifer*, 2 Port. 519. Accordingly, it has been held that interest is allowed on judgments at common law to the time of affirmance or of a new judgment rendered. *Zink v. Langton*, 2 Doug. 749. By the rules of the common law Lord Ellenborough considered it to be within the general province of a jury to give damages for the detention of a debt, and he, therefore, sustained a verdict which allowed interest on a statutable as-

certainment of damages for an injury to individual property occasioned by a public improvement made by a corporation (1 M. & Sel. 171); and in 7 Har. & J. 755, it is said that both by the decisions of the court of Maryland and the English courts every judgment for money carries interest unless otherwise agreed by the parties or its terms forbid it. So in North Carolina it has been holden that a plaintiff is entitled to interest on his judgment if a new action is brought up to the time of the rendition of the new judgment. 2 Hayw. 26, 378; *Thomas v. Edwards*, 3 Ans. 804; *Butler v. Stoullit*, 8 Moore 472; *Prescott v. Parker*, 4 Mass. 170. In *Atkinson v. Braybrooke*, 4 Camp. 380, Lord Ellenborough considered that interest was not in general recoverable on a foreign judgment because it was a simple contract. S. P., 3 Price 350. But in *McClure v. Dunkin*, 1 East 436, the court of king's bench determined that in *assumpsit* on a judgment rendered in Ireland it was competent to the jury to allow interest to the plaintiff, and that in that respect there was no difference between a foreign judgment and a judgment in a court of record in England. The only adjudication to the contrary is a case in 4 McCord 212, which is deemed outweighed by the authorities. In *Moore v. Patten*, 2 Port. 451, it was determined that a jury might, in their discretion, allow interest upon unsettled accounts for goods, wares, etc., from the time they became due. And in *Tate v. Innerarity*, 1 Stew. & Port. 33, it was adjudged competent upon common-law principles for parties to

it and the distribution of their proceeds.⁹⁸ A creditor who first attaches the reversion in a fund not bearing interest is entitled to interest from the date of his judgment, although at the ex-

stipulate for the payment of a reasonable rate of interest, and where it was not ascertained by contract the rate might be fixed by the custom of the place where the contract was made.

"From the decisions we have noticed we educe as applicable to the case at bar the rule that the allowance of interest, except upon the particular liabilities embraced by statute, must depend upon the circumstances of the case. To avoid its payment it is competent for the defendant to show that he is not in fault for the non-payment of the principal sum, or that the plaintiff had been absent from the country, without having left a known agent, etc.; but if the defendant offers no excuse for the delay the plaintiff is entitled to recover interest as damages."

In *Himely v. Rose*, 5 Cranch 313, 3 L. ed. 111, it was held that if property ordered to be restored be sold, interest is not to be paid unless specially ordered by the decree. Marshall, C. J.: "Restitution of the cargo was awarded. The property having been sold, the money proceeding from the sale is substituted for the specific articles. If this money remains in the possession of the court, it carries no interest; if it be in the hands of an individual, it may bear interest or otherwise, as the court may direct."

In *Cox v. Marlatt*, 36 N. J. L. 389, 13 Am. Rep. 454, the court say: "Our practice has been for many years, independent of any express statute, to allow interest to be

levied under execution as an incident to the judgment, and as an increase of damages for the detention of the debt without bringing a distinct action for the interest as damages for such detention." See *Todd v. Botchford*, 86 N. Y. 517.

Judgments for costs carry interest (*Emmitt v. Brophy*, 42 Ohio 82; *In re Kennedy*, 94 Cal. 22; *Klock v. Robinson*, 22 Wend. 157), when the costs are included in a judgment which is the cause of action. *Tiernan v. Minghini*, 28 W. Va. 314. See p. 1060.

In an admiralty proceeding a federal circuit court is not bound to allow interest on costs awarded by the district court although they are included in the former's decree. *The Scotland*, 118 U. S. 507, 30 L. ed. 153.

A judgment entered *nunc pro tunc* bears interest from the day on which it is considered to have been rendered. *Barber v. Briscoe*, 9 Mont. 341.

⁹⁸ If a decree provides for the division of the proceeds of designated property according to fixed priorities and specifies the amounts to be paid claimants, and there is not enough to pay the principal and interest due them all it will not be construed as allowing interest to one claimant to the exclusion of others. *National Bank v. Heard*, 65 Ga. 189.

A decree distributing a fund paid into court to await the determination of the rights of the parties does not bear interest. *Franklin Bank v. Bruns*, 84 Ohio 12.

pense of subsequent attaching creditors of the same fund.⁹⁹ It is not a sufficient reason for not allowing interest at the legal rate on a recovery for the conversion of bonds that they bore a less rate.¹ A judgment on city warrants bears interest though the warrants do not by reason of a provision in the charter.² An officer liable for a judgment because of neglect to pay over money must pay interest though his deputy was responsible to him for the default, he having in his hands enough funds of the deputy to discharge the judgment.³ In cases of fraud interest should not antedate the verdict;⁴ and it has been said that in tort actions interest should be computed only from the time judgment was rendered.⁵ A judgment on a penal bond securing the payment of money in instalments, some of which are to become due, carries interest on them as they may become due and remain unpaid.⁶

Rule twenty-three of the supreme court of the United States provides that in cases where a writ of error is prosecuted to that court and the judgment is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid. This has reference only to the action of the supreme court respecting interest, and is not to be enforced by inferior courts to which mandates of the former are sent. If the judgment or decree of an inferior court is silent as to interest and is merely affirmed, nothing being said as to interest, it is to be taken as a declaration by the supreme court that no interest is to be allowed.⁷

Under a statute providing that "interest shall be allowed on all money due upon any judgment," it may be recovered upon a foreign judgment which is sued upon.⁸ In suits upon judg-

⁹⁹ *Edenton v. Dickinson*, 2 Tenn. Cas. 324.

¹ *Scollans v. Rollins*, 179 Mass. 346.

² *San Antonio v. Alamo Nat. Bank* (Tex. Civ. App.), 155 S. W. 620.

³ *Combs v. Bates*, 150 Ky. 188.

⁴ *McDonough v. Williams*, 86 Ark. 600.

⁵ *Arkansas & L. R. Co. v. Stroude*, 82 Ark. 117; *Tobler v. Union S. Y.*

Co., 85 Neb. 413; *The Argo*, 127 C. C. A. 456, 210 Fed. 872; *Burrows v. Lownsdale*, 66 C. C. A. 650, 133 Fed. 250.

⁶ *Dike v. Andrews*, 80 Neb. 455.

⁷ *In re Washington & G. R. Co.*, 140 U. S. 96, 35 L. ed. 341; *Kimberly v. Arms*, 40 Fed. 551; *Green v. Chicago, etc. R. Co.*, 1 C. C. A. 478, 49 Fed. 907.

⁸ *Santa Clara Valley M. & L. Co.*

ments rendered in other states interest is generally recoverable under the laws of the forum, and not at the rate authorized by the laws of the state in which they were rendered,⁹ and this is the rule whether the law of the original jurisdiction allows interest on judgments or not.¹⁰ There is reason in the view which denies the recovery of interest on a judgment rendered in another state unless proof be made of its laws allowing it.¹¹ If interest is recovered as damages this rule is undoubtedly correct. In Illinois interest on foreign judgments is fixed at the rate allowed in the state in which they were rendered, it being proved.¹²

v. Prescott, 238 Ill. 625; Shickle v. Watts, 94 Mo. 410.

⁹ Wells, Fargo & Co. v. Davis, 105 N. Y. 670; Barringer v. King, 5 Gray 9; Hopkins v. Shepard, 129 Mass. 600; Clark v. Child, 136 id. 344; Crone v. Dawson, 19 Mo. App. 214 (in the absence of proof of the rate of interest in the state in which judgment was rendered). But see Owsley v. Central T. Co., 196 Fed. 412.

In Schell v. Stetson, 12 Phila. 187, a judgment of a New York court sued on in Pennsylvania was held to carry interest by virtue of the fact that it would do so in the former state, of the law of which the court took notice. The judgment was for costs, and interest thereon was not allowable under the laws of Pennsylvania.

In Stewart v. Spaulding, 72 Cal. 264, the judgment of another state directed that a part of the sum recovered bear interest at a specified rate, but was silent as to the rate of interest on the balance. Interest should have been allowed on the balance at the rate fixed by the law of the foreign state.

A federal court will award interest on a judgment rendered in a state court against a federal receiver at the rate provided for by the state

law. Willcox v. Jones, 177 Fed. 870, 101 C. C. A. 84.

If nothing appears to the contrary it will be presumed that a judgment of an English court bears the same rate of interest as a judgment of the forum. Murphy v. Murphy, 145 Cal. 482, 78 Cal. 1053.

¹⁰ Nelson v. Felden, 7 Rich. Eq. 394; Warren v. McCarty, 25 Ill. 95; Prince v. Lamb, Breese, 378; Fonville v. Monroe, 74 Ill. 129; Talbot v. National Bank, 129 Mass. 67, 37 Am. Rep. 302; Williams v. American Bank, 4 Mete. (Mass.) 317; Barringer v. King, 5 Gray 9; Olson v. Veazie, 9 Wash. 481, 43 Am. St. 855. The contrary is assumed in Santa Clara Valley M. & L. Co. v. Prescott, *supra*.

¹¹ Schroeder v. Boyce, 127 Mich. 33; Thompson v. Morrow, 2 Cal. 99, 56 Am. Dec. 318; Cavender v. Guild, 4 Cal. 253. The Michigan court said: As the common law is presumed to be in force in other states unless the contrary is shown, and as at common law judgments do not carry interest, interest is not recoverable on a judgment rendered by the courts of another state without proof that the law of such state allows interest on judgments.

¹² Britton v. Chamberlain, 234 Ill. 246, aff'g 136 Ill. App. 290.

A judgment for costs is within the words "interest shall be allowed on all money due upon any judgment,"¹³ also one for costs and attorney's fees;¹⁴ but not one for the fees of witnesses and officers.¹⁵ Where the defendant paid the judgment and costs at the close of the litigation and the plaintiff had paid but a mere item of the costs he was not entitled to interest on the costs.¹⁶ If the party against whom a judgment for costs is rendered enjoins its collection on grounds not going to its validity, although it may be proper to stay the payment, he is liable for interest from the time the injunction was granted.¹⁷ Interest on costs cannot be recovered under a statute fixing the rate of interest on all money decrees and judgments.¹⁸ A direction in a judgment that the costs of the attorneys for the parties be paid out of the estate is not a judgment, no statement being made in it as to the amount of the costs, and such amount never having been inserted therein, notwithstanding it was fixed by an order in the action.¹⁹ An order for the payment of lying-in expenses and maintenance in a bastardy proceeding does not bear interest.²⁰ It is otherwise with a judgment for taxes,²¹ and allowed claims in bankruptcy; these bear interest before and after their allowance.²²

A judgment is rendered or made when the trial court makes its original findings,²³ and not when it enters corrected findings

¹³ *Santa Clara Valley M. & L. Co. v. Prescott*, 238 Ill. 625; *Bates v. Wilson*, 18 Colo. 287; *Keifer v. Summers*, 137 Ind. 106; *Hayden v. Hefferan*, 99 Mich. 262; *Johnson v. Masters*, 49 S. C. 525; *Dowdy v. Calvi*, 14 Ariz. 148. *Contra*, *Cockrill v. Mizer*, 11 Ky. L. Rep. 637; *Ashworth v. Tramwell*, 102 Va. 852. See note, p. 904.

¹⁴ *Healy v. Protection Mut. F. Ins. Co.*, 213 Ill. 99; *Hoyt v. Beach*, 104 Iowa 257, 65 Am. St. 461; *Carver v. Mayfield L. Co.*, and Texas cases cited.

¹⁵ *Keifer v. Summers*, *supra*; *Baum v. Reed*, 74 Pa. 322; *Ghent v. Boyd*, 18 Tex. Civ. App. 88.

¹⁶ *O'Donnell v. Omaha, etc. R. Co.*, 31 Neb. 846.

¹⁷ *Shipman v. Fletcher*, 95 Va. 585.

¹⁸ *People's Bank v. Aetna Ins. Co.*, 76 Fed. 548, ruled under statutes of South Carolina.

¹⁹ *State Trust Co. v. Cowdrey*, 68 Hun 97.

²⁰ *Commonwealth v. Smith*, 19 Pa. Dist. 973.

²¹ *State v. Parker*, 2 Ohio C. C. (N. S.) 38, 25 Ohio C. C. 237.

²² *In re Osborn's Sons & Co.*, 177 Fed. 184, 100 C. C. A. 392, 29 L.R.A. (N.S.) 887.

²³ *Cutting F. P. Co. v. Canty*, 141 Cal. 692.

under the mandate of the supreme court; hence, under a statute which provides for the computation of interest upon the decision of the court from the time it was rendered or made, interest is to be computed from the time the former event occurred.²⁴ Interest from the time of verdict is not allowable where the judgment is reversed and the plaintiff given an election to take judgment for a less sum and no more.²⁵ An estate is liable for interest pending an appeal taken by the administrator from a decree directing him to pay money held by his intestate in trust, where he retains possession of the fund as administrator and takes the appeal in good faith, from the time the decree was entered until it was affirmed.²⁶ Where a judicial sale of real estate is not absolute so as to entitle the purchaser to a conveyance or the judgment creditor to any part of the proceeds until it has been confirmed the debtor is not liable for interest until that time.²⁷ In such a case the creditor is entitled to interest until the sale is confirmed.²⁸ A party who interpleads and retains money ordered to be paid into court is liable for interest.²⁹ Under a statute providing that judgments for money upon contracts bearing more than six per cent interest shall bear the contract rate, if suit is brought on a judgment which bears interest at the rate of ten per cent the new judgment

²⁴ Barnhart v. Edwards, 128 Cal. 572.

In Ohio the computation is made from the first day of the term at which judgment is rendered. Standard B. & P. Co. v. Cleveland, 25 Ohio C. C. 380.

Under a statute providing that every judgment debt shall carry interest from the time it is entered up and that all equity orders whereby any sum of money shall be payable to any person shall have the effect of judgments, an order of reference to have the damages ascertained does not bear interest; that runs only from the time the damages are ascertained by the referee. Ashover v. Fluor Spar Mines, (1911) 2 Ch. 355.

Suth. Dam. Vol. I.—67.

A referee's report does not bear interest until confirmed. In re East River L. Co., 206 N. Y. 545.

Interest will be allowed on any judgment changed by the higher court only from the date of the judgment thereof. Sheldon v. Egan, 18 Manitoba, 221.

²⁵ Lehman v. Amsterdam C. Co., 151 Wis. 207.

²⁶ Haines v. Hay, 169 Ill. 93.

²⁷ Lombard I. Co. v. Burton, 5 Kan. App. 197.

²⁸ Trompen v. Hammond, 61 Neb. 446, citing Lombard I. Co. v. Burton, *supra*, and Central T. Co. v. Condon, 67 Fed. 84.

²⁹ Millett v. Swift, 138 Ky. 408.

should bear interest at the same rate.³⁰ And where a note stipulates for the payment of one rate of interest on the money borrowed and a lower rate on principal and interest as attorney's fee, if it should be placed in the hands of an attorney for collection, the judgment properly provides that it shall carry the higher rate on the whole sum.³¹ The contract rate should control the rate the judgment bears.³² A conditional judgment does not bear interest prior to compliance with it.³³

§ 334. **Same subject.** Although the judgment separately states the amount of principal and interest the total bears interest,³⁴ and interest is to be computed on statutory damages or a penalty included in the judgment.³⁵ After judgment against a corporation interest on it is computed in an action against a stockholder.³⁶ It seems to have been the practice in

³⁰ *Corley v. McKeag*, 57 Mo. App. 415.

³¹ *Llano I. Co. v. Watkins*, 4 Tex. Civ. App. 428; *Washington v. First Nat. Bank*, 64 Tex. 4.

³² *Livingston v. Salter*, 6 Ga. App. 377.

³³ *Moore v. Durnan*, 70 N. J. Eq. 1.

³⁴ *Steamship Wellesley Co. v. Hooper*, 185 Fed. 733, 108 C. C. A. 71; *Morris v. Carr*, 77 Ark. 228; *Coles v. Kelsey*, 13 Tex. 75.

A verdict will not be vitiated by including improper interest, separately stated from any other sum found, nor for assuming to direct that prospective interest be allowed; the excessive interest or the impertinent direction that the sum found bear interest in the future may be stricken out or disregarded as surplusage. *Brugh v. Shanks*, 5 Leigh 598.

Where a petition sets forth the recovery of judgment for a certain sum, without stating the rate of interest it is entitled to draw, but the plaintiff in his petition demands judgment for the amount of the re-

covery, with interest thereon at ten per cent. from a day therein stated, the record showing a submission of the cause to the court by the parties, and the rendition of a judgment for the original judgment, with ten per cent. interest, without exception, it was considered that the demand for ten per cent. would authorize the introduction of proof of that rate, and that the production of such proof should be presumed. *Haskins v. Alcott*, 13 Ohio St. 210.

Under a statute providing that judgments for money upon contracts shall bear the contract rate it is not necessary that the judgment so provide; the rate of interest may be determined from the record. *Catron v. Lafayette County*, 125 Mo. 67.

³⁵ *Mutual Reserve L. Ins. Co. v. Jay*, 50 Tex. Civ. App. 165

³⁶ See § 343.

The parties liable for the payment of a money judgment are also liable for interest on it—as the assignee of shares of stock. *Logan v. Illinois T. & S. Bank*, 93 Ill. App. 39; *Florsheim v. Same*, id. 297.

Kentucky, prior to the statute of 1837, giving interest on judgments and decrees, and in other states, to adjudge "accruing" interest on debts which by the terms of the agreement were to bear interest "until paid." The practice was to adjudge interest from the date when it was provided by agreement to commence without any computation to the rendition of the judgment, and it was not included with the principal sum recovered; when the judgment was collected or paid the interest was computed according to the agreement and judgment without rest at the time of the latter. But where interest was recoverable as damages it was embraced in the judgment. Interest on judgments in that state, prior to 1837, as damages for detention of the money was not matter of right, but discretionary.³⁷ Judgments upon contracts stipulating a certain rate of interest until the debt should be paid were entered for accruing interest. The court entered judgment for the debt in the declaration mentioned and also the legal or conventional interest from the time the debt was due and payable, or the interest stipulated to be given computed until payment should be made.³⁸ But since the statute of 1837, giving interest on all judgments, it is error to render judgment in a suit on a bill of exchange for principal and interest by way of damages, by which interest would run after judgment by force of the statute.³⁹ In debt on a judgment bearing interest, if the plaintiff demanded only principal and interest accrued at the commencement of the action, he could not have judgment for accruing interest.⁴⁰ But general-

³⁷ *Lair v. Jelf*, 3 Dana 181; *West v. Patrick*, 1 J. J. Marsh. 95; *Shockey v. Glasford*, 6 Dana 16; *Marshall v. Dudley*, 4 J. J. Marsh. 245; *Caldwell v. Richards*, 2 Bibb 331; *Guthrie v. Wickliffe*, 4 id. 542, 7 Am. Dec. 746; *Smith v. Todd*, 3 J. J. Marsh. 306, 20 Am. Dec. 142; *Bartlett v. Blanton*, 4 J. J. Marsh. 440; *McMillan v. Scott*, 1 T. B. Mon. 150.

³⁸ *Harden v. Major*, 4 Bibb 104; *Taul v. Moore*, Hardin 99; *Cotton v. Reavill*, 2 Bibb 99; *Russell v.*

Shepherd, Hardin 44; *Harper v. Bell*, 2 Bibb 221; *Troxwell v. Fugate*, Hardin 2. See *Henderson v. Desha*, Hemp. C. C. 231. But see also *Byrd v. Gasquet*, id. 261.

³⁹ *Chamberlain v. Maitland*, 5 B. Mon. 448.

⁴⁰ *Caldwell v. Richards*, 2 Bibb 332.

Where a creditor obtained a judgment at law, and went into a court of equity to foreclose a mortgage for the same debt it was held that interest should not be decreed, the

ly, under statutes allowing judgments to be taken upon contracts to bear interest thereafter at the contract rate the correct rule is to add the interest due on the principal up to the time of the judgment to the principal, and enter the judgment for the gross amount; and this judgment, including both principal and interest, is then to bear the interest stipulated in the contract until the debt is paid.⁴¹ A final decree for alimony carries interest upon unpaid alimony allowed in a former decree from the date of the maturity of each instalment, and upon unpaid counsel fees from the date of the original decree; but costs of the original trial do not bear interest.⁴² On the affirmance of a judgment the trial court should enter judgment for the amount of the original judgment, with interest thereon, but it should not include as part of the principal interest on the interest due when the original judgment was first rendered.⁴³ Under a statute providing that on the affirmance of a money judgment, the execution of which has been stayed, the judgment shall bear an additional rate of interest to be fixed by the court the rate so fixed does not continue after the mandate of the court has reached the trial

judgment not bearing it; but the amount of the judgment must be taken as the amount to be paid. *Heydle v. Hazelhurst*, 4 Bibb 19. See *Brigham v. Van Buskirk*, 6 B. Mon. 197, holding that by the statute of 1837 the intention was to establish the principle that debts established by judgment or decree should bear interest from that time unless by the terms of the judgment they bore interest from a prior day.

⁴¹ *Guy v. Franklin*, 5 Cal. 416; *Emerie v. Tams*, 6 id. 155; *McCaun v. Lewis*, 9 id. 246; *Mount v. Chapman*, id. 297; *Corcoran v. Doll*, 32 id. 82; *Bibend v. Liverpool, etc. Ins. Co.*, 30 id. 78; *Coles v. Kelsey*, 13 Tex. 75; *Palmer v. Murray*, 8 Mont. 312, overruling earlier cases; *Havemeyer v. Paul*, 45 Neb. 373, 389; *Connecticut Mut. L. Ins. Co. v.*

Westerhoff, 58 Neb. 379, 76 Am. St. 101; *Schofield v. Palmer*, 134 Fed. 753; *Soudan P. Co. v. Stevenson*, 100 Ark. 384.

Under a statute which provides that "when a decree or judgment is rendered or made for the payment of money it shall be for the aggregate of principal and interest due at the time of judgment or decree, with interest thereon from that date," when a decree has once been made for the principal and interest to that date a second aggregation of the same debt in the same cause in subsequent decrees for the payment of the original decree is unauthorized. *Tiernan v. Minghini*, 28 W. Va. 314, 323.

⁴² *Huellmantel v. Huellmantel*, 124 Cal. 583.

⁴³ *Braue v. Portland*, 35 Ore. 471.

court, because execution of it is no longer stayed. The interest so imposed should not be compounded by computing the amount due up to the time of the order in the higher court and then computing interest thereon upon the whole sum.⁴⁴ Equity follows the law and allows interest in like cases.⁴⁵ On debts on which interest would be given as damages at law it is decreed in chancery down to the time of the decree.⁴⁶ Interest on the proceeds of property, the title to which has been contested, deposited pursuant to agreement of the parties is recoverable only from the date of the judgment.⁴⁷ The rate of interest on a judgment for conversion of notes, the action not being *ex contractu*, is not determined by the rate borne by such notes.⁴⁸

§ 335. **Not allowed on revival of judgment by scire facias.** Accrued interest on a judgment is lost by reviving it by *scire facias*. Nearly all the authorities agree that the judgment in such proceedings does not include interest on the judgment revived; the party reviving only obtains execution of the judgment without interest.⁴⁹ And it has been held in Vermont that the revival of the judgment by such process is a final waiver and renunciation of the interest which had accrued up to the time of the new judgment on the *scire facias*.⁵⁰ But it is held

⁴⁴ *Syndicate I. Co. v. Bradley*, 7 Wyo. 228; *Lonsdale Co. v. Woonsocket*, 25 R. I. 428.

⁴⁵ *Linton v. National L. Ins. Co.*, 44 C. C. A. 54, 104 Fed. 584; *Baker v. Cummings*, 8 D. C. App. Cas. 515; *Connecticut Mut. L. Ins. Co. v. Stinson*, 86 Ill. App. 668; *Morse v. Pacific R. Co.*, 93 Ill. App. 33; *Samuel v. Minter*, 3 A. K. Marsh. 480; *McAlexander v. Lee*, id. 483; *Moore v. Pendergrast*, 6 J. J. Marsh. 534; *Taylor v. Knox*, 5 Dana 466; *Hammond v. Hammond*, 2 Bland's Ch. 306; *Lonsdale Co. v. Woonsocket*, *supra*.

⁴⁶ *Deany v. Scriba*, 2 Call 415; *Dawson v. Clay*, 1 J. J. Marsh. 165; *Lair v. Jeff*, 3 Dana 181; *Hughes v. Standeford*, id. 285.

⁴⁷ *Citizens' Bank v. Arkansas C.*

& W. Co., 80 Ark. 601, 117 Am. St. 102.

⁴⁸ *Wilkinson v. Bradford* (Tex. Civ. App.), 154 S. W. 691.

⁴⁹ *Anonymous*, Mart. & Hayw. 182; *Mann v. Taylor*, 1 McCord 113. See *Barron v. Morrison*, 44 N. H. 226.

⁵⁰ *Hall v. Hall*, 8 Vt. 156. In this case Redfield, chancellor, said: "It is well settled that on *scire facias* to revive a judgment no damages can be awarded. The writ claims none. The object of the suit is merely to revive the judgment and no interest can be added to it; execution upon the judgment in *scire facias* must issue for the same sum of the original judgment. At common law not only could no damages be recovered, but no costs, until the

in Pennsylvania that bringing *scire facias* does not extinguish the right to interest. Where a judgment had been several times so revived, the plaintiff, in an action on it, had a right to charge interest on the aggregate amount of principal and interest due at the time of rendering judgment on each *scire facias*.⁵¹

§ 336. **Interest in condemnation proceedings.** Interest is allowed on the damages assessed in proceedings to condemn property in the exercise of the power of eminent domain if the property has been taken,⁵² and from the time of the taking

statute of 8 & 9 Wm. 3, ch. 11, which provides for costs. 14 Petersdorf 386. As the debtor had been discharged on *habeas corpus*, no good reason is now perceived why the oratrix might not have brought debt upon the judgment. *Scire facias* is the most common, although not the exclusive, remedy. But the judgment having been revived by *scire facias*, the plaintiff failed, of course, of obtaining execution of the interest which had accrued; and we think thus lost the claim of interest. It will not be allowed to separate the interest from the debt of which it is a mere incident. The judgment upon the *scire facias* so far merged the judgment for the alimony that the portion not recovered by the levy was gone. It became a new debt and could never be declared upon as a judgment of any other term than that of the judgment on the *scire facias*."

⁵¹ Fries v. Watson, 5 S. & R. 220. See Meason's Est., 4 Watts 341.

It is said in an amicable action to revive and continue the lien of a judgment that the statute does not require that the amount of principal and interest then due should be liquidated. A general judgment upon the *scire facias* to revive that judgment is all that is prescribed. No doubt it may often be advisable,

where no interest has been paid, to ascertain the amount of the debt; but the judgment of revival points the subsequent purchaser or incumbrancer directly to the original judgment where the amount is fixed, and a simple calculation ascertains the interest due upon it. Appeal of Fogelsville L. & B. Ass'n, 89 Pa. 293; Kistler v. Mosser, 140 Pa. 367.

Where there was an amicable revival of a judgment for \$500, upon which interest was due, for "\$500, with interest," it was held that the judgment bore interest from the date of its revival only and that interest prior thereto could not be allowed to the prejudice of a subsequent incumbrancer. Kistler v. Mosser, *supra*. See In re Assigned Est. of McCamant, 6 Delaware Co. Rep. 192, 12 Lancaster L. Rev. 251.

⁵² Phillips v. South Park Com'rs, 119 Ill. 627; Alloway v. Nashville, 88 Tenn. 510, 8 L.R.A. 123; Clough v. Unity, 18 N. H. 75; Cook v. South Park Com'rs, 61 Ill. 115; Commonwealth v. Boston, etc. R., 3 Cush. 25; Chicago v. Palmer, 93 Ill. 125; Reed v. Hanover Branch R. Co., 105 Mass. 303; Atlantic, etc. R. Co. v. Koblenz, 21 Ohio St. 334. See South Park Com'rs v. Dunlevy, 91 Ill. 49, and § 1091, where the subject is more fully considered.

though proceedings are not instituted until subsequently,⁵³ and it will run during the pendency of an appeal if the assessment appealed from is confirmed or increased;⁵⁴ but not otherwise.⁵⁵ The right to interest will be affected by circumstances. If the owner has had the profitable use of the premises, or has received rents pending the appeal, these facts should be taken into account and interest abated accordingly.⁵⁶ So if the owner appeals and is the sole occupant, interest should not be allowed.⁵⁷ But if the condemning party also appeals interest should be allowed where collection is thereby stayed.⁵⁸ Before possession is taken interest is not allowed; until then there is a *locus penitentia* to those moving the condemnation,⁵⁹ and the money is not considered as detained.⁶⁰ If the first assessment is set aside on motion of a corporation which has instituted proceedings for condemnation of private property and taken possession it is competent for the jury, in making a second assessment, to allow and include in their verdict interest from the time when posses-

⁵³ *Velte v. United States*, 76 Wis. 278; *Sweaney v. United States*, 62 Wis. 396.

⁵⁴ *Illinois, etc. R. Co. v. McClintock*, 68 Ill. 296; *Beebe v. Newark*, 24 N. J. L. 47.

If the condemning party, notwithstanding an appeal, may deposit the money for the use of the landowner or give security for the costs and damages which may be awarded on appeal, and if the money deposited may be taken without prejudice to the owner's right to appeal, interest is only allowable on the amount finally awarded in excess of the deposit; if no deposit is made interest on the whole amount is due. *Concord R. Co. v. Greely*, 23 N. H. 237; *Shattuck v. Wilton R. Co.*, id. 269. But if the owner may not take the money deposited under the award of the commissioners and the party condemning may occupy the land, the former is entitled to interest

from the time compensation was due him, the damages given being increased on the appeal. *Sioux City R. Co. v. Brown*, 13 Neb. 317; *Hayes v. Chicago, etc. R. Co.*, 64 Iowa 753; *West v. Milwaukee, etc. R. Co.*, 56 Wis. 318; *Uniack v. Chicago, etc. R. Co.*, 67 Wis. 108.

⁵⁵ *Reisner v. Atchison Union Depot Co.*, 27 Kan. 382.

⁵⁶ *Donnelly v. Brooklyn*, 121 N. Y. 9; *Hamersly v. Mayor*, 56 N. Y. 533; *Hilton v. St. Louis*, 99 Mo. 199; *West v. Milwaukee, etc. R. Co.*, *supra*; *Metler v. Easton, etc. R. Co.*, 36 N. J. L. 222.

⁵⁷ *Metler v. Easton, etc. R. Co.*, *supra*; *Matter of Trustees of New York & B. Bridge*, 137 N. Y. 95.

⁵⁸ *Metler v. Easton, etc. R. Co.*, *supra*.

⁵⁹ *Chicago v. Barbican*, 80 Ill. 482.

⁶⁰ *Fisk v. Chesterfield*, 14 N. H. 240. But see *Beveridge v. West Chicago Park Com'rs*, 100 Ill. 75.

sion was taken, although the company had paid into court the amount of the damages and the sum continued to be retained by the court.⁶¹ The state is liable to pay interest upon the amount of a legal appraisal of damages for land taken for public use only after a demand made by the party entitled of the officers of the law charged with the duty of making payment; ⁶² and so with a city where an award is payable upon its confirmation.⁶³ If a city is not authorized to institute proceedings for the ascertainment of the damages resulting to property owners from a change in the grade of streets the party claiming compensation cannot recover interest thereon until he exercises his right to have the damages liquidated, and interest will be allowed only from the time he began proceedings for that purpose.⁶⁴ But if the municipality may take the initiative the property owner is entitled to interest from the time the damages were sustained.⁶⁵ In Pennsylvania, interest as such is not allowed in actions sounding in tort when the damages sought to be recovered are unliquidated. In condemnation proceedings the jury may consider the lapse of time between the taking of the land and the trial in making up the damages.⁶⁶

§ 337. Interest on taxes, license fees, special assessments and customs duties. Taxes do not draw interest as contracts or as damages except by force of a statute.⁶⁷ A county is not liable

⁶¹ *Atlantic, etc. R. Co. v. Koblenz*, 21 Ohio St. 334; *Beebe v. Newark*, 24 N. J. L. 47.

⁶² *People v. Canal Com'rs*, 5 Denio 401.

⁶³ *Barnes v. Mayor*, 27 Hun 236.

⁶⁴ *Tyson v. Milwaukee*, 59 Wis. 78.

⁶⁵ *Cincinnati v. Whetstone*, 47 Ohio St. 196.

⁶⁶ *Klages v. Philadelphia & R. T. Co.*, 150 Pa. 386; *Becker v. Same*, 177 Pa. 252, 35 L.R.A. 583.

⁶⁷ *Illinois Cent. R. Co. v. Adams*, 78 Miss. 895; *Camden v. Allen*, 26 N. J. L. 398; *Shaw v. Peckett*, 26 Vt. 482; *Danforth v. Williams*, 9

Mass. 324; *Haskell v. Bartlett*, 34 Cal. 281; *Himmelman v. Oliver*, id. 246; *Perry v. Washburn*, 20 Cal. 318; *Perry County v. Selma, etc. R. Co.*, 65 Ala. 391; *Louisville, etc. R. Co. v. Commonwealth*, 89 Ky. 531; *Ormsby v. Louisville*, 79 Ky. 202; *People v. Central Pac. R. Co.*, 105 Cal. 576; *McWilliams v. Jacobs*, 128 Ga. 375.

A statute declaring that every tax has the effect of a judgment against the person does not impose liability for interest on taxes; but a judgment for taxes bears interest like any other judgment. *People v. Central Pac. R. Co.*, *supra*.

to the state for interest on taxes by way of damages.⁶⁸ Non-payment by a city of the tax on its funded debt carries liability for interest during the default.⁶⁹ If taxes are illegally demanded and paid under a protest interest may be recovered,⁷⁰ from the time judgment was rendered,⁷¹ but not anterior thereto.⁷² Interest may not be recovered if payment was made by mistake as to the parties' rights and the over-payment has not been vexatiously withheld.⁷³ One who secures an abatement of his taxes is entitled to interest on the sum paid in excess of that which he was liable for⁷⁴ from the time the excess was paid.⁷⁵ Under the Michigan law concerning the taxation of railroads, though the reports of a company to the auditor-general correctly show its gross earnings interest is not demandable for delay in paying the amount thereby appearing to be due until that officer acts upon the reports and notifies the company.⁷⁶ An assessment made for public improvements does not carry interest unless it is so expressed in the statute,⁷⁷ and if that fixes the conditions upon which interest may be demanded it must be

⁶⁸ *State v. Multnomah County*, 13 Ore. 287. See *Fuller v. Cousins*, 167 Mich. 453.

A statute imposing liability for interest in case of delay by county treasurers in paying over state taxes applies to other officers who perform duties such as are imposed upon such treasurers. *People v. Myers*, 138 N. Y. 590.

If, through neglect of the state's officers, a county treasurer fails to make a prompt return of the tax due the state and afterwards embezzles it, the county is not liable for interest on that part of the money which the state must return to it. *Commonwealth v. Philadelphia County*, 157 Pa. 531; *Commonwealth v. Philadelphia City & County*, 157 Pa. 555.

⁶⁹ *Baltimore v. State*, 105 Md. 1.

⁷⁰ *Atwell v. Zehuff*, 26 Mich. 118; *Shaw v. Becket*, 7 Cush. 442; *Galveston County v. Galveston G. Co.*,

72 Tex. 509; *Pennsylvania Co. v. McClain*, 9 Pa. Dist. Ct. 747; *Kinney v. Conant*, 166 Fed. 720, 92 C. C. A. 410.

⁷¹ *Miller v. Kern County*, 150 Cal. 797.

⁷² *Lewis v. San Francisco*, 2 Cal. App. 112.

⁷³ *Fairbank Co. v. Chicago*, 153 Ill. App. 140; *Home Sav. Bank v. Morris*, 141 Iowa, 560.

⁷⁴ *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 336, 348.

⁷⁵ *Neil v. Ridge*, 220 Mo. 233.

⁷⁶ *Lake Shore, etc. R. v. People*, 46 Mich. 193.

⁷⁷ *Road Com'rs v. Hudson*, 45 N. J. L. 173; *Brennert v. Farrier*, 47 id. 75; *Mall v. Portland*, 35 Ore. 89; *Sargent v. Tuttle*, 67 Conn. 162, 32 L.R.A. 822; *Hartford v. Poin Dexter*, 84 Conn. 121; *McChesney v. Chicago*, 213 Ill. 592.

But this rule has no application to ordinary taxes if the taxpayer

complied with.⁷⁸ A reassessment carries interest from the time the original assessment became delinquent.⁷⁹ If liability for interest on taxes is imposed a taxpayer who appeals from an excessive assessment is not exempted therefrom to the extent that the assessment is sustained, neither does interest cease during the time the assessment is being reviewed unless he tenders enough money to meet his liability.⁸⁰ A fee required to be paid by a foreign insurance company as a condition imposed upon its right to do business is not a tax, and if the privilege is applied for, obtained and used without making the required payment the company is responsible for the fee and for interest upon it.⁸¹ Under a statute prescribing that all executions for taxes shall bear interest taxes accruing against a railroad company while its property is in the hands of a receiver are included. Such a provision does not impose a penalty.⁸² The legal rate of interest on the sum bid for land sold under proceedings to collect an assessment is the basis of the owner's liability when he redeems.⁸³ Liability for interest accrues when execution may issue for the collection of taxes,⁸⁴ unless the tax is collectible by suit, in which case interest runs from the time the petition is filed.⁸⁵ When a void tax foreclosure is set aside the legal rate of interest governs rather than the statutory penalty imposed for the nonpayment of taxes.⁸⁶ One who

can ascertain from the records the exact sum due notwithstanding error was committed in apportioning the tax. *Louisville v. Louisville R. Co.*, 118 Ky. 534.

⁷⁸ *Benjamin L. & T. Syndicate v. Bradsher*, 99 Ark. 348.

⁷⁹ *Young v. Tacoma*, 31 Wash. 153; *Johnson v. Seattle*, 53 Wash. 564 (it seems.)

Interest is recoverable upon a "back assessment" made by the state against railroad property. *People v. Chicago & A. R. Co.*, 228 Ill. 102.

⁸⁰ *Western U. Tel. Co. v. State*, 64 N. H. 265; *Hartford v. Hills*, 72 Conn. 599. Interest may be collect-

ed. *Walsh v. Barthel*, 85 Conn. 552.

⁸¹ *Travelers' Ins. Co. v. Fricke*, 99 Wis. 367, 41 L.R.A. 557; *Southern C. & F. Co. v. State*, 133 Ala. 624.

A license fee is a tax under some circumstances. See *Mays v. Cincinnati*, 1 Ohio St. 268; *State v. Roberts*, 11 Gill & J. 506.

⁸² *Sparks v. Lowndes County*, 98 Ga. 284.

⁸³ *Miller v. Winslow*, 70 Wash. 401.

⁸⁴ *Georgia R. Co. v. Wright*, 125 Ga. 589.

⁸⁵ *Henderson B. Co. v. Commonwealth*, 120 Ky. 690.

⁸⁶ *Gould v. White*, 62 Wash. 406.

asks relief from an invalid tax sale must pay interest on all just taxes from the time of sale.⁸⁷ Interest on liquidated customs duties may be recovered after demand, and where they have been reliquidated on the additional sum due at the legal rate of the state in which the goods have been taken.⁸⁸

§ 338. **Infants liable for.** It was the conviction of Lord Ellenborough that an infant could not give security for a debt, and that his bond conditioned for the payment of the principal sum and interest was clearly prejudicial.⁸⁹ Following this view it was held in Vermont that interest could not be allowed on an account against a minor,⁹⁰ but this position was soon receded from on the ground that any general rule exempting infants from interest would be unjust.⁹¹

§ 339. **Interest as between landlord and tenant.** Interest is allowable in personal actions for the recovery of specific sums agreed to be paid for rent after the same become due and in arrears on the principles that apply to other debts after it becomes the debtor's duty to pay.⁹² In New York and Wisconsin

⁸⁷ *State Finance Co. v. Beck*, 15 N. D. 374, overruling contrary cases.

⁸⁸ *United States v. Mexican I. R. Co.*, 154 Fed. 519.

⁸⁹ *Fisher v. Mowbray*, 8 East, 330; *Baylis v. Dinely*, 3 M. & S. 477.

⁹⁰ *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228.

⁹¹ *Bradley v. Pratt*, 23 Vt. 378.

⁹² *Lloyd v. Campbell*, 186 Ill. App. 566; *Waialua A. Co. v. Oahu R. & L. Co.*, 19 Hawaii 446; *Vandervoort v. Gould*, 36 N. Y. 639; *Hack v. Norris*, 46 Mich. 587; *Heissler v. Stose*, 131 Ill. 393; *Pearson v. Sanderson*, 128 Ill. 88 (appraisal of improvements made under terms of a lease; interest allowed from time appraisal made); *Elkin v. Moore*, 6 B. Mon. 462; *Honore v. Murray*, 3 Dana 31; *Walker v. Hadduek*, 14 Ill. 399; *Buck v. Fisher*, 4 Whart. 516; *Ten*

Eyck v. Houghtaling, 12 How. Pr. 523; *Obermeyer v. Nichols*, 6 Bin. 159, 6 Am. Dec. 439; *Cook v. Farinholt*, 3 Ala. 384; *Naglee v. Ingersoll*, 7 Pa. 185; *Clark v. Barlow*, 4 Johns. 183; *Dennison v. Lee*, 6 Gill & J. 383; *West Chicago A. Works v. Sheer*, 8 Ill. App. 367. See § 854.

In *Jackson v. Wood*, 24 Wend. 443, it was held that in ascertaining the mesne profits or the rents of premises situate in New York city interest may be computed upon rents from the expiration of the quarter days when payable.

In *Stockton v. Guthrie*, 5 Harr. 204, it was held that interest is recoverable for arrears of rent payable in money on a day certain, though the letting be by parol from year to year. Bayard, J.: "It is sufficient to determine that in this state, whenever a sum certain is payable by contract on a day certain, interest is recoverable of right

it is settled that when the rent is payable in specified kinds of property which the tenant has failed to deliver interest is recoverable on the value of the rent from the time it became

against the party in default; and this whether the contract be under seal in writing or merely verbal. The interest is allowed as a legal incident to the principal sum existing from the default in the non-performance of his contract by the debtor whenever there is a certainty in the sum to be paid and the time of payment; nor can any sufficient reason be given for a distinction in the allowance of interest between contracts for the payment of money under seal or in writing and verbal contracts. The contract being valid the breach is as injurious to the creditor in the one case as in the other and the exact character of the act or duty to be performed as fully ascertained in the one case as in the other, and the consequences of the default should therefore be the same. There would seem to be but one exception to this rule, and that is where interest becomes due on a principal sum on a day certain; yet interest on the interest so in arrears is not recoverable. This exception is founded on the statute which prohibits the taking of more than a certain rate of interest for the use or loan of money; and until the interest in arrears is severed from the principal sum by the agreement of the parties it has been held that it cannot be treated as a new loan. Arrears of rent, however, have no analogy to arrears of interest, and fall neither within the words or intent of the statute. In the case of lands, whether the fee or a life estate be parted with, there can be in reason no difference in the right to interest on the sum payable for the estate acquired by

the vendee or tenant; provided it is payable in money on a day certain, and no question could be made as to the right of the vendor to recover interest on the unpaid purchase-money of land sold in fee from the time it became payable, whether there was an express stipulation for the payment of interest or not. Nor can any difference or distinction as to the right to interest arise from the fact that no greater estate at law in lands can, in Delaware, be granted than for one year except by deed; for the estate acquired by the tenant from year to year, holding under a verbal contract, for a sum certain, is just as valid as that acquired by the lessee for a term of years, or a vendee in fee under a demise or conveyance by deed. The tenant equally with the lessee for years, or the vendee, acquires the estate for which he is to pay by a contract ascertaining and fixing the sum to be paid, and the day of payment, and in default of payment interest should equally follow as of right in either case. It may be observed that the allowance of interest is, in general, a rule of practice (*In re Badger*, 2 Barn. & Ald. 691, and *Windle v. Andrews*, id. 696); and in this state the practice of allowing interest on arrears of rent has been uniform and settled." But see *Breckenridge v. Brooks*, 2 A. K. Marsh. 335, 12 Am. Dec. 401; *Cooke v. Wise*, 2 Hen. & M. 463; *Skipwith v. Clinch*, 2 Call 253; *Graham v. Woodson*, id. 249; *Kyle v. Roberts*, 6 Leigh 495; *Van Rensselaer v. Platner*, 1 Johns. 276; *Dowe v. Adams*, 5 Munf. 21.

payable.⁹³ When, however, the landlord seeks his remedy for rent by distress or by re-entry, to hold until the arrears are paid, this remedy does not extend to the interest.⁹⁴ A lessee who is ejected is entitled to interest on the fair value of the leased premises to him.⁹⁵ A mortgagee in possession of the mortgaged premises must answer for interest on their reasonable rental value if entitled to interest on the debt.⁹⁶

§ 340. **Interest on damages for infringing patents.** "The general rule is that interest should be allowed on royalties from the time those royalties ought to have been paid, in all cases where a royalty is the measure of the complainant's damages; the theory in such cases being that damages are liquidated at such time as the royalty would have been due if the defendant had elected to purchase instead of to infringe the right to the use of the invention in suit, but that no interest is due on damages measured otherwise than by a royalty because such damages are unliquidated until they are ascertained by an action.⁹⁷ But the latter part of this rule is subject to exceptions, and in equity the allowance of interest appears to have been left largely to the discretion of the court."⁹⁸ The profits allowed in equity for

⁹³ *Lush v. Druse*, 4 Wend. 313; *Van Rensselaer v. Jones*, 2 Barb. 643; *Livingston v. Miller*, 11 N. Y. 80; *Van Rensselaer v. Jewett*, 2 id. 135, 5 Denio 135; *Vaughan v. Howe*, 20 Wis. 523, 91 Am. Dec. 436; *Gammon v. Abrams*, 53 Wis. 323.

⁹⁴ *Tanton v. Boomgaarden*, 89 Ill. App. 500; *Marr v. Ray*, 151 Ill. 340, 26 L.R.A. 799; *Lansing v. Rattoone*, 6 Johns. 42; *Longuell v. Ridinger*, 1 Gill 57; *Bantleon v. Smith*, 2 Bin. 146, 4 Am. Dec. 430; *Dougherty's Est.* 9 W. & S. 189, 42 Am. Dec. 326; *Gaskins v. Gaskins*, 17 S. & R. 390.

⁹⁵ *Hodgkins v. Price*, 141 Mass. 162.

⁹⁶ *Walter v. Calhoun*, 88 Kan. 801.

⁹⁷ *Walker, Pat.*, § 571; *Locomo-*

tive S. T. Co. v. Railroad Co., 2 Fed. 681; *Mowry v. Whitney*, 14 Wall. 653, 20 L. ed. 867; *Jarecki v. Hays*, 161 Pa. 613.

⁹⁸ *Creamer v. Bowers*, 35 Fed. 206, per *Wales, J.*

It was held in *Graham v. Plano Mfg. Co.*, 35 Fed. 597, that the allowance by a court of a named sum for each machine manufactured, as damages for the infringement of a patent, the sum not resting on the basis of a customary charge, does not establish a fixed royalty which may be made the basis to calculate interest upon in favor of the patentee in a subsequent suit for another infringement, damages in which were recovered at the same rate, the patentee having in a third suit contended for a larger measure of damages. See § 1197.

the injury that a patentee has sustained by the infringement of his patent are unliquidated, and as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained.⁵⁹

§ 341. **Right to interest as affected by the marital relation.** Wherever the wife has a separate estate which she permits her husband to use, they living together and enjoying the benefits of it, and there is no stipulation that interest shall be paid by him for its use, it will be presumed, in the absence of any circumstances showing a contrary understanding, that the husband is not liable to account for or pay interest thereon.¹ The fact that he is the trustee of his wife's estate does not affect the legal presumption.² But if, from the mode of dealing between them, there are any circumstances from which it may reasonably be inferred that the intention was to charge interest the husband will be liable for it.³ If a portion of the purchase price of property bought by a husband is contributed by the wife and the title is taken in her name she will not be entitled to interest on her investment therein so long as they continue to live on the property; but if the husband severs the ownership of it and treats the proceeds of the property as his own and both parties move away from the property he is chargeable in equity with interest on her money.⁴ A wife who has bequeathed to her a

⁵⁹ *Tilghman v. Proctor*, 135 U. S. 130, 100, 34 L. ed. 661, 672.

¹ *Columbin Bay, Bank v. Winn*, 132 Mo. 80; *Kille's Est.* 156 Pa. 445; *Wormley's Est.* 137 Pa. 101; *Lashy v. Lashy*, 2 Tenn. Ch. 5, 4 Lea 418; *Powell v. Hankey*, 2 P. Wms. 62; *Rideout v. Lewis*, 1 AHe. 209; *Rouch v. Bennett*, 24 Miss. 93; *Logan v. Hall*, 19 Iowa 491; *Hamill's App.*, 88 Pa. 303.

² It is well settled that a husband who receives any portion of the principal of his wife's separate estate becomes, in the absence of an agreement controlling his reception of it, her debtor for the amount so received, but he is not, as a general

rule, chargeable with interest upon it. It lies on him to show the agreement which relieves him from the payment of the principal, and on her to show the agreement which entitles her to interest, but the agreement, in either case, may be implied from the circumstances attending the transaction." *Hamer's Est.* 140 Pa. 420, 23 Am. 80, 245.

³ *Lashy v. Lashy*, *supra*; *Cutten v. Rideout*, 1 Allen, & G. 599.

⁴ *Rouch v. Bennett*, *supra*; *Kendy v. White*, 168 Ill. 70; *Crabbie v. Crabbie*, 20 Ohio 303.

⁵ *Moore v. Moore*, 105 Pa. 464; *In re Remmerde*, 206 Fed. 820.

mortgage against her husband on land on which they had lived together, there being no formal promise to pay interest except to the testator, cannot recover interest from the sheriff's vendee of the land except from the date of the sale, notwithstanding the husband had paid the wife interest for several years, he having quit doing so. The fact that he had always supplied her with money for necessities for herself and family, which she regarded as in lien or satisfaction of the interest, was considered as raising the presumption that she did not intend to claim interest.⁵ To recover interest from her husband for money loaned to him the wife must prove an agreement or promise that entitles her to it. His obligation to pay interest cannot be presumed, but his agreement to do so may be inferred from the circumstances attending the loan.⁶ A demand by the wife for payment terminates the presumption that the loan to the husband was not to draw interest.⁷

§ 342. Interest as between partners. The right to interest on partnership accounts and dealings, in the absence of agreement to pay it, may depend upon the practice of each particular firm or on the custom of the trade in which it is engaged.⁸ In the absence of both of these or an express agreement, the rule is that interest cannot be recovered on capital paid in.⁹ If no demand has been made on a partner who has failed to furnish the amount due under his agreement as capital and the business has not required it interest, according to the Nebraska court, is not recoverable on the deficiency on a final accounting; but this

⁵ *Stuart v. Stuart*, 182 Pa. 543.

⁶ *Cornman's Est.*, 197 Pa. 125.
See *Collins v. Babbitt*, 67 N. J. Eq. 165.

⁷ *Lamb's Est.*, 11 Pa. Dist. 243.

⁸ *Kelley v. Shay*, 206 Pa. 215;
Morris v. Allen, 14 N. J. Eq. 44;
Miller v. Craig, 6 Beav. 433.

⁹ *Wilson v. Wilkinson*, 97 Ga. 814; *Burgher v. Burgher*, 12 Ky. L. Rep. 95 (Ky. Super. Ct.); *Gilmour v. Kerr*, 18 Ky. L. Rep. 400; *Rodgers v. Clement*, 162 N. Y. 422, 76 Am. St. 342; *Smith v. Putnam*, 107 Wis.

155, 168; *Tirrell v. Jones*, 39 Cal. 655; *Day v. Lockwood*, 24 Conn. 185, 198; *Sanford v. Barney*, 50 Ill. 108; *Seibert's Assignee v. Ragsdale*, 103 Ky. 206; *Tutt v. Land*, 50 Ga. 350; *Desha v. Smith*, 20 Ala. 747. Compare *Reynolds v. Mardis*, 17 id. 32.

Monthly balances in partnership transactions do not fairly represent new principal, and interest on them is not compoundable. *Wells v. Babcock*, 56 Mich. 276.

may be doubted.¹⁰ Though it is agreed that capital shall bear interest the contract ceases to operate on the dissolution of the partnership because its earning capacity is then ended and it is no longer beneficial to the other partners in making profits, but is resolved into property held only for the purpose of distribution.¹¹ But in Texas a surviving partner engaged in settling the partnership business may recover interest accruing upon advancements after the death of his copartner, as well as before, interest being stipulated for in the contract of partnership.¹² An advance by a partner to the firm is not treated in England and in some American courts as an increase of his capital, but rather as a loan on which interest ought to be paid, and by usage it is payable on money *bona fide* advanced and used for partnership purposes, the advance being made with the knowledge of the other partners.¹³ But it has been ruled that, in the absence of usage or contract, interest is not allowed on advances.¹⁴ Such a general statement is not to be accepted literally; but as meaning that if the moneys paid or advanced for the use of the firm were in fact loans and the partner who furnished them was a creditor of the firm he stands upon the same footing as any other creditor with respect to the right to interest upon an accounting. "A partner may loan money to the firm of which he is a member, and when he does his right to interest is to be determined in the same way as that of any

¹⁰ Clark v. Worden, 10 Neb. 87. The contrary is assumed, without discussion, in Krapp v. Aderholt, 42 Kan. 247. In accord with the latter case is Delp v. Edlis, 190 Pa. 25.

¹¹ Kennedy v. Hill, 89 S. C. 462; St. Paul T. Co. v. Finch, 52 Minn. 342; Watney v. Wells, L. R. 2 Ch. 250; Barfield v. Loughborough, L. R. 8 Ch. 1.

¹² Gresham v. Harcourt, 93 Tex. 149.

¹³ Consaul v. Cummings, 24 App. D. C. 36; 1 Lindley's Part. *390 (2d Am. ed.); Ex parte Chippendale, 4 De G., M. & G. 36; Denton v. Rodie,

3 Camp. 491; Baker v. Mayo, 129 Mass. 517; Berry v. Folkes, 60 Miss. 576; Matthews v. Adams, 84 Md. 143; Hill v. Beach, 12 N. J. Eq. 31; Uhler v. Semple, 20 N. J. Eq. 288.

¹⁴ Doyle v. Duckworth, 149 Iowa, 623; Ice v. Kilworth, 84 Kan. 458, 35 L.R.A.(N.S.) 220; Godfrey v. White, 43 Mich. 171; Sweeney v. Neely, 53 Mich. 421; Prentice v. Elliott, 72 Ga. 154.

A partner cannot claim interest on money in his possession which was produced by the business of the firm as an advance thereof by him. Wells v. Babcock, 56 Mich. 276.

other creditor. In such cases the general rule is to allow interest upon the advances, although there was no express agreement by the firm to pay it, in the absence of some agreement to the contrary, express or implied. The right to interest, or an agreement to pay or allow it, is to be implied in such cases without any express promise, as in like transactions between parties holding no partnership relations to each other.¹⁵ A partner who executes a note soon after an adjustment of the firm accounts, whereby an equal partnership is formed, which note is for the benefit of the firm, is entitled, in a subsequent accounting, to credit for interest paid by him on the note, although the maker of it was to furnish the money necessary to conduct the partnership business.¹⁶ The rule which applies to unliquidated demands governs in the case of partnership accounts; and ordinarily interest will not be allowed on the latter until a balance has been struck,¹⁷ if there has been no unreasonable delay in

¹⁵ Mack v. Engel, 165 Mich. 540; Rodgers v. Clement, 162 N. Y. 422, 76 Am. St. 342, citing many New York cases, and Morris v. Allen, 14 N. J. Eq. 44; Baker v. Mayo, 129 Mass. 517; In re German M. Co., 4 De G., M. & G. 35; In re Norwich Yarn Co., 22 Beav. 143, 168; Tronp's Case, 29 Beav. 353; In re Beulah Park Est., L. R. 15 Eq. 43; Hodges v. Parker, 17 Vt. 242, 44 Am. Dec. 331; Ligare v. Peacock, 109 Ill. 94; Matthews v. Adams, 84 Md. 143; Grant v. Smith, 70 App. Div. (N. Y.) 301, is to the same effect.

¹⁶ Hake v. Coach, 114 Mich. 558.

¹⁷ Goodwill v. Heim, 212 Pa. 595; Lovejoy v. Bailey, 214 Mass. 134; Kemmerer v. Kemmerer, 85 Iowa 193; Wendling v. Jennisch, 85 Iowa 392; Dexter v. Arnold, 3 Mass. 284; Day v. Lockwood, 24 Conn. 185; Lee v. Lashbrooke, 8 Dana 214; Prentice v. Elliott, 72 Ga. 154; Smith v. Knight, 88 Iowa 257; Jones v. Farquhar, 186 Pa. 386, 396; Gilman v. Vaughan, 44 Suth. Dam. Vol. I.—68.

Wis. 646; Gage v. Parmalle, 87 Ill. 330; McKay v. Overton, 65 Tex. 82; Sweeney v. Neely, 53 Mich. 421.

A claim for loss of capital stock does not bear interest until a balance has been found. Juillard v. Orem, 70 Md. 465.

In McCormick v. McCormick, 7 Neb. 440, all the partners drew out such sums as they pleased, which were charged on the books, and all except the plaintiff so largely over-drew that in consequence of bad debts the capital was thereby impaired to such an extent that money had to be borrowed to take its place. The plaintiff claimed that he was entitled to interest on what was due at each annual rest from the time the capital was so impaired that money had to be borrowed; but it was held that he was not thus entitled, for that the deficiency arose from bad debts that were regarded as assets without considering whether they were collectible, and those overdrawing did

arriving at a settlement.¹⁸ And if there is uncertainty as to the state of the accounts interest will not be allowed anterior to the institution of the action.¹⁹ The allowance or disallowance of interest is largely governed by the circumstances of the individual case,²⁰ the character of the claim, as well as the vigilance or laches of the party who demands it. If unusual delay in prosecuting litigation is attributable to the parties that may be a cause for denying the claim for interest, although the accounts have been preserved,²¹ and there will be a more cogent reason for so doing if they have been lost.²² Interest has been allowed where a partner had withdrawn largely more than he was entitled to do from the firm treasury and used the money for personal purposes, harm resulting to the other partners,²³ though the account was overdrawn inadvertently,²⁴ and where a partner, after the dissolution of the firm, had retained money due his copartners.²⁵ Interest upon interest will be charged a surviving partner who wrongfully withdraws and fraudulently appropriates money.²⁶

"Ordinarily, interest on the balance found due to a partner at the dissolution of a partnership will be allowed from the date of the dissolution, or from such date as would afford a reasonable opportunity to close up the partnership business.²⁷ A partner who, on the dissolution of the partnership, holds the assets and

not intend thereby to cripple, much less to bankrupt, the firm. *Ather-ton v. Whitecomb*, 66 Vt. 447, approves the case stated.

¹⁸ *Magilton v. Stevenson*, 173 Pa. 560; *Brownell v. Steere*, 128 Ill. 209.

¹⁹ *Lemma v. Blanding*, 139 Wis. 156; *Carroll v. Little*, 73 Wis. 52; *Green v. Stacy*, 90 Wis. 46.

If one of two persons engaged in a joint enterprise, not amounting to a partnership, is liable to account to the other, but unnecessarily fails to do so he will be liable for interest from the time when the account could have first been stated. *Jones v. Farquhar*, 186 Pa. 400.

Interest may not be recovered

anterior to judgment though the account between the partners had previously been stated by a referee. *Brown v. Rogers*, 76 S. C. 180.

²⁰ *Lamb v. Rowan*, 83 Miss. 45.

²¹ *Hunt v. Smith*, 3 Rich. Eq. 465, 520; *Brenner v. Carter*, 10 Pa. Dist. 457, 203 Pa. 75; *Carter v. Producers' O. Co.*, 200 Pa. 579.

²² *Smith v. Smith*, 18 R. I. 722.

²³ *Masonic Sav. Bank v. Bangs*, 10 Ky. L. Rep. 743.

²⁴ *Forsyth v. Butler*, 152 Cal. 396.

²⁵ *Wells v. Babcock*, 56 Mich. 276.

²⁶ *Porter v. Long*, 136 Mich. 150.

²⁷ *Allen v. Woonsocket Co.*, 13 R. I. 146; *Kennedy v. Hill*, 89 S. C. 462.

property of the firm and is intrusted with the duty of winding up its affairs is chargeable with interest as between himself and copartner if he mingles the money of the firm with his own or neglects unreasonably to settle his accounts."²⁸ The assumption of firm obligations by a solvent surviving partner, whether paid or not, is equivalent to payment so as to relieve such partner from liability for interest to the estate of the deceased partner.²⁹ Under the Illinois statute the delay of payment which subjects a surviving partner to liability for interest on money received in settling the partnership affairs must be both unreasonable and vexatious;³⁰ but these aggravating circumstances are not everywhere essential.³¹ A suit for an accounting is not for the recovery of unliquidated damages, and interest may be allowed from the date of the bill.³² A partner who has the firm property in possession for the purpose of winding up the partnership affairs is not liable for interest if there has been no mismanagement, and the delay in settlement is the result of mutual fault;³³ or if he has not been advantaged by the use of the money of the firm.³⁴ But if the partnership property is used by the surviving partner for his individual benefit and the business is so conducted that he cannot make an accounting, he will be charged with the rental value of it in lieu of interest.³⁵ A partner who, prior to the dissolution of the firm, is allowed to take its property is liable for interest on its value from the date

²⁸ Per Torrance, J., in *Buckley v. Kelly*, 70 Conn. 411; *Dunlap v. Watson*, 124 Mass. 305; *Crabtree v. Randall*, 133 Mass. 552; *Robbins v. Laswell*, 58 Ill. 203; *Kaufmann v. Kaufmann*, 239 Pa. 42. See *Stiles v. Haight*, 124 App. Div. (N. Y.) 60.

A partner who has been intrusted with money by a retiring partner to meet the contingent liability of the firm is not liable for interest so long as such liability exists. *Young v. Potter*, 150 Mich. 375.

²⁹ *Moore's Est.*, 228 Pa. 516.

³⁰ *Maynard v. Richards*, 166 Ill. 466, 57 Am. St. 145.

A defendant is liable for interest if he obtained a contract of settlement by fraud and deception and after its repudiation by the plaintiff contested his right to recover. *Phillips v. Reynolds*, 236 Ill. 119.

³¹ *Powell v. Horrell*, 92 Mo. App. 406; *Campbell v. Coquard*, 93 Mo. 474.

³² *Young v. Winkley*, 191 Mass. 570.

³³ *Randolph v. Inman*, 172 Ill. 575; *Snell v. Taylor*, 182 Ill. 473, aff'g 79 Ill. App. 462.

³⁴ *Condon v. Callahan*, 115 Tenn. 285, 1 L.R.A.(N.S.) 643.

³⁵ *Smith v. Knight*, 88 Iowa 257.

he appropriated it.³⁶ Where by mistake a sum largely in excess of that due has been paid a partner as his share of the firm profits,³⁷ interest was allowed from the time the money was received; but where the overpayment was the result of a mutual and innocent mistake it was allowed only from the time of demand.³⁸ A surviving partner who accounts for the profits of the business is not liable for interest on the sum improperly withdrawn as salary; the profits take the place of interest.³⁹ The estate of a deceased partner may require of the surviving partner who continues the business interest on the former's share of the capital or the profits it earned; and the surviving partner may claim interest or a share of the profits proportioned to the capital contributed.⁴⁰ A partner who sells goods to the partnership and receives advances thereon in the manner of others who have like dealings with it is not liable for interest.⁴¹

§ 343. **Interest on stockholders' statutory liability.** The liability of the stockholders of an insolvent national bank under the federal statutes is for the contracts, debts and engagements of the bank to its creditors. Hence the former are liable for interest to the same extent the bank would have been if it remained solvent, not, however, to exceed the maximum fixed by law,⁴² from the time the comptroller of the currency makes his order determining their liability,⁴³ and in the case of book accounts in favor of the depositors, from the time of the suspension of the bank.⁴⁴ In Illinois, South Carolina, Colorado and Maine, stockholders are not liable for interest on the amount for which they are responsible to the creditors of the corporation under the statutes.⁴⁵ In New York, Georgia and Ohio such

³⁶ *Folsom v. Marlette*, 23 Nev. 459; *Powell v. Horrell*, 92 Mo. App. 406; *Morrill v. Weeks*, 70 N. H. 178.

³⁷ *Atherton v. Cochran*, 11 Ky. L. Rep. 185.

³⁸ *Gould v. Emerson*, 160 Mass. 438, 39 Am. St. 501.

³⁹ *Clausen v. Puvogel*, 114 App. Div. (N. Y.) 455.

⁴⁰ *McGibbon v. Tarbox*, 144 App. Div. (N. Y.) 837. See *Robinson v.*

Simmons, 146 Mass. 167, 4 Am. St. 299.

⁴¹ *Forsyth v. Butler*, 152 Cal. 396.

⁴² *Richmond v. Irons*, 121 U. S. 27, 64, 30 L. ed. 864, 876.

⁴³ *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *Davis' Est. v. Watkins*, 56 Neb. 288; *Bowden v. Johnson*, 107 U. S. 251, 27 L. ed. 386; *May v. Ullrich*, 132 Mich. 6.

⁴⁴ *Richmond v. Irons*, *supra*.

⁴⁵ *Munger v. Jacobson*, 99 Ill.

liability exists from the time suit was begun,⁴⁶ and in Michigan from the time when it was adjudged that it was necessary to enforce liability.⁴⁷ In Ohio, in cases in which the liability is sought to be enforced before suit has determined the extent of it, if such liability equals the face value of the stock interest will follow from the time suit was begun; but if the extent of liability is not fixed interest can only be recovered from the time judgment was rendered.⁴⁸ In Wisconsin, Michigan, Missouri and Kansas stockholders are liable for interest on judgments against corporations.⁴⁹ In Colorado interest may be recovered from stockholders on any debt bearing interest against the corporation.⁵⁰ In California stockholders are liable for interest on corporate debts from the time they become due.⁵¹ In Louisiana interest on stock subscriptions runs from the date of judicial demand; ⁵² and so in Kansas.⁵³ In Missouri a creditor of a corporation proceeding by motion against a shareholder whose shares have not been paid in full can recover interest only from the time the motion is granted; ⁵⁴ but the liability of a bank stockholder for interest to a depositor in the bank dates from the commencement of suit and is not affected because the interest extends his liability beyond the limit fixed by law.⁵⁵ A note given for stock does not bear interest until payment of subscriptions is called for, notwithstanding it may be past due

349; *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. 225; *Cole v. Butler*, 43 Me. 401; *Adams v. Clark*, 36 Colo. 65.

⁴⁶ *Handy v. Draper*, 89 N. Y. 334; *Burr v. Wilcox*, 22 id. 551; *Mason v. Alexander*, 44 Ohio St. 318, following *Wehrman v. Reakirt*, 1 Cin. Super. Ct. 230. See *Wheeler v. Millar*, 90 N. Y. 353; *Wheatley v. Glover*, 125 Ga. 710.

⁴⁷ *Wedemeyer v. Hindelang*, 161 Mich. 600.

⁴⁸ *Berger v. Commercial Bank*, 5 Ohio Dec. 277.

⁴⁹ *Cleveland v. Burnham*, 64 Wis. 347; *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557; *Shickle*

v. Watts, 94 Mo. 410; *Grund v. Tucker*, 5 Kan. 70.

⁵⁰ *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. 145.

⁵¹ *Knowles v. Sanderecock*, 107 Cal. 629; *Wells v. Enright*, 127 Cal. 669, 49 L.R.A. 647.

⁵² *Jackson F. & M. Ins. Co. v. Walle*, 105 La. 89.

⁵³ *Pine v. Western Nat. Bank*, 63 Kan. 462. See, as to the rate of interest, *Whitman v. Citizens' Bank*, 110 Fed. 503, 49 C. C. A. 122.

⁵⁴ *Coquard v. Prendergast*, 47 Mo. App. 243.

⁵⁵ *Millisack v. Moore*, 76 Mo. App. 528.

when the call is made, no promise to pay interest being in the note.⁵⁶ The provisions in the articles of a corporation as to the rate of interest defaulting stockholders shall pay do not apply to calls made by the liquidators of the corporation; they will be charged with the usual rate from the time the call should have been paid.⁵⁷

§ 344. **Allowed on annuities and legacies.** Annuities, except those which are testamentary, are not very common in this country. In England and in Australia they do not bear interest in case of a foreclosure or redemption action as between encumbrancers, and as against the property charged;⁵⁸ nor do liquidated demands generally after default except on commercial securities.⁵⁹ But on the principles which govern on this side of the Atlantic, after a sum is due (which is not interest) and ought to be paid, it bears interest.⁶⁰ There is no reason why an annuity should be an exception.⁶¹ The courts, however, are not

⁵⁶ *Seattle T. Co. v. Pitner*, 18 Wash. 401.

⁵⁷ *In re Welsh Flannel & T. Co.*, L. R. 20 Eq. 360; *In re Spottiswoode Est. Co.*, 21 Vict. L. R. 334.

⁵⁸ *Earl of Mansfield v. Ogle*, 4 De Gex & J. 41; *Booth v. Coulton*, L. R. 5 Ch. 684; *Blogg v. Johnson*, L. R. 2 Ch. 225; *Wigley v. Crozier*, 9 Aust. Com. L. R. 425. See *Buson v. Elliot*, 1 Del. Ch. 368.

It is otherwise in the working out of a judgment in an action for the administrator of the estate of the grantor of an annuity. *In re Salvin*, [1912] 1 Ch. 332.

⁵⁹ *Higgins v. Sargent*, 2 B. & C. 348. See quotation from *Mayne on Damages* in note to § 329.

⁶⁰ *Dobblins v. Higgins*, 78 Ill. 440. Interest may be claimed on monthly wages on each sum as it becomes due. *Butler v. Kirby*, 53 Wis. 188.

⁶¹ *Brotzman's App.*, 133 Pa. 478; *Parker v. Cobe*, 208 Mass. 260, 33 L.R.A.(N.S.) 978; *Stringer v. Stevens' Est.*, 146 Mich. 181, 8

L.R.A.(N.S.) 393, 117 Am. St. 620 (liability continues after death of annuitant).

"Where the bequest is of an annuity, in the absence of any direction to the contrary, the annuity will commence from the death of the testator, and the first payment become due at the end of the first year from that event." *Welsh v. Brown*, 43 N. J. L. 37.

An annuity is due at the death of the testator notwithstanding the executors were directed to invest the principal of the legacy and failed to do so. *Eichelberger's Est.*, 170 Pa. 242.

Where a legatee was erroneously informed by one of the executors that her annuity did not begin to run until the death of her mother, acquiescence in such mistake and omission for seventeen years to demand the annuity was not such laches as barred the right to interest on each annual payment as it became due. *Hoffman's Est.*, 3 Pa. Dist. 663. But where there is no

agreed on the question. Some deny the allowance of interest on general principles;⁶² others consider that the circumstances of each case are determinative of the question.⁶³ On the principle that where a debt is payable by instalments each instalment will bear interest after it is due,⁶⁴ interest should be allowed where there is unexcused default in the payment of annuities.

The rule as to legacies is that they bear interest after they are payable, which is usually, by legal intendment, at the expiration of one year from the testator's death,⁶⁵ unless the will

such mistake long delay in demanding interest prevents recovery of it anterior to demand or suit. *Gaskins v. Gaskins*, 17 S. & R. 390.

In some cases the annuitant's right to interest is for the jury. *Rohn v. Odenwelder*, 162 Pa. 346.

⁶² *Adams v. Adams*, 10 Leigh 527; *Isenhardt v. Brown*, 2 Edw. Ch. 341.

⁶³ *Laura Jane v. Hagen*, 10 Humph. 332; *Savage v. Savage*, 141 Fed. 346, 72 C. C. A. 494, 3 L.R.A. (N.S.) 923.

⁶⁴ *Knettle v. Crouse*, 6 Watts 123.

⁶⁵ *Redfield v. Marvin*, 78 Conn. 704; *Lupton v. Coffel*, 47 Ind. App. 446; *Graham v. Whitridge*, 99 Md. 248, 66 L.R.A. 408; *Wherley v. Rowe*, 106 Minn. 494, citing the text; *Berkmeir v. Peters*, 111 Mo. App. 717; *In re Rutherford*, 196 N. Y. 311; *Bunting's Est.*, 14 Pa. Dist. 7 (on the corpus of the legacy); *Twell's Est.*, 11 Pa. Dist. 713; *Lowman v. Lowman*, 69 S. C. 543; *Walford v. Walford*, [1912] App. Cas. 658; *In re Walford*, [1912] 1 Ch. 219; *Duffield v. Pike*, 71 Conn. 521; *Bartlett, Petitioner*, 163 Mass. 509; *Moore v. Pullen*, 116 N. C. 284; *Watt's Est.*, 3 Pa. Dist. 343; *Chappel v. Theus*, 3 Tenn. Cas. 457; *Bonham v. Bonham*, 38 N. J. Eq. 419; *Dustan v. Carter*, 3 Dena. 149; *Bliss v. Olmstead*, id. 273; *Verne v. Williams*, id. 349; *Bartlett v. Slater*,

53 Conn. 102, 55 Am. Rep. 73; *Wood v. Hammond*, 16 R. I. 98; *Chambers v. Chambers*, 87 Ky. 144; *Sevearingham v. State*, 4 Har. & Mellen. 38; *Lyons v. Magagno*, 7 Gratt. 377; *Shobes v. Carr*, 3 Munf. 10; *King v. Diehl*, 9 S. & R. 409; *Page's App.*, 71 Pa. 402; *Hoagland v. Schenck*, 16 N. J. L. 370; *Bradner v. Faulkner*, 12 N. Y. 472; *Darden v. Orgain*, 5 Cold. 211; *Daniels v. Benton*, 180 Mass. 559. In *Valentine v. Rnste*, 93 Ill. 585, it was held that where legacies or bequests in a will are by their terms to be paid when the testator's estate is settled, the legatees cannot demand the same until the happening of the contingency. If the executors should fail to settle the estate when by law they ought to do so, the court can compel them to make such settlement, and then the legacies might be demanded; the legatees were not entitled to interest upon the legacies before the principal was demandable.

A contingent general legacy does not bear interest until the precedent event occurs. *Cannon v. Apperson*, 14 Lea 553.

Where the legacy was payable on the death of a life beneficiary of the income the residuary legatee, to whom the estate had been transferred charged with the payment of the legacy, was liable for interest only

discloses a contrary intention.⁶⁶ Legacies payable at a designated time bear interest from such time;⁶⁷ if payable out of the proceeds of lands to be sold at any time within two years after the testator's death interest runs from that time or from the time of sale if that was earlier.⁶⁸ A legacy payable out of a reversionary fund bears interest from the time the fund falls into possession;⁶⁹ and if given in satisfaction of a debt carries

from the time of demand. *Gilbert v. Taylor*, 148 N. Y. 298.

⁶⁶ *Brown's Est.*, 143 Cal. 450; *Palmer v. Palmer*, 106 Me. 25; *Gibbon v. Chaytor*, [1907] 1 Irish 65. See *Langhorst v. Ahlers*, 12 Ohio Dec. 405.

"On bequest of the residue of the testator's estate, or of some aliquot part or portion thereof, in trust to pay the interest or income to a legatee for life with the gift of the principal over at his death, the interest or income payable to the tenant for life will be computed from the testator's death." *Welsh v. Brown*, 43 N. J. L. 37; *Marsh v. Taylor*, 43 N. J. Eq. 1; *Williamson v. Williamson*, 6 Paige 304; *Loving v. Minot*, 9 Cush. 151; *Couch v. Eastham*, 29 W. Va. 784; *Townsend's App.*, 106 Pa. 268, 51 Am. Rep. 523.

Such intention is not to be inferred as to general legacies because of a clause in the will extending the time for paying legacies to certain institutions. *Bartlett, Petitioner*, 163 Mass. 509. Nor because the will gives the executors three years in which to settle the estate in their discretion. *Warwick v. Ely*, 59 N. J. Eq. 44; *Spencer's Petition*, 16 R. I. 25.

Where it is directed that a legacy be paid as soon as convenient to the executors, the legatee being one, he is not entitled to interest though payment was not made until sixteen

months after letters were issued. *Matter of Hodgman*, 140 N. Y. 421. Interest is not demandable where legacies are payable out of the proceeds of real estate, the conversion being made within a reasonable time. *Warner's Est.*, 18 Pa. Dist. 262.

It is not a reason for denying interest that the legacy is limited as to time. *Entermann's Est.*, 18 Pa. Dist., 343.

The rule stated in the text is not affected because of the death of the legatee within the year, nor because an administrator of his estate was not appointed until after the year expired and within that time the person afterwards appointed administrator claimed a personal interest in the legacy and notified the executor to pay it to no one else. *Esmond v. Brown*, 18 R. I. 48.

⁶⁷ *Duffield v. Pike*, 71 Conn. 521; *Doten v. Doten*, 66 N. H. 331; *Langhorst v. Ahlers*, 9 Ohio Dec. 607; *Langendorfer's Est.*, 8 Pa. Dist. 273; *Hodges v. Phelps*, 65 Vt. 303; *Harrison v. Denny*, 113 Md. 509; *Kennedy v. Dickey*, 99 Md. 295; *Bank v. Talbot*, 110 App. Div. (N. Y.) 519. See *Lambert v. Lambert*, [1910] 1 Irish 280.

⁶⁸ *Re Robinson*, 22 Ont. 438; *In re Gunning's Est.*, 234 Pa. 148.

⁶⁹ *Gibbon v. Chaytor*, [1907] 1 Irish 65; *Wheeler v. Ruthven*, 74 N. Y. 428, 30 Am. Rep. 315; *In re*

interest from the time of the testator's death;⁷⁰ and so does a legacy consisting of the next interest or income of a given sum.⁷¹ In Massachusetts this rule has been extended to a legacy given absolutely to a widow in lieu of dower,⁷² but it is otherwise in Pennsylvania,⁷³ New Jersey,⁷⁴ and New York,⁷⁵ especially where the testator leaves no real estate and the widow parts with nothing by accepting the legacy. But if the legacy is the income of a trust fund and is given in lieu of dower the widow is entitled to interest from the time of the testator's death.⁷⁶ Where creditors' rights will not be affected interest on a note payable to the testator ceases to run at the time of his death, the note providing that if it was not paid before such death it might be deducted from the maker's share of the testator's estate.⁷⁷ Where a will sets apart a fund and impresses it with a trust in favor of the legatee, to be paid before distribution of the estate, the legacy bears interest from the time of the testator's death.⁷⁸ An exception is made where a legacy is given by a parent to a child or by one *in loco parentis* by way of maintenance, the possession of the principal being deferred.⁷⁹ In Vermont legacies, unless otherwise controlled by the will,

Rutherford, 133 App. Div. (N. Y.) 89.

A legacy charged upon land, the possession of which is postponed until the termination of an intervening estate, bears interest from the date when the devisee who is required to pay the legacy from the land may take possession or receive the profits. *Bowen v. True*, 74 S. C. 486.

⁷⁰ *Clark v. Sewell*, 3 Atk. 99; *Knauss's Est.*, 148 Pa. 265.

⁷¹ *In re Estate of Catron*, 82 Mo. App. 416; *Ayre v. Ayre*, 128 Mass. 575; *Flickwir's Est.*, 136 Pa. 374; *Cooke v. Meeker*, 36 N. Y. 15; *Matter of Stanfield*, 135 N. Y. 292; *Green v. Blackwell*, 32 N. J. Eq. 768; *Griffith's Est.*, 21 Pa. Dist. 82.

⁷² *Pollard v. Pollard*, 1 Allen 490; *Pollock v. Learned*, 102 Mass. 49; *Towle v. Swasey*, 106 Mass. 100.

⁷³ *Martin v. Martin*, 6 Watts 67; *Gill's App.*, 2 Pa. 221.

⁷⁴ *Dutch Church v. Ackerman*, 1 N. J. Eq. 40.

⁷⁵ *Matter of Barnes*, 7 App. Div. (N. Y.) 13, affirmed without opinion, 154 N. Y. 737.

An absolute legacy in lieu of dower carries interest only from one year after letters testamentary are issued. *In re Bostwick's Est.*, 49 N. Y. Misc. 186.

⁷⁶ *Matter of Barnes*, *supra*.

⁷⁷ *In re Will of Newcomb*, 98 Iowa 175.

⁷⁸ *Ensley v. Ensley*, 105 Tenn. 107; *Harrison v. Henderson*, 7 Heisk. 348.

⁷⁹ *Robinson's Est.*, 35 Pa. Super. 192.

draw interest after one year from its probate,⁸⁰ and in New York at the expiration of one year after the granting of letters testamentary or of administration, whether temporary or final.⁸¹ If the probate of a will is revoked and a final will is established interest on a legacy begins to run one year after the issuance of letters under the latter will.⁸² In the absence of any contrary expression or unavoidable implication of a contrary intent of the testator, devises or bequests subordinate to a life estate in his widow and contingent upon her death, or payment of which is postponed until then, become presently payable upon her election to take under the intestate laws. As to its effect to take upon all claims under the will her election is equivalent to her death.⁸³ But the right to interest may not exist simultaneously with such election. Where there was a contest over the will and the executors could not pay until it was settled the Kentucky court held that interest did not begin to run until the termination of the litigation.⁸⁴ The rule is otherwise in Massachusetts.⁸⁵ Inability to ascertain the amount of a legacy is cause for postponing the liability for interest.⁸⁶

There is a difference of opinion concerning the effect of a statute which provides that if no time is fixed in the will for the payment of legacies the executor or administrator shall have one year after its probate to pay and satisfy them. Some courts hold or say that, inasmuch as a legacy does not draw interest before it becomes legally payable, the effect of the statute is to postpone the right to interest for one year after the will has been established, no direction being given in it.⁸⁷

⁸⁰ *Bradford Academy v. Grover*, 55 Vt. 462; *Vermont State Baptist Convention v. Ladd*, 58 id. 95.

⁸¹ *Matter of McGowan*, 124 N. Y. 526; *Matter of Oakes*, 19 App. Div. (N. Y.) 192.

In Indiana a general legacy draws interest only from the expiration of one year from the granting of letters. *Stimson v. Rountree*, 51 Ind. App. 207.

⁸² *Patterson's Est.*, 5 N. Y. Misc. 178.

⁸³ *Coover's App.*, 74 Pa. 143; *Ferguson's Est.*, 138 Pa. 208; *Trustees Church Home v. Morris*, 99 Ky. 317.

⁸⁴ *Trustees, etc., v. Morris*, *supra*.

⁸⁵ *Cladlin v. Holmes*, 202 Mass. 157.

⁸⁶ *In re Gans' Will* (N. Y. App. Div.), 114 N. Y. Supp. 975.

⁸⁷ *Bradner v. Faulkner*, 12 N. Y. 364; *Thorn v. Garner*, 113 id. 198.

The surrogates' courts of New York regard the expressions of the court of appeals in the cases referred to as *dicta*, and hold that the interest runs in favor of a legatee one year after the death of the testator.⁸⁸ This is in accord with the view in New Jersey,⁸⁹ but not with that declared in Ohio and Michigan.⁹⁰

Where the legacy is to a child of the testator, or one to whom he stood *in loco parentis*, and for whom no other provision is made in the will interest thereon is given from the death of the testator on the presumption that such was his intention.⁹¹ The right of an infant legatee to interest from the time of the testator's death is not affected because the will contains a provision for the maintenance of the child out of the income of the legacy, or out of the income of a share of the residue given to him equally with the other children. This

⁸⁸ See *Matter of Gibson*, 24 Abb. N. C. 45; *Lawrence v. Embree*, 3 Bradf. 354; *Wallace's Est.*, 24 N. Y. St. 405; *Campbell v. Cowdrey*, 31 How. Pr. 172; *Dustan v. Carter*, 3 Dema. 149; *Carr v. Bennett*, id. 433, 457; *In re Rutherford*, 196 N. Y. 311, which is in harmony with this view.

⁸⁹ *Davidson v. Rake*, 45 N. J. Eq. 767.

⁹⁰ *Gray v. Case School of Applied Science*, 62 Ohio St. 1; *Wheeler v. Hathaway*, 54 Mich. 550.

⁹¹ *Robinson's Est.*, 16 Pa. Dist. 31; *Budd v. Garrison*, 45 Md. 420; *Langendorfer's Est.*, 8 Pa. Dist. 273; *Webb v. Webb*, 92 Md. 101; *Keating v. Bruns*, 3 Dema. 233; *Brown v. Knapp*, 79 N. Y. 136; *Flinn v. Flinn*, 4 Del. Ch. 44; *King v. Talbot*, 50 Barb. 453; *Martin v. Martin*, 6 Watts 67; *Magollin v. Patton*, 4 Rawle 113; *Heath v. Perry*, 3 Atk. 101; *Harvey v. Harvey*, 2 P. Wms. 21; *Green v. Belchin*, 1 Atk. 506. See *Cooke v. Meeker*, 42 Barb. 533; *Inledon v. Northcote*, 3 Atk. 438; *Hearle v. Greenbank*, id. 716; *Coleman v. Seymour*, 1 Ves. Sr. 210;

Beckford v. Tobin, id. 308; *Carey v. Askew*, 2 Bro. Ch. 58.

Where a sum is left in trust, with direction that the interest and income be applied to the use of a person, he is entitled to interest from the death of the testator. *Cooke v. Meeker*, 36 N. Y. 15.

The rule does not extend to minor grandchildren nor to an adult child (*Brinkerhoff v. Merselis*, 24 N. J. L. 682; *Howard v. Francis*, 30 N. J. Eq. 444), unless the testator stood *in loco parentis* to the grandchild. *Marsh v. Taylor*, 43 N. J. Eq. 1.

The fact that an infant legatee has extraneous means of support does not affect the right to interest from the testator's death. *Neder v. Zimmer*, 6 Dema. 180.

Where the son of the testator was legatee of \$1,000,000, payable eighteen months after the death of the testator, and there was no clause in the will relating to interest or for the support of the legatee until payment of the legacy, interest was denied notwithstanding the legatee, who was twenty-seven years old and had always been supported by his

rule rests on the theory that the residue is an unascertained amount and may be insufficient for the support of the legatee—the question is to be regarded with reference to the sufficiency of the provision made for the infant.⁹² A legacy for the maintenance of the legatee draws interest from the time of the testator's death.⁹³ But it must be shown that it was the intention of the testator to give the legacy for that purpose if the relation of *loco parentis* does not exist. Where a grandfather bequeathed pecuniary legacies to his grandchildren to be paid at their majority, with a condition that if either of them died before attaining that age the share to which he would have been entitled should go into the residue of the testator's estate, the legatees were not entitled to interest. "To require in the meantime the payment of interest would, in effect, add a provision to the will, or would imply that the testator intended interest to be paid because of the existence between him and the legatees of the relation of parent and child though there is not the slightest evidence that such a relation did in fact exist."⁹⁴ Neglect to demand interest may affect the time for which it may be recovered where the time of payment is within the discretion of a person named.⁹⁵

The date from which and the rate at which a legacy bears interest is to be determined by the law of the testator's domicile.⁹⁶ After a legacy is due it bears interest although the fund liable therefor may not have come to the executor's hands within that time, and notwithstanding the delay was occasioned by something in the will;⁹⁷ or the will was not probated at the ex-

father, was in delicate health, though not incompetent to transact business. *Thorn v. Garner*, 113 N. Y. 198.

Where a legacy given for the education of the legatee was not applied for by him until he was thirty years of age it was awarded with interest. *Lynch's App.*, 12 W. N. C. 104. But see *Bohrer v. Otterback*, 21 D. C. 32, holding that if the legatee permits the legacy to remain in the *corpus* of the estate for many years after it

is payable he forfeits the right to interest.

⁹² *Re Moody*, [1895] 1 Ch. 101.

⁹³ *In re Mackay*, 107 Cal. 303.

⁹⁴ *Vonder Horst v. Vonder Horst*, 88 Md. 127; *In re Todd's Est.*, 237 Pa. 466, 43 L.R.A. (N.S.) 869.

⁹⁵ *Harrison v. Watkins*, 127 Ga. 314.

⁹⁶ *Welch v. Adams*, 152 Mass. 74, 9 L.R.A. 244; *Graveley v. Graveley*, 25 S. C. 1, 60 Am. Rep. 478.

⁹⁷ *In re Ewing's Est.*, 103 App.

piration of a year from the testator's death,⁹⁸ or the executors have not been able to realize from the estate because of unjustifiable proceedings taken by the legatees.⁹⁹ But if a legatee who is chargeable with knowledge that his legacy must be paid out of the proceeds of the sale of land wrongfully enters into the possession of the land and prevents its sale he is not entitled to interest during the time the sale is delayed.¹ If the legacy produces interest the legatee is entitled to it though the amount is realized contrary to the testator's direction.² The interest is payable at the legal rate though it is in excess of that produced by the fund.³ But a legatee who causes delay in payment can recover only such interest as the fund produced.⁴ If a legacy consists of sums directed to be paid annually it seems that interest on arrears is not allowed unless under special circumstances.⁵ A testamentary annuity to the widow in lieu of dower

Div. (N. Y.) 500; *Davis v. Rake*, 44 N. J. Eq. 506; *Kent v. Dunham*, 106 Mass. 586; *Huston's App.*, 9 Watts 472; *Hoagland v. Schenck*, 16 N. J. L. 370; *Martin v. Martin*, 6 Watts 67; *Addams v. Heffernan*, 9 id. 529. See *Turrentine v. Perkins*, 46 Ala. 631; *Magoffin v. Patton*, 4 Rawle 113; *Brownlee v. Steel*, Walk. (Miss.) 179.

Interest is due after judicial demand. *Fuentes v. Canon*, 6 Philip. Isl. 117.

⁹⁸ *Ogden v. Pattee*, 149 Mass. 82, 14 Am. St. 401; *Lawrence v. Embree*, 3 Bradf. 364.

⁹⁹ *Kent v. Dunham*, 106 Mass. 586.

¹ *Haight v. Pine*, 10 App. Div. (N. Y.) 470.

² *Whitworth v. Ewing*, 15 Lea 595; *Stephenson v. Harrison*, 3 Heald 729; *Stroud v. Gwyer*, 28 Beav. 130. See *Dimes v. Scott*, 4 Russ. 195.

³ *Welch v. Adams*, 152 Mass. 74, 9 L.R.A. 244; *Ogden v. Pattee*, 149 Mass. 82, 14 Am. St. 401; *Loring v. Woodward*, 41 N. H. 381, 77 Am. Dec. 769; *Kent v. Dunham*, 106 Mass. 586; *Stevens v. Melcher*, 152

N. Y. 551, 580; *Matter of Oakes*, 19 App. Div. (N. Y.) 192; *Gray v. Case School of Applied Science*, 62 Ohio St. 1; *Watt's Est.*, 3 Pa. Dist. 343; *Sloan's App.*, 168 Pa. 422, 47 Am. St. 889; *Griffith's Est.*, 21 Pa. Dist. 82. In *Matter of O'Hara*, 19 N. Y. Misc. 254, it is held that a bequest in trust, with direction that the income shall be applied to a person's use for life, does not entitle the legatee to interest from the time of the decedent's death where there was no income from it during the year following the granting of letters.

⁴ *Baugh's Est.*, 12 Pa. Dist. 303. Under a statute the rate of interest is fixed by the court within the legal rate according to the circumstances of the case. See *Twell's Est.*, 11 id. 713.

⁵ *Watt's Est.*, 3 Pa. Dist. 343; *McNairy v. McNairy*, 1 Tenn. Cas. 329; *Grant v. Edwards*, 92 N. C. 447; *Isenhardt v. Brown*, 2 Edw. 341; *Adams v. Adams*, 10 Leigh 527.

A legatee is not bound, in the absence of an order of court, to accept payment of his legacy in

will be considered as intended for support and looked upon with favor, and interest will be allowed while in arrears;⁶ but not if payable in agricultural products at a particular place, in the absence of proof of a demand there.⁷ Where, in execution of an ante-nuptial agreement that the wife should have one-third of all the real and personal property her husband should die seized and possessed of during her life and widowhood, in lieu of her dower and distributive share, the court of chancery, with her consent, decreed a sale of lands of the deceased husband free from all claims of the widow and prescribed as part of the terms of sale that one-third of the price should be payable on the termination of her life or widowhood, but the interest thereon should be annually paid to her, it was considered that the same rule should apply as to annuities granted for maintenance and that interest should be allowed on the arrears of interest.⁸

If a legatee is executor and receives money from the estate from time to time which is charged as a payment upon the legacy and applied to the use of the legatee, it is proper to compute the interest upon the legacy until the sum so received equals the interest and then to credit it as a payment upon the legacy and compute the interest upon the balance until another payment was so credited.⁹ If a legatee does not demand interest and during the period of neglect the executrix enjoys the income of the property, interest cannot be collected thereafter

instalments. *Welch v. Adams*, 152 Mass. 74, 9 L.R.A. 244.

⁶ *Waples v. Waples*, 1 Harr. 394; *Houston v. Jamison*, 4 id. 330. See *Webb v. Lines*, 77 Conn. 51; *Fanning v. Main*, 77 Conn. 94.

If a widow accept the provisions made for her by will in lieu of dower, when she might have rejected them, she cannot claim the benefit of the rule which regards her as a purchaser for value, and must accept the interest on her legacy subject to the general rule; interest on the deferred interest will not be al-

lowed. *Welch v. Adams*, 152 Mass. 74, 9 L.R.A. 244.

⁷ *Phillips v. Williams*, 5 Gratt. 259.

⁸ *Turrentine v. Perkins*, 46 Ala. 631; *Beavers v. Smith*, 11 id. 32; *Newman v. Auling*, 3 Atk. 579. See *Addams v. Heffernan*, 9 Watts 529; *Reed v. Reed*, 1 W. & S. 235; *Smyser v. Smyser*, 3 id. 437; *Stewart v. Martin*, 2 Watts, 200; *Knettle v. Crouse*, 6 id. 123. See also, *Woodward v. Woodward*, 2 Rich. Eq. 23; *Gill's App.*, 2 Pa. 221.

⁹ *Stevens v. Meleher*, 152 N. Y.

at the expense of the tenants in remainder.¹⁰ The right to interest is waived if it is not asserted at the time of executing a release and acquittance, the acceptance of the principal being a sufficient consideration to support the acquittance and release.¹¹ The facts that the legatee is a non-resident of the state and that his residence is unknown to the executor, and that the residue of the testator's estate is given in trust for his mother, the income to be paid on the trust fund from the death of the testator, is immaterial to the legatee's right to interest after the expiration of one year from the testator's death though payment of the legacy was not demanded at the expiration of the year.¹² Though an active spendthrift trust for life is not terminable by the act of the *cestui que trust* his right to interest ceases where his conduct prevents its payment or the setting aside of it for his benefit.¹³ Interest will not be allowed the personal representatives of a widow as legatee of a sum in lieu of her exemption where she received the entire income of the estate during her life and did not demand the legacy.¹⁴ Where the administration of estates is regulated by a statute wherein no mention of interest is made none can be allowed.¹⁵

§ 345. Interest on advancements. Because property or money advanced to a legatee or distributee belongs to him the general rule is, in the absence of anything to the contrary in the will, that he is not chargeable with interest on it during the life-time of the ancestor,¹⁶ though the amount was originally an indebtedness to him and remained such until he made his will.¹⁷ If there is any liability for interest it does not arise until the

551, 580; German Pioneer Verein v. Meyer, 70 N. J. Eq. 192.

¹⁰ Adams v. Adams, 55 N. J. Eq. 42.

¹¹ Kechmer v. Kinder, 81 Ill. App. 23; Matter of Hodgman, 140 N. Y. 421.

¹² Daniels v. Benton, 180 Mass. 559.

¹³ Porter's Est., 21 Pa. Dist. 330.

¹⁴ Bateman's Est., 21 Pa. Dist. 475.

¹⁵ Cobb v. Stratton's Estate, 56 Colo. 278.

¹⁶ Cahell v. Puryear, 27 Gratt. 902; Barrett v. Morris, 33 id. 273; Davies v. Hughes, 86 Va. 909.

¹⁷ Patterson's App., 128 Pa. 269; Garth v. Garth, 139 Mo. 456; Matter of Keenan, 15 N. Y. Misc. 368; Farnum's Est., 176 Pa. 366; Comer v. Shehee, 129 Ala. 588. See Baker v. Safe Deposit & T. Co., 93 Md. 368.

estate is ready for final distribution.¹⁸ In Pennsylvania interest will be charged from one year after the testator's death;¹⁹ but in Tennessee it is chargeable from the time of death,²⁰ although receipts for the amount provide for its computation from an earlier period.²¹ In an English case²² the testator gave his residuary estate to his widow for life with remainder to his children equally, with a proviso for bringing into hotchpot all sums advanced to any of them by him during his life. He made advances to some of them, and it was held that in distributing the residuary estate among the children after the death of the widow the children to whom advances were made must bring them into hotchpot with interest up to the distribution of the estate, such interest to be computed from the death of the widow. In another case²³ interest was allowed as from the date of the advance, that being necessary to bring about equality between the heirs. An heir who is a debtor to the estate and who asserts his right to share in the distribution of it may not recover interest on notes of the testator held by him after the death of the testator.²⁴ If the representatives of a decedent are authorized to treat an advancement as a loan interest is to be computed only from the time they elect to so treat it.²⁵ If land is conveyed by way of advancement and the value of its use and occupation cannot be shown with reasonable certainty the grantee will be charged with annual interest on its value as it was when he took possession.²⁶ The intent

¹⁸ Cases cited first to this section; *Tart v. Tart*, 154 N. C. 502.

¹⁹ *Patterson's App.*, *supra*.

Where the testator charges bequests with all sums advanced and with unpaid interest thereon interest is to be computed from one year after his death until the estate is settled. *Stelwagon's Est.*, 17 Pa. Dist. 609. It is payable annually if instalments of the legacy are so payable. *Schall's Est.*, *id.* 471.

²⁰ *Johnson v. Patterson*, 13 Lea 626; *Williams v. Williams*, 15 *id.* 438; *Steele v. Frierson*, 85 Tenn.

430. Compare *McNairy v. McNairy*, 1 Tenn. Cas. 329 (1874), and *Granberry v. Jordan*, 3 *id.* 267 (1879).

²¹ *Roberson v. Nail*, 85 Tenn. 124.

²² *In re Rees*, 17 Ch. Div. 701.

²³ *Middleton v. Moore*, [1897] 2 Ch. 169. See *Dallmeyer v. Dallmeyer*, [1896] 1 Ch. 372.

²⁴ *Tobias v. Richardson*, 5 Ohio C. C. (N. S.) 74. Under the statute interest is not chargeable after the death of the ancestor. *Ibid.*

²⁵ *Cole v. Andrews*, 176 N. Y. 374.

²⁶ *Tart v. Tart*, *supra*.

of the testator as disclosed by his will is determinative of the right to interest,²⁷ but such intent must be clearly manifested.²⁸

§ 346. **On money due on policy of insurance, and on premiums.** An illustration of the principle that all moneys certain in amount and time of payment bear interest after they become due is afforded by the rule applied in actions on policies of insurance which contain an agreement to pay at a certain time after loss. Interest is allowed after that time expires until payment is made.²⁹ The time fixed by the policy may be waived by the conduct of the insurer and the money become due before that period expires, as where, on proof of loss and demand of payment at an earlier day, the insurer, admitting the loss, offered a less sum and refused to pay the full amount.³⁰ If the loss is payable sixty days after proofs are made an agreement to arbitrate the loss is a waiver of proofs, and interest may be recovered from the time of the loss,³¹ or, prefer-

²⁷ Gray v. Hayhurst, 157 Ill. App. 488; Miller's App., 31 Pa. 337; Porter's App., 94 Pa. 332; Farnum's Est., 176 Pa. 366.

²⁸ Stahl's Est., 25 Pa. Super. 402.

²⁹ Hartford Ins. Co. v. Enoch, 79 Ark. 475; Grand Lodge of L. F. v. Orrell, 206 Ill. 208, 109 Ill. App. 422; Boening v. North American Union, 155 Ill. App. 528; Gray v. Merchants' Ins. Co., 125 Ill. App. 370; Supreme Lodge, etc. v. Rebg, 116 Ill. App. 59; Knights Templars & M. L. Ind. Co. v. Crayton, 110 Ill. App. 648; Crook v. New York L. Ins. Co., 112 Md. 268; Palatine Ins. Co. v. O'Brien, 107 Md. 341, 16 L.R.A.(N.S.) 1055; Home Ins. Co. v. Schiffs, 103 Md. 648; Amory v. Reliance Ins. Co., 208 Mass. 378; Bamberge v. Supreme Tribe, 159 Mo. App. 102; Berry v. Virginia State Ins. Co., 83 S. C. 13; Ledford v. Hartford F. Ins. Co., 161 Ill. App. 233; McNellis v. Aetha Ins. Co., 176 Ill. App. 575; Catholic Knights v. Franke, 137 Ill. 118; Grand Lodge
Suth. Dam. Vol. I.—69.

A. O. U. W. v. Bagley, 164 Ill. 340, 60 Ill. App. 589; Southern Ins. Co. v. White, 58 Ark. 277; Hanover F. Ins. Co. v. Lewis, 28 Fla. 209; Pratt v. Manhattan L. Ins. Co., 47 La. Ann. 855; Hardy v. Lancashire Ins. Co., 166 Mass. 210, 33 L.R.A. 241, 55 Am. St. 395; Randall v. American F. Ins. Co., 10 Mont. 340, 24 Am. St. 50; Wood v. Cascade F. & M. Ins. Co., 8 Wash. 427, 40 Am. St. 917; Unsell v. Hartford L. & A. Ins. Co., 32 Fed. 443; Guarantee Co. v. Mechanics' Sav. Bank & T. Co., 80 Fed. 766; Home Ins. Co. v. Adler, 71 Ala. 516; Hastings v. Westchester F. Ins. Co., 73 N. Y. 141; Queen Ins. Co. v. Jefferson Ice Co., 64 Tex. 578; Field v. Insurance Co., 6 Biss. 121; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Peoria M. & F. Ins. Co. v. Lewis, 18 Ill. 553.

³⁰ Baltimore F. Ins. Co. v. Loney, 20 Md. 20.

³¹ Glover v. Rochester German Ins. Co., 11 Wash. 142.

ably, sixty days after the waiver.³² On the denial of its liability the insurer becomes immediately liable for interest though formal demand of payment was not made.³³ In at least one case liability for interest related back to the time of loss.³⁴ If the policy provides for the payment of the loss after its adjustment or after proofs of it have been made, in the former case there will be no liability for interest anterior to judicial demand if reasonable efforts are made by the insurer to effect an adjustment;³⁵ and so in the latter case if proper proofs are not furnished.³⁶ If the contract contemplates that a loss is to be paid within a specified time if the funds on hand are sufficient, and otherwise that the company shall make an assessment, and there is no laches in making the assessment, interest cannot be recovered.³⁷ If the insurance is payable to the person whose life is insured, if he survives a certain day, interest is recoverable only from the time demand is made. If there is also a provision in the policy by which it is payable ninety days after notice of the death of the insured this clause has no application to the first contingency, and interest is due only as

³² *East Texas F. Ins. Co. v. Brown*, 82 Tex. 631.

Where the rights of the insured were repudiated the time of the service of the complaint was fixed as that from which the time for making proofs was to be computed. *Smith v. Northwestern Nat. L. Ins. Co.*, 123 Wis. 586.

³³ *Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388; *Wehring v. Modern Woodmen*, 107 Minn. 25; *Perine v. Grand Lodge A. O. U. W.*, 51 Minn. 224; *North-Western Mut. L. Ins. Co. v. Freeman*, 19 Tex. Civ. App. 632.

³⁴ *Western & A. Pipe Lines v. Home Ins. Co.*, 145 Pa. 346.

³⁵ *Gettwerth v. Tentonia Ins. Co.*, 29 La. Ann. 30.

³⁶ *Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285; *Trager v. Louis-*

iana Equitable L. Ins. Co., 31 La. Ann. 235.

The conditions upon which interest may be demanded against a state must be complied with. *Evers v. Glynn*, 126 App. Div. (N. Y.) 519.

Under a statute expressing that no interest shall be allowed on any claim up to the time of the rendition of judgment unless there be a contract stipulating for it, a territory is not liable for interest upon a judgment of its highest court, which is reversed by the supreme court of the United States, prior to the judgment of the latter. *Lowrey v. Territory*, 20 Hawaii 112.

Demand should be made on a beneficial society. *Dary v. Providence P. Ass'n*, 27 R. I. 377.

³⁷ *Commonwealth v. Massachusetts Mut. Ins. Co.*, 119 Mass. 45; *Pray v. Life Ind. & S. Co.*, 104 Iowa, 114.

damages.³⁸ The insurer is not liable for interest according to the terms of its policy so long as the person entitled to receive the amount due neglects to clothe himself with the legal right to demand and receive it,³⁹ or refuses to accept because of a dispute as to the amount due.⁴⁰ The insured cannot recover interest if he refuses to submit the extent of the loss to arbitration in accordance with the policy;⁴¹ nor if he sues to set aside an award; there is nothing on which to compute interest before judgment in that suit.⁴² If the contract is partly written and partly unwritten it is unwritten within the meaning of the Illinois statute, and interest is not recoverable unless there has been unreasonable and vexatious delay in payment.⁴³ Interest is not allowable in favor of claimants against the assets of an insolvent insurer.⁴⁴ Where the sum sued for in any case is certain and liquidated it does not cease to be such for the purpose of the allowance of interest though the jury make an arbitrary deduction therefrom.⁴⁵ Interest may not be recovered on a policy insuring credits anterior to the time the debtor was liable therefor.⁴⁶

A marine policy is a maritime contract, and the allowance

³⁸ *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151; *Davis v. National L. Ins. Co.*, 188 Mass. 299.

³⁹ *Palmer v. Lloyd Mystic Legion*, 86 Neb. 596 (if the time for making proof is not fixed and the loss is payable ninety days after it is made, thirty days is a reasonable time in which to make proof); *Webster v. British Empire Mut. L. Assur. Co.*, 15 Ch. Div. 169, overruling *Crossley v. City of Glasgow L. Assur. Co.*, 4 id. 421; *Britton v. Supreme Council Royal Arcanum*, 46 N. J. Eq. 102, 19 Am. St. 376.

Interest is not due on an indemnity policy until the insured has paid a judgment against him. *Henderson v. Maryland Cas. Co.*, 29 Pa. Super. 398.

⁴⁰ *Williams v. New York Life Ins. Co.*, 122 Md. 141.

⁴¹ *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291.

A waiver of the provision for arbitration is equivalent to striking it out of the policy, and interest may be allowed without reference to it. *Gragg v. Northwestern Nat. Ins. Co.*, 140 Mo. App. 685.

⁴² *Stemmer v. Scottish Ins. Co.*, 33 Ore. 65.

⁴³ *Railway Passenger & F. Conductors' Ass'n v. Tucker*, 157 Ill. 194. See § 323.

⁴⁴ *American Cas. Ins. Co.'s Case*, 82 Md. 535, 38 L.R.A. 97.

⁴⁵ *Martin v. Silliman*, 53 N. Y. 615. If the jury fail to award interest in a verdict for the face value of a life policy the court may add it or direct the jury to do so. *Knights of Pythias v. Allen*, 104 Tenn. 623.

⁴⁶ *Pringle v. Philadelphia Cas. Co.*, 153 App. Div. (N. Y.) 180.

of interest, under the rules adopted by the United States supreme court for the government of courts of admiralty, is for the discretion of the court. Where the insurer admitted liability for almost the whole sum claimed but withheld it for nearly seven years, during which a costly litigation was carried on, the allowance of interest from the time the sum due should have been paid was sustained.⁴⁷ If there is no stipulation concerning interest the rate is governed by the statute in force when the right to recover the loss occurred unless the law reducing the rate took effect intermediate that event and payment, in which case interest at the larger rate would be due until the reduced rate became the legal rate, when that would govern.⁴⁸ Interest is payable at the rate provided by the laws of the state in which the policy was executed and is payable.⁴⁹ A judgment rendered in favor of an insurance company for premiums earned up to the time of cancellation of the policy should include interest from that time.⁵⁰ Interest on a delayed payment of a premium, made within the period of grace, is not due until an account therefor is rendered and demand for payment made.⁵¹

§ 347. **Not allowed on unliquidated demands.** It is a general principle that interest is not allowed on unliquidated damages or demands. The term "unliquidated" applies to the damages recoverable for assault and battery, other personal injury, or slander, and also to those recoverable on a *quantum meruit* for goods sold and delivered, or services rendered. Interest is denied when the demand is unliquidated for the reason that the person liable does not know what sum he owed, and therefore cannot be in default for not paying. Those damages which are wholly at large, depending on no legal standard, and which are referred to the discretion of a jury, can never be made certain except by accord or verdict. There can be no default in respect to their payment and they are never en-

⁴⁷ *New Zealand Ins. Co. v. Earnmoor S. S. Co.*, 24 C. C. A. 644, 79 Fed. 368.

⁴⁸ *Firemen's Fund Ins. Co. v. Western Ref. Co.*, 162 Ill. 322. See §§ 368-370.

⁴⁹ *Cudahy P. Co. v. New Amsterdam Cas. Co.*, 132 Fed. 623.

⁵⁰ *Casualty Co. of America v. Beattie*, 75 Wash. 166.

⁵¹ *People v. Western Life Indemnity Co.*, 181 Ill. App. 116.

hanced by interest.⁵² But demands based upon market values susceptible of easy proof, though unliquidated until the particular subject of the demand has been made definite and certain by agreement or proof, are not so uncertain that no default can be predicated of any delay in making payment.⁵³ A demand is

⁵² *Herrman v. Leland*, 163 App. Div. (N. Y.) 515; *Schmidt v. Briarcliff Lodge Ass'n*, 147 N. Y. Supp. 911; *Illinois Surety Co. v. United States*, 131 C. C. A. 476, 215 Fed. 334; *Stephens v. Phoenix B. Co.*, 139 Fed. 248, 71 C. C. A. 374; *Krasilnikoff v. Dundon*, 8 Cal. App. 406; *United States v. Quinn*, 122 Fed. 65, 58 C. C. A. 401; *Clyde M. & E. Co. v. Buoy*, 71 Kan. 293; *Winter v. Gittings*, 102 Md. 464; *Myers v. Radford*, 167 Mich. 135; *Bull v. Rich*, 92 Minn. 481; *Excelsior T. Co. v. Harde*, 181 N. Y. 11, 106 Am. St. 493; *Munson v. Sith W. Mach. Co.*, 118 App. Div. (N. Y.) 398; *Stannard v. Reid*, 118 App. Div. (N. Y.) 304; *Fox v. Davidson*, 111 App. Div. (N. Y.) 174; *Penny v. Ludwick*, 152 N. C. 375; *Louisville & N. R. Co. v. Wallace*, 90 Tenn. 53, 14 L.R.A. 548; *Burrows v. Lownsdale*, 133 Fed. 250, 66 C. C. A. 650; *Big Sandy R. Co. v. Rice*, 147 Ky. 645; *Board of Com'rs v. Flanagan*, 21 Colo. App. 467; *American-H. E. & C. Co. v. Butler*, 17 Cal. App. 764; *General Supply & C. Co. v. Goelet*, 149 App. Div. (N. Y.) 80; *Meyer v. Buckley*, 22 Cal. App. 96; *Trego v. Rubovits*, 178 Ill. App. 127; *Kitchin v. Oregon N. Co.*, 65 Ore. 20; *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 151 App. Div. (N. Y.) 465; *Ferrea v. Chabot*, 121 Cal. 233; *Coburn v. Goodall*, 72 Cal. 498, 1 Am. St. 75; *Easterbrook v. Farquharson*, 110 Cal. 311; *Cox v. McLaughlin*, 76 Cal. 67, 9 Am. St. 164; *Macomber v. Bigelow*, 123 Cal. 532, 126 Cal. 9; *Dexter v. Collins*, 21

Colo. 455; *Imperial H. Co. v. Clafin Co.*, 175 Ill. 119; *Wittenberg v. Mollyneaux*, 59 Neb. 203, citing the text; *Button v. Kinnetz*, 88 Hun, 35; *Matter of Hartman*, 13 N. Y. Misc. 486; *Meyers' Est.*, 179 Pa. 157; *Kuhn v. McKay*, 7 Wyo. 42, 65, quoting the text; *Pacific P. Tel. Cable Co. v. Fleischner*, 14 C. C. A. 166, 66 Fed. 899; *Coburn v. Muskegon B. Co.*, 72 Mich. 134; *Mansfield v. New York, etc. R. Co.*, 114 N. Y. 331, 4 L.R.A. 566.

⁵³ *New York, etc. R. Co. v. Roper*, 176 Ind. 497, 36 L.R.A. (N.S.) 952.

Regardless of the character of the action interest is recoverable in all cases for the use or destruction of property when the amount which is due the plaintiff may be known or ascertained approximately by reference to market values. *Missouri, etc. R. Co. v. Clark*, 60 Neb. 406, citing the text and *De Lavallette v. Wendt*, 75 N. Y. 579; *Sullivan v. McMillan*, 37 Fla. 134, 53 Am. St. 239; *Gulf, etc. R. Co. v. Dunman*, 6 Tex. Civ. App. 101; *Mobile, etc. R. Co. v. Jurey*, 111 U. S. 524, 28 L. ed. 527.

In *Times Pub. Co. v. Rood*, — Tex. Civ. App. —, 163 S. W. 1037, interest was allowed on damages resulting from a breach of contract to supply newspapers to a newsdealer.

In *Wentworth v. Manhattan Market Co.*, 218 Mass. 91, interest was allowed on damages for lessee's failure to erect a building in accordance with his contract with the lessor.

unliquidated if one party alone cannot make it certain,⁵⁴—when it cannot be made certain by mere calculation; but the allowance of interest as damages is not dependent on this rigid test.⁵⁵ The test as to the right to recover interest for the breach of contracts for the sale of property is the existence of an established market value of it, or means accessible to the party sought to be charged of ascertaining by computation or otherwise the amount to which the plaintiff is entitled,⁵⁶ though the vendee may assert a counterclaim because of defects in the quality of the goods.⁵⁷ It is not sufficient to bring a case within this rule that expert testimony shows the value of the property; market value must be shown by sales, the current price.⁵⁸ The words “debt or sum certain payable at a certain time,” in the English statute governing the right to interest require that the certainty of both the

⁵⁴ *Anthony v. Moore*, 135 App. Div. (N. Y.) 203; *Coates v. Nyack*, 127 App. Div. (N. Y.) 153; *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 151 App. Div. (N. Y.) 465; *Thacher v. New York, etc., R. Co.*, 153 App. Div. (N. Y.) 186; *Clark v. Dutton*, 69 Ill. 521; *Roberts v. Prior*, 20 Ga. 561.

Where a contract to convey land is so indefinite in its description as to be incapable of specific performance, and its money value is unknown, and the vendor cannot know even approximately how much he is liable for, the rule permitting interest upon damages ascertainable by computation or from well established market prices cannot be applied. *Harvey v. Hamilton*, 54 Ill. App. 507.

⁵⁵ *Sanderson v. Read*, 75 Ill. App. 190, quoting the text.

⁵⁶ *Courteney v. Standard B. Co.*, 16 Cal. App. 600; *New York B. N. Co. v. Kidder P. Mfg. Co.*, 192 Mass. 391; *Reynolds v. Burr*, 104 App. Div. (N. Y.) 31; *Parks v. Elmore*, 59 Wash. 584; *Gray v. Central R. Co.*, 157 N. Y. 483; *White v. Miller*, 78 N. Y. 393, 34 Am. Rep. 544; *Mans-*

field v. New York, etc. R. Co., 114 N. Y. 331, 4 L.R.A. 566; *Clegg v. New York N. Union*, 72 Hun 395; *Martyn v. Western Pac. R. Co.*, 21 Cal. App. 589.

In *Parkins v. Missouri Pac. R. Co.*, 76 Neb. 242, the court said it was no answer to the claim for interest against a vendee who refused to accept property that the amount required to compensate the vendor was unascertained and could only be ascertained by verdict, and, consequently he was unable to tender the amount, because that uncertainty was one of the consequences of the defendant's act, and if the loss must fall upon one or the other because of such uncertainty, it is just that it should fall on the wrongdoer. *Wittinberg v. Mollyneaux*, 59 Neb. 203, was overruled.

⁵⁷ *Dickinson F. & P. B. Co. v. Crowe*, 63 Wash. 550. This is regarded as doubtful, and is contrary to *Excelesior T. C. Co. v. Harde*, 181 N. Y. 11, 106 Am. St. 493.

⁵⁸ *City of Rawlins v. Murphy*, 19 Wyo. 238; *Sloan v. Baird*, 162 N. Y. 327.

sum due and the time it is payable shall be ascertainable from the contract. If all the elements of certainty so appear and nothing more is required than an arithmetical computation to ascertain the exact sum or the exact time for payment, interest may be recovered.⁵⁹ The code of California awards interest to every person who is entitled to recover damages, certain or capable of being made certain by computation, if the right of recovery exists upon a particular day. Interest is recoverable under this provision where a contract has been fully performed by the plaintiff and its fruits accepted without objection by the defendant, who was in default as to payment, the only question open being as to the value of such performance.⁶⁰ It is not recoverable where the value of the services rendered can only be established by evidence in court or by an accord between the parties, and is not susceptible of ascertainment either by computation or by reference to known standards of value,⁶¹ nor where the price of the goods sold fluctuated during the period in question.⁶²

In a leading New York case suit was brought for the value of rent long in arrear, payable in services and specific articles: "eighteen bushels of wheat, four fat hens, and one day's service with carriage and horses," were payable yearly as rent. It was an unliquidated demand, not payable in money, nor was a specified sum to be paid in any other way. But the time of payment was certain, and therefore the claim of interest clearly raised the question whether the uncertainty of amount alone

⁵⁹ *London, etc. R. Co. v. South-eastern R. Co.*, [1892] 1 Ch. 120, [1893] App. Cas. 429; *Merchant S. Co. v. Armitage*, L. R. 9 Q. B. 99; *McCullough v. Clemow*, 26 Ont. 467.

A sum is payable at a certain time if the promise is that it shall be paid within six months after the death of the promisor. *Fooks v. Horner*, [1896] 2 Ch. 188.

⁶⁰ *Mix v. Miller*, 57 Cal. 356; *McFadden v. Crawford*, 39 Cal. 662. The latter case was ruled before the code was enacted.

⁶¹ *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. 164; *Swinnerton v. Argonaut L. & D. Co.*, 112 Cal. 375; *Seymour v. Oelrichs*, 162 Cal. 318; *Farnham v. California S. D. & T. Co.*, 8 Cal. App. 266; *Chambers v. Boyd*, 116 App. Div. (N. Y.) 208; *Merchants' Collection Agency v. Gopcevic*, 23 Cal. App. 216; *Perkins v. Blauth*, 163 Cal. 782.

⁶² *Coghlan v. Quartararo*, 15 Cal. App. 662.

relieved the lessee from liability for interest on the value, he having made default in paying in the particular mode provided for. Bronson, J., delivered the opinion in favor of such liability. He said: "It was decided in 1806, without assigning any reason for the judgment, that interest was not recoverable in such a case."⁶³ But since that time the supreme court has deliberately held, on three several occasions, including the present one, that interest is recoverable in such a case.⁶⁴ The principle to be extracted from these decisions may be stated as follows: Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which he has done him; and a just indemnity, though it may sometimes be more, can never be less, than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought in all cases to recover interest, in addition to the debt, by way of damages. It is true that on an agreement like the one under consideration the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services. But the value can be ascertained; and when that has been done the creditor, as a question of principle, is just as plainly entitled to interest after the default as he would be if the like sum had been payable in money. The English courts do not allow interest in such cases; and I feel some difficulty in saying that it can be allowed here without the aid of an act of the legislature to authorize it. But the courts in this and other states have for many years been tending to the conclusion, which we have finally reached, that a man who breaks his contract to pay a debt, whether the payment was to be made in money or in anything else, shall indemnify the creditor so far as that can be done by adding interest to the amount of damage which was sustained on the day

⁶³ Van Rensselaer v. Platner, 1 Johns. 276.

⁶⁴ Lush v. Druse, 4 Wend. 313; Van Rensselaer v. Jones, 2 Barb. 643.

of the breach. The rule is just in itself; and as it is now nearly nineteen years since the point was decided in favor of the creditor and eight out of the nine judges of the supreme court have, at different times, concurred in that opinion, we think the question should be regarded as settled."⁶⁵ The doctrine of this case has been adhered to in that state and often re-affirmed.⁶⁶ In many other states there is a tendency at least in favor of the allowance of interest as damages where there is default in payment.⁶⁷ Justice Winslow of the Wisconsin bench has thus expressed the trend of judicial sentiment: It is quite well established by the preponderance of authority that there are cases for breach of contract, and cases sounding in tort, where the damages are wholly unliquidated, but where they may be fixed by known and reasonably certain market values or other definite standards, where interest is to be allowed from the time of the

⁶⁵ *Van Rensselaer v. Jewett*, 2 N. Y. 135 (1849). In *McMahon v. New York & E. R. Co.*, 20 id. 463, it is said of this case that the court went as far as it was reasonable to go. See *Mansfield v. New York, etc. R. Co.*, 114 id. 331, 4 L.R.A. 566.

If the contract price for work is subject to a reduction for damages which must be ascertained by a trial, interest may not be recovered. *Excelsior T. C. Co. v. Harde*, 181 N. Y. 11, 106 Am. St. 493.

A demand payable in building materials does not bear interest before judgment. *Poppleton v. Jones*, 42 Ore. 24.

⁶⁶ *Kervin v. Utter*, 120 App. Div. (N. Y.) 610; *Degnon-McL. C. Co. v. City Trust, etc. Co.*, 99 App. Div. (N. Y.) 195; *Adams v. Fort Plain Bank*, 36 N. Y. 255; *McCormick v. Pennsylvania Cent. R. Co.*, 49 id. 303; *Mygatt v. Wilcox*, 45 id. 406, 6 Am. Rep. 112; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *McMahon v. New York & E. R. Co.*, 20 N. Y. 463; *McCollum v. Seward*, 62 id. 316; *Pipperly v. Stewart*, 50 Barb. 52; *Church v.*

Kidd, 6 Hun 475; *Mereer v. Vose*, 67 N. Y. 56; *Wilson v. Troy*, 135 N. Y. 104, 18 L.R.A. 449; *Mausfield v. New York, etc. R. Co.*, 114 N. Y. 331, 4 L.R.A. 566; *Gray v. Central, etc. R. Co.*, 157 N. Y. 483; *Sweeney v. New York*, 173 N. Y. 414.

⁶⁷ *Sullivan v. McMillan*, 37 Fla. 134, 143, 53 Am. St. 39 (it is said in this case that the distinction is practically obliterated between liquidated and unliquidated demands); *McCormack v. Lynch*, 69 Mo. App. 524; *Watkins v. Junker*, 90 Tex. 584; *Kuhn v. McKay*, 7 Wyo. 42, 65; *Murray v. Doud*, 63 Ill. App. 247; *Vierling v. Iroquois F. Co.*, 68 id. 643; *Spaulding v. Mason*, 161 U. S. 375, 396, 40 L. ed. 738, 746; *Laycock v. Parker*, 103 Wis. 161 (quoted from, § 321); *New York, etc. R. Co. v. Ansonia L. & W. P. Co.*, 72 Conn. 703, stated in § 355; *Bartee v. Andrews*, 12 Ga. 407; *Vaughan v. Howe*, 20 Wis. 523, 91 Am. Dec. 436; *Gammon v. Abrams*, 53 Wis. 323; *Ryan v. Beldrick*, 3 McCord 294; *Driggers v. Bell*, 94 Ill. 223; *Swanson v. Andrus*, 83 Minn. 505, 510.

breach or the commission of the injury. In such cases interest is not allowed, as such, but simply as compensation for the delay, and in order that the plaintiff may be fully remunerated for his injury. In such cases interest is regarded, in the absence of special circumstances showing greater loss, as measuring the proper compensation for the delay which the plaintiff has suffered in waiting for the payment of his damages; the principle being that the plaintiff will not be fully compensated unless he receive, not only the value of the thing lost, but receive it, as nearly as may be, of the date of his loss.⁶⁸ In Georgia the allowance of interest is discretionary with the jury according to the facts and circumstances.⁶⁹

§ 348. **Same subject.** The question is the same, of course, so far as the uncertainty of amount affects it, when the demand is for services rendered, or for property sold and delivered. Such a case was decided in New York in 1867. The referee found that the defendant was indebted for professional services to the plaintiff's assignor, on a certain date, in a specified sum. But the court remark: "It is not our province and we are not called upon to examine the evidence to ascertain how this indebtedness arose. It is found as a fact that such indebtedness specifically existed in a certain ascertained amount, and consequently it became presently due and payable, and an action could then have been maintained for its recovery, and it follows that interest was recoverable on the amount from the

⁶⁸ *Darlington v. J. L. Gates Land Co.*, 151 Wis. 461; *Bagnall v. City of Milwaukee*, 156 Wis. 642; *J. I. Case Plow Works v. Niles & S. Co.*, 107 Wis. 9; *Richards v. Citizens' N. G. Co.*, 130 Pa. 37; *McCall Co. v. Icks*, 107 Wis. 232; *Gripling v. Winfield*, 53 Fla. 589; *Gross v. Heckert*, 120 Wis. 304. See § 1026.

Courts are coming more and more to recognize that a rule forbidding an allowance for interest upon unliquidated damages is one well calculated to defeat the purpose of making fair compensation for an in-

jury in many cases, and that no good reason exists for drawing an arbitrary distinction between liquidated and unliquidated damages. The determination of whether or not interest is to be recognized as a proper element of damage is one to be made in view of the demands of justice rather than through the application of any arbitrary rule. *Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388.

⁶⁹ *Tifton, etc. R. Co. v. Butler*, 4 Ga. App. 191; *Snowden v. Waterman*, 110 Ga. 99.

day the same became due.”⁷⁰ Damages by way of interest may be allowed the plaintiff in an action on a building contract for the detention of money due him, notwithstanding the amount sued for is liable to be reduced because of his deviation from the plans for the building.⁷¹ Where the rule of damages is the difference between the contract price and the market value, as in case of failure to deliver goods according to contract, interest is allowed on that measure from the date of the breach.⁷² Johnson, J., insisted on the duty to pay interest in this forcible language: “The party is entitled on the day of performance to the property agreed to be delivered; if it is not delivered, the law gives as the measure of compensation then due the difference between the contract and market prices. If he is not also entitled to interest from that time, as a matter of law, this contradictory result follows: that while an indemnity is professedly given, the law adopts such a mode of ascertaining its amount that the longer a party is delayed in obtaining it the greater shall its inadequacy become. It is, however, conceded to be law that in these cases the jury may give interest by way of damages in their discretion. Now, in all cases, unless this be an exception, the measure of damages in an action upon a contract relating to money or property is a question of law, and does not at all rest in the discretion of the jury. If the giving or refusing interest rests in discretion, the law, to be consistent, should furnish some legitimate means of influencing its exercise by evidence; as by showing that the party in fault has

⁷⁰ *Fairechild v. Bay Point & C. R. Co.*, 22 Cal. App. 328; *Bradley v. McDonald*, 157 App. Div. (N. Y.) 572; *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Watkins v. Junker*, 90 Tex. 584; *Mercer v. Vose*, 67 N. Y. 56; *Yates v. Shepardson*, 39 Wis. 173; *Brass v. Springville*, 100 App. Div. (N. Y.) 197. *Contra*, *Swinerton v. Argonaut L. & D. Co.*, 112 Cal. 375.

The test of liability is the existence of means by which the debtor may ascertain the extent of his lia-

bility by computation or otherwise. *People v. Wilcox* (App. Div.) 138 N. Y. Supp. 1055, citing local cases.

⁷¹ *Healy v. Fallon*, 69 Conn. 228; *Laycock v. Parker*, 103 Wis. 161. See *Bennett v. Federal C. & C. Co.* 70 W. Va. 456, 40 L.R.A.(N.S.) 588.

⁷² *Driggers v. Bell*, 94 Ill. 223; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Phumb v. Campbell*, 129 Ill. 101; *McCall Co. v. Ieks*, 107 Wis. 232.

failed to perform either wilfully or by mere accident, and without any moral misconduct. All such considerations are constantly excluded from a jury; and they are properly told that in such an action their duty is to inquire whether a breach of the contract has happened, not what motives induced the breach. That by law a party is to have the difference between the contract price and the market price, in order that he may be indemnified, and because the rule affords the measure of his injury when it occurred; that he may not, as a matter of law, recover interest which is necessary to a complete indemnity; that nevertheless the jury may, in their discretion, give him a complete indemnity, by including the amount of interest in their estimate of his damages; but that he may not give any evidence to influence their discretion, presents a series of propositions, some of which cannot be law. The case of *Van Rensselaer v. Jewett*⁷³ establishes a principle broad enough to include this case, and has freed the law from this as well as other inconsistencies in which it was supposed to have become involved. The right to interest in actions upon contract depends not upon discretion, but upon legal right; and in actions like the present interest is as much a part of the indemnity to which the party is entitled as the difference between the market value and the contract price.”⁷⁴

Nor is it an objection to the allowance of interest on the contract price of property sold, not paid when due, that there is a dispute between the parties as to the quantity and quality.⁷⁵ In actions between vendor and purchaser for failure to fulfill the contract, or for breach of warranty—where the measure of recovery is the difference between market price and contract price, or the market price of a warranted property and its actual value in a state or quality inferior to that which was warranted,—interest is to be added to the damages from the

⁷³ 2 N. Y. 141.

⁷⁴ In *Dana v. Fiedler*, 12 N. Y. 40, 50, 62 Am. Dec. 130. *Watkins v. Junker*, 90 Tex. 584, is to the same effect.

⁷⁵ *Vaughn v. Howe*, 20 Wis. 523,

91 Am. Dec. 436. See *Gammon v. Abrams*, 53 Wis. 323. Interest is not recoverable on an account for services if the employment is disputed. *Griggs v. Ganford*, 50 Ill. App. 172.

time of the breach.⁷⁶ So where the action is on warranty of title.⁷⁷ Money is due immediately, and carries interest from the date of the transaction, where there is a purchase of goods or other things for cash on delivery, or without any other time being agreed on.⁷⁸ If a sale is made on a definite term of credit, agreed on or implied from custom, interest is chargeable from the expiration of that term of credit.⁷⁹ Where a party's right to compensation under a contract is doubtful, is contested upon reasonable grounds and a suit is required to determine the amount, interest will not be allowed for any time preceding such determination.⁸⁰ A denial in good faith of the right to recover

⁷⁶ *J. I. Case Plow Works v. Niles & S. Co.*, 107 Wis. 9, citing the text; *Brown v. Doyle*, 69 Minn. 543; *Bu-ford v. Gould*, 35 Ala. 265; *Clark v. Dales*, 20 Barb. 42; *Hamilton v. Ganyard*, 34 id. 204; *Fishell v. Winans*, 38 id. 228; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Badgett v. Broughton*, 1 Ga. 591; *Enders v. Board Public Works*, 1 Gratt. 372; *Blackwood v. Leman*, Harp. 143; *Bicknall v. Waterman*, 5 R. I. 43; *Merryman v. Criddle*, 4 Munf. 542; *McKay v. Lane*, 5 Fla. 268; *Wolfe v. Sharpe*, 10 Rich. 60; *Marshall v. Wood*, 16 Ala. 806; *Mayor v. Purcell*, 3 Munf. 243; *Sohier v. Williams*, 2 Curtis 195. See *Curtis v. Innerarity*, 6 How. 146.

After demand interest may be recovered for the breach of a contract to deliver goods, the price and quantity being agreed upon. *Thomas v. Wells*, 140 Mass. 517.

⁷⁷ *Rowland v. Shelton*, 25 Ala. 217; *Goss v. Dysant*, 31 Tex. 186; *Crittenden v. Posy*, 1 Head 311; *Eggleston v. Macauley*, 1 McCord 237. But see *Anerum v. Slone*, 2 Spear 594.

⁷⁸ *McAfee v. Dix*, 101 App. Div. (N. Y.) 69; *Wyandotte, etc. G. Co. v. Schliefer*, 22 Kan. 468; *Foote v. Blanchard*, 6 Allen 221, 83 Am. Dec. 624; *Pollock v.*

Ehle, 2 E. D. Smith 541; *Salter v. Parkhurst*, 2 Daly 240; *Clark v. Dalton*, 69 Ill. 521; *Waring v. Henry*, 30 Ala. 721; *Smith v. Shaffer*, 50 Md. 132; *Atlantic P. Co. v. Graffin*, 114 U. S. 492, 29 L. ed. 221. Where there is a sale of goods and the price is not a gross sum the amount is liquidated by the terms of the invoice received and retained by the vendee. *Ibid. Contra, State v. Warner*, 55 Wis. 271; *Marsh v. Fraser*, 37 Wis. 152. Both these cases are probably overruled by *Laycock v. Parker*, 103 Wis. 161, 185. In harmony with the latter is *Farr v. Sample*, 81 Wis. 230.

⁷⁹ *Esterly v. Cole*, 3 N. Y. 502; *Kennedy v. Barnwell*, 7 Rich. 124; *Howard v. Farley*, 3 Robert. 308; *National Lancers v. Lovering*, 30 N. H. 511; *Moore v. Patton*, 2 Port. 451; *Raymond v. Isham*, 8 Vt. 258; *Dickinson v. Gould*, 2 Tyler 32; *Leyde v. Martin*, 16 Minn. 38; *Foote v. Blanchard*, 6 Allen 221, 83 Am. Dec. 624; *Wiltburger v. Randolph, Walk. (Miss.)* 20; *Wyandotte, etc. G. Co. v. Schliefer*, 22 Kan. 468.

⁸⁰ *Shipman v. State*, 44 Wis. 458; *Tucker v. Grover*, 60 id. 240. See *Tyson v. Milwaukee*, 50 Wis. 78. The two cases first cited are affected by *Laycock v. Parker, supra*.

avoids liability for interest prior to judgment though there is no question concerning the extent of the contingent liability.⁸¹ Interest has been denied because an excessive claim was made upon an unliquidated demand.⁸² It has been laid down as a general rule that there cannot be a recovery of interest on the damage sustained in an action for the breach of contract where the recovery is measured by the loss of profits,⁸³ and that interest is not recoverable on profits anterior to their determination by verdict.⁸⁴

§ 349. **Interest on accounts.** On accounts which were not due when made nor by the expiration of any term of credit interest is allowed after demand *in pais* or by suit.⁸⁵ A demand made by rendering the account informs the debtor what is

⁸¹ *Sorenson v. Oregon P. Co.*, 47 Ore. 24; *Baker County v. Huntington*, 48 Ore. 593.

⁸² *Excelsior T. C. Co. v. Harde*, 90 App. Div. (N. Y.) 4, 181 N. Y. 11, 106 Am. St. 493; *O'Reilly v. Mahoney*, 123 App. Div. (N. Y.) 275.

⁸³ *Underwood T. Co. v. Century R. Co.*, 165 Mo. App. 131; *Wiggins F. Co. v. Chicago & A. R. Co.*, 128 Mo. 224.

⁸⁴ *Swanson v. Andrus*, 83 Minn. 505; *Beekwith v. New York*, 121 App. Div. (N. Y.) 462.

⁸⁵ *Mulligan v. Smith*, 32 Colo. 404; *Hunt v. Boston E. R. Co.*, 199 Mass. 220; *Childs v. Krey*, 199 Mass. 352; *Hefferlin v. Karlman*, 29 Mont. 139; *Montague v. Aggarn*, 164 Ill. App. 596; *Lane v. Turner*, 114 Cal. 396; *Evans v. Western B. Mfg. Co.*, 118 Mo. 548; *Dempsey v. Schawacker*, 140 Mo. 680; *Williams v. Chicago, etc. R. Co.*, 153 Mo. 487; *Patterson v. Missouri G. Co.*, 72 Mo. App. 492; *Laycock v. Parker*, 103 Wis. 161, 187; *Remington v. Eastern R. Co.*, 109 Wis. 154; *Ledyard v. Bull*, 119 N. Y. 62; *Carriarti v. Blanco*, 121 N. Y. 230; *Heidenheimer v. Ellis*, 67 Tex. 426; *Case v.*

Hotchkiss, 3 Keyes 334, 3 Abb. Pr. (N. S.) 381, 1 Abb. Ct. of App. 324; *Mygatt v. Wilcox*, 45 N. Y. 306, 6 Am. Rep. 93; *White v. Miller*, 78 N. Y. 393, 34 Am. Rep. 544; *Mellvaine v. Wilkins*, 12 N. H. 474; *Barnard v. Bartholomew*, 22 Pick. 291; *Wheeler v. Haskins*, 41 Me. 432; *Hall v. Huekins*, id. 574; *Goff v. Rehoboth*, 2 Cush. 475; *Wood v. Hickox*, 2 Wend. 501; *Brainerd v. Champlain T. Co.*, 29 Vt. 154; *Gammel v. Skinner*, 2 Gall. 45; *Van Huse v. Kanouse*, 13 Mich. 303; *Beardslee v. Horton*, 3 id. 560; *McCullum v. Seward*, 62 N. Y. 316; *Harrison v. Conlan*, 10 Allen 85; *Adams Exp. Co. v. Milton*, 11 Bush 49; *Palmer v. Stockwell*, 9 Gray 237; *Hunt v. Nevers*, 15 Pick. 505, 26 Am. Dec. 616; *Barrow v. Reab*, 9 How. 366, 13 L. ed. 177; *Enders v. Board of Public Works*, 1 Gratt. 389; *Ruckman v. Pitcher*, 20 N. Y. 9; *McFadden v. Crawford*, 39 Cal. 662; *Young v. Diekey*, 63 Ind. 31; *Rend v. Boord*, 75 Ind. 307; *Marsteller v. Crapp*, 62 Ind. 359; *Munn & Co. v. Americana Co.*, 82 N. J. Eq. 443, disallowing interest in the absence of demand.

claimed to be due and gives him the means of examining it in detail; and if no objection is made it becomes a stated account—from that time a liquidated debt.⁸⁶ If a bill is presented and the debtor admits his indebtedness for the items thereof, subject to modification and correction as to the sum charged, interest runs from that time on the items not subsequently objected to, and on the others from the commencement of the action.⁸⁷ The ac-

⁸⁶ *Dean & Son, Ltd. v. W. B. Conkey Co.*, 180 Ill. App. 162; *De La Cuesta v. Montgomery*, 144 Cal. 115; *Reynolds v. Phillips*, 142 Ill. App. 482; *Howell's Succession*, 121 La. 955; *Jonesboro, etc. R. Co. v. United I. W. Co.*, 117 Mo. App. 153; *Brown v. Gise*, 14 N. M. 282; *Fearon v. Little*, 227 Pa. 348; *Miller v. Ryder*, 145 Wis. 526; *Henderson C. Mfg. Co. v. Lowell M. Shops*, 86 Ky. 668, quoting the text; *Walden v. Sherburne*, 15 Johns. 409; *Liotard v. Graves*, 3 Cal. 226; *Elliott v. Minott*, 2 McCord 125; *Beardslee v. Horton*, 3 Mich. 560; *Van Husan v. Kanouse*, 13 id. 303; *Underhill v. Gaff*, 48 Ill. 198; *Richard v. Parrett*, 7 B. Mon. 379, 383; *Barnard v. Bartholomew*, 22 Pick. 291; *Mygatt v. Wilcox*, 45 N. Y. 308, 6 Am. Rep. 90; *Case v. Hitchcock*, 3 Keyes 334; *Martin v. Silliman*, 53 N. Y. 615; *Atkinson v. Golden Gate T. Co.*, 21 Cal. App. 168; *In re Hawks*, 204 Fed. 309. See *Davis v. Smith*, 48 Vt. 52.

Under the statute of Illinois interest is not recoverable on a verbal contract unless there has been an unreasonable and vexatious delay of payment. *West Chicago A. Works v. Sheer*, 104 Ill. 586. See § 323; *Falcon E. Co. v. Wright*, 171 Ill. App. 521.

It is not cause for denying the recovery of interest on a mechanic's lien, from the time of filing notice of the claim therefor, that it would be enforced against a stranger to

the contract with the lien claimant. *Sorg v. Crandall*, 129 Ill. App. 255.

Interest is recoverable on the lien of a subcontractor though there may not have been unreasonable or vexatious delay in making payment. *Merritt v. Crane*, 126 id. 337.

If goods are sold under a contract in writing which fixes the times at which payments are to be made interest will be allowed upon all sums not paid when due from the time agreed upon for payment whether the delay in payment is unreasonable and vexatious or not. *Rouse v. Western W. Works*, 66 Ill. App. 647, aff'd 169 Ill. 536, 539. And, it seems, the promise to pay need not be in writing if the creditor presents monthly statements and the debtor promises from month to month to pay. *Lusk v. Throop*, 189 Ill. 127, aff'd 89 Ill. App. 509.

The court may arbitrarily fix the date from which interest should be computed. *Falcon E. Co. v. Wright*, *supra*.

In Colorado interest is recoverable on an account stated and on an open account from the date when it became due and payable. *Mine & Smelter S. Co. v. Parke*, 47 C. C. A. 34, 107 Fed. 881.

In Nevada, in an action on an open account interest prior to judgment is not recoverable. *Thompson v. Tonopah Lumber Co.*, — Nev. —, 141 Pac. 69.

⁸⁷ *Manchester F. Assur. Co. v. Fitzpatrick*, 120 Ill. App. 535; *Bor-*

counts of a public officer are liquidated by being submitted to the authorities who have power to pass upon and approve them.⁸⁸ On the termination of mutual accounts the creditor is entitled to interest by way of damages upon the balance due from that date until judgment.⁸⁹ The general rule as to accounts may not apply to exceptional dealings. Where a contract for the reorganization of a railroad company was operative from the time it was made but was silent as to interest for money or the debts of the company during the time of the proceedings of the reorganization, interest was not recoverable upon the mutual demands and liabilities of the parties.⁹⁰

The denial of interest on accounts rests more on the ground that there is a running credit than because the demand is uncertain and unliquidated.⁹¹ This latter objection may exist in particular cases; but accounts are not ordinarily unliquidated demands in the sense which prevents the allowance of interest. A demand is not to be assumed to be unliquidated and uncertain merely because it is in the form of an account. A running account implies an indefinite credit, and a demand is necessary to place the debtor in default. Interest is properly due and recoverable on accounts when the items are not controverted nor unliquidated, and where the circumstances are such that a debtor is in default;—has unreasonably neglected to make payment.⁹² To put an account upon interest a demand is often necessary, but not on the ground of uncertainty. And after demand or commencement of suit accounts generally bear interest. The beginning of suit is a form of demand. Accounts

den & S. Co. Fraser, 118 id. 655;
Hand v. Church, 39 Hun 303.

⁸⁸ Cicero v. Grisko, 144 Ill. App.
564; Stern v. People, 102 Ill. 540.

⁸⁹ Fearon v. Little, *supra*; Mc-
Keon v. Byington, 70 Conn. 429.

⁹⁰ Davidson v. Mexican Nat. R.
Co., 58 Fed. 653.

⁹¹ Ledyard v. Bull, 119 N. Y. 62;
Cox v. McLaughlin, 76 Cal. 60, 9
Am. St. 164; Rogers v. Yarnell, 51
Ark. 198; Miles v. Bowers, 49 Ore.
429; Gibson's Est., 228 Pa. 409.

⁹² Bassick G. M. Co. v. Beardsley,
49 Colo. 275, 33 L.R.A.(N.S.) 852;
Florence, etc. R. Co. v. Tennant, 32
Colo. 71; Harding v. York K. Mills,
142 Fed. 228. See cases in first
note to § 349; 1 Am. Lead. Cas.
505; Kinard v. Glenn, 25 S. C. 590.

Interest is recoverable where there
is an express admission that the ac-
count is due. Harvey v. Denver &
R. G. R. Co., 56 Colo. 570.

are generally made up of items which represent money paid or advanced, goods sold and delivered or services rendered on request. They are, severally, demands on which interest may be claimed, though the price has not been fixed by agreement and must be established by evidence.⁹³

An account is no more uncertain as to amount, in the aggregate, than are its constituent items; and the fact that they are charged in account can have no adverse effect in respect to interest; entering them in a book has even been emphasized as though it were a circumstance having some influence in favor of interest.⁹⁴ Where, however, the account or demand is for particulars, the value or amount of which cannot be measured or ascertained by reference to market rates, and are intrinsically uncertain, or the creditor's demand of payment is excessive or vague, a different case is presented.⁹⁵ Where the plaintiff merely asked the defendant for his pay for labor and materials, an account not being presented and never having been rendered, such request was not considered a demand which could aid any view of the case.⁹⁶ But a demand of that kind would be sufficient where no information in respect to the amount of the claim need be imparted.⁹⁷

Where no such uncertainty appears and the subject of the account and the circumstances connected with it indicate that the delay has not been owing to the debtor's ignorance of the amount he had to pay, interest has been allowed after a reasonable credit.⁹⁸ Nor will the want of a demand be any objection

⁹³ Id.; *Smith v. Shaffer*, 50 Md. 132. See *Pomeroy v. Noud*, 145 Mich. 37.

⁹⁴ *Florence O. & R. Co. v. McRae*, 40 Colo. 303; *Marsh v. Fraser*, 37 Wis. 149. Compare *Schmidt v. Limehouse*, 2 Bailey 276; *Dillon v. Dudley*, 1 A. K. Marsh. 65; *Hunt v. Nevers*, 15 Pick. 500, 26 Am. Dec. 616; *Dodge v. Perkins*, 9 Pick. 368; *Cannon v. Beggs*, 1 McCord 370, 10 Am. Dec. 677; *Scudder v. Morris*, 2 N. J. L. *419; *Wells v. Abernethy*, 5 Conn. 222; *Breyfogle v. Beckley*, 16 S. & R. 264; *Nelson v. Cartmel*, *Suth. Dam. Vol. I.—70*.

6 Dana 7; *Ringo v. Biscoe*, 13 Ark. 563.

⁹⁵ *Cox v. McLaughlin*, *supra*. See *Clark v. Clark*, 46 Conn. 586.

⁹⁶ *Marsh v. Fraser*, 37 Wis. 149. The debtor's request for delay is the legal equivalent of presentment. *Babcock v. Hubbard*, 56 Conn. 284, 306.

⁹⁷ *Gammel v. Skinner*, 2 Gall. 45.

⁹⁸ *Bassick G. M. Co. v. Beardsley*, *supra*; *Wells v. Brown*, 3 N. J. L. 411; *Wood v. Smith*, 23 Vt. 706.

In Nebraska accounts do not show interest until the expiration of six

to the allowance of interest where the debtor has absented himself from the state without calling for his account and thereby prevented any demand being made upon him. In such a case interest was held to be allowable from the time of the latest transaction or service.⁹⁹ A demand of more than is due may well be treated as insufficient to put the debtor in default, for it not only does not tend to liquidate the claim but indicates that the plaintiff prevents both adjustment and payment or that the claim is intrinsically uncertain.¹ A promise to pay interest on an open account is binding as to the amount in fact due though the debtor disputes items in it.²

In Vermont the rule respecting interest is somewhat peculiar. In cases of ordinary running accounts, where there is no express or implied understanding to the contrary, annual rests should be made and interest allowed on the balance from each such rest. In these cases the law implies a contract to pay interest on whatever may remain unsatisfied after the expiration of a year, on the ground that a year is by common understanding the usual period of credit in matters of open account, and that the debtor should have seen to the adjustment of the account at that time, and, failing to do so, is presumed to have contemplated the payment of subsequently accruing interest. This rule, though mainly applied to cases of mutual dealings, has not been limited thereto. In a recent case the plaintiff contracted to board the intestate's daughter; no stipulation was made respecting the time board should be furnished or paid for. The plaintiff performed his contract for sixteen years, during which but seven small payments were made, and made

months from the date of the last item thereof. *Staker v. Begole*, 34 Neb. 107; *Garneau v. Omaha P. Co.*, 52 Neb. 383.

In Pennsylvania book accounts for goods bear interest six months after their sale and delivery. *Kamber v. Becker*, 27 Pa. Super. 266.

The Texas statute provides for interest on accounts from the first day of the calendar year after they were

made. *Browning v. El Paso L. Co.* (Tex. Civ. App.), 140 S. W. 386.

⁹⁹ *Graham v. Graham*, 2 Keyes 21; *Graham v. Chrystal*, 2 Abb. App. Dec. 263; *Bell v. Mendenhall*, 78 Minn. 56, 67.

¹ *Hoagland v. Segur*, 38 N. J. L. 230; *Lusk v. Smith*, 21 Wis. 28; *Goff v. Rehoboth*, 2 Cush. 475.

² *Lee v. Hill*, 92 S. C. 114.

no demand. Interest was computable from the end of each year.³

§ 350. **Same subject.** Claims sounding in damages and accounts, where there has been no especial diligence on the part of the creditor or long and vexatious delay on the part of the debtor, in the absence of a demand, present cases where interest may not be recovered as matter of law, but may be allowed in the name of damages by a jury in their discretion.⁴ The important inquiry is whether the debtor has done all the law required of him in the particular case. If he has he is not liable for interest; if he has not he must pay it as a compensation for the non-performance of his contract.⁵

The cases are numerous in which it has been held or declared in general terms that interest is not allowed on open running accounts.⁶ But they were those where there had been no demand

³ *Yeartean v. Bacon's Est.*, 65 Vt. 516, stating the application of the rule to different classes of questions and citing the cases; *Gordon v. Mead*, 81 Vt. 36 (account between attorney and client).

⁴ *Calvert Bank v. Katz*, 102 Md. 56; *Frazer v. Bigelow C. Co.*, 141 Mass. 126; *Eckert v. Wilson*, 12 S. & R. 393; *Anonymous*, 1 Johns. 315; *Constable v. Colden*, 2 id. 480; *Hagg v. Augusta Ins. & B. Co.*, Taney, 159; *Wiltburger v. Randolph*, Walk. (Miss.) 20; *Huston v. Crutcher*, 31 Miss. 51; *Willings v. Consequa*, Pet. C. C. 172; *Gilpins v. Consequa*, id. 85; *Dox v. Dey*, 3 Wend. 356; *Stark v. Price*, 5 Dana 140; *Morford v. Ambrose*, 3 J. J. Marsh. 688; *Dela-ware Ins. Co. v. Delaunie*, 3 Bin. 295; *Amory v. McGregor*, 15 Johns. 24, 8 Am. Dec. 205; *Kilderhouse v. Saveland*, 1 Ill. App. 65; *Chicago v. Allecock*, 86 Ill. 384; *Newson v. Douglass*, 7 Harris & J. 417; *Black v. Reybold*, 3 Harr. 528; *Dotter v. Bennett*, 5 Rich. 295; *Feeter v. Heath*, 11 Wend. 477; *Tatum v. Mohr*, 21 Ark. 350; *Rogers v. West*,

9 Ind. 403; *Bare v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42; *Richmond v. Dubuque*, etc. R. Co., 33 Iowa 422; *McNally v. Shobe*, 22 Iowa 49; *Mote v. Chicago*, etc. R. Co., 27 Iowa 22; *McNear v. McOmber*, 18 Iowa 12; *Noe v. Hodges*, 5 Humph. 103; *Watkinson v. Laughton*, 8 Johns. 213; *Uhland v. Uhland*, 17 S. & R. 265; *Graham v. Williams*, 16 S. & R. 257, 16 Am. Dec. 569. See *Wood v. Smith*, 23 Vt. 706; § 321.

⁵ *Dodge v. Perkins*, 9 Pick. 368. This case is referred to in *Foote v. Blanchard*, 6 Allen 221, 83 Am. Dec. 624, as correctly stating the law. See *Evans v. Beckwith*, 37 Vt. 285; *Seroggs v. Cunningham*, 81 Ill. 110.

⁶ *Grangers' Union v. Ashe*, 12 Cal. App. 757, and local cases cited; *Marrone v. Ehrat*, 175 Ill. App. 649; *Polhemus v. Annin*, 1 N. J. L. 176; *Tucker v. Ives*, 6 Cow. 193; *Davis v. Walker*, 18 Mich. 25; *Clement v. McConnell*, 14 Ill. 154; *Beardslee v. Horton*, 3 Mich. 560; *Marsh v. Fraser*, 37 Wis. 149; *Henry v. Risk*, 1 Dall. 265, 1 L. ed. 130; *Williams v. Craig*, 1 Dall. 338; *Blaney v.*

of payment or other circumstances to impose the immediate duty to pay; or else the claim founded on the account was exceptionally uncertain and unliquidated.⁷ When a promissory note or other instrument expresses no time when it is payable it is due immediately and bears interest from date;⁸ and other commercial paper payable at day certain will bear interest after maturity.⁹ Notes payable on demand will not bear interest until a demand is made; the creditor, so long as he refrains from making a demand, acquiesces in the debtor's retention of the money.¹⁰ A due bill, payable on demand and

Hendrick, 3 Wils. 205; De Haviland v. Bowerbank, 1 Camp. 50; Smith v. Velie, 60 N. Y. 106; Benedict v. Sliter, 82 Hun 190.

In an action to recover the value of services as warehouseman the account between the parties had not been settled for several years, and the balance due either party was uncertain and indefinite; interest was allowed only from the date the action was begun. *Tobin v. South*, 18 Ky. L. Rep. 350.

In Illinois interest cannot be recovered on an account unless there has been an unreasonable and vexatious delay in payment. *Sammis v. Clark*, 13 Ill. 544; *Phillips v. Rehm*, 64 Ill. App. 477. See § 323.

⁷ If liability is denied and the recovery is for less than the sum claimed interest is allowed only from judgment. *Erickson v. Stockton & T. C. R. Co.*, 148 Cal. 206.

⁸ *Gaylord v. Van Loan*, 15 Wend. 308; *Lewis v. Lewis*, Mart. & Hayw. 191; *Purdy v. Phillips*, 1 Duer 169; *Francis v. Castleman*, 4 Bibb 383, 1 Am. Neg. Cas. 900; *Sheehy v. Mandeville*, 7 Cranch 208, 3 L. ed. 317; *Farquhar v. Morris*, 7 T. R. 124; *Collier v. Gray*, *Overton*, 110; *Rogers v. Colt*, 21 N. J. L. 19.

⁹ *Gantt v. MacKenzie*, 3 Camp. 51; *Thorndike v. United States*, 2

Mason 1; *Hastings v. Wiswall*, 8 Mass. 455.

Interest begins to run on a note payable on a certain day with interest after maturity after it is due although it is not suable until expiration of days of grace. *Wheless v. Williams*, 62 Miss. 369, 52 Am. Rep. 190; *Weems v. Ventress*, 14 La. Ann. 267.

¹⁰ *Hudson v. Daily*, 13 Ala. 722; *Vaughan v. Goode*, Minor, 417; *Freeland v. Edwards*, Mart. & Hayw. 207; *Hurd v. Palmer*, 21 Up. Can. Q. B. 49; *Pate v. Gray*, Hemp. 155; *Patrick v. Clay*, 4 Bibb 246; *Bartlett v. Marshall*, 2 id. 469; *Wallace v. Wallace*, 8 Ill. App. 69; *South v. Leary*, Hardin, 518; *Conyers v. McGrath*, 4 McCord 218; *Trotter v. Grant*, 2 Wend. 413; *Wood v. Hickok*, id. 501; *McConnico v. Curzen*, 2 Call 301; *Kerr v. Love*, 1 Wash. (Va.) 217; *Hadley v. Ayres*, 12 Abb. Pr. (N. S.) 240; *Wood v. Smith*, 23 Vt. 706; *Shemel v. Givan*, 2 Blackf. 312; *Delaware Ins. Co. v. De Launie*, 3 Bin. 301; *Crawford v. Willing*, 4 Dall. 286, 1 L. ed. 836; *Oberinger v. Nichols*, 6 Bin. 159, 6 Am. Dec. 439; *Newell v. Keith*, 11 Vt. 214; *Esterly v. Cole*, 1 Barb. 235, 3 N. Y. 502; *McKnight v. Dunlop*, 4 Barb. 36; *Hoagland v. Segur*, 38 N. J. L. 230.

being silent as to interest, bears interest only from the time payment is demanded.¹¹ It has been held that, by consenting to a delay of payment, a creditor is precluded from recovering interest during such delay; so, if a person entitled to money resists the reception of it or fails to qualify himself to receive it he cannot recover interest.¹² If a note be payable at a fixed time, as one day after date, and there be a subjoined agreement that suit shall not be brought so long as the maker is alive or the payee is satisfied that he is solvent interest still runs from the time specified for payment.¹³ Where an obligation was payable in a certain month it was held that interest did not commence until after the last day of that month.¹⁴ Interest is not payable before the maturity of the principal unless so expressed. Where a note is for several annual instalments interest is payable on them as they become due, and not annually on the whole sum.¹⁵ If a mortgage given to secure an account provides for the payment of a higher rate of interest on certain items of the account than on others the lower rate only can be recovered if the plaintiff does not separate the items.¹⁶

§ 351. When demand necessary. Although money lent bears interest from the lending it is only so when there is no agreement of the parties modifying the right. If a note for money

In *Darlington v. Wooster*, 9 Ohio St. 518, an action on a demand note where there was no proof of a demand, it was held that by force of the statute fixing the rate of interest the plaintiff was entitled to recover interest from the date of the note. The statute provides "that all creditors shall be entitled to receive interest upon all moneys after the same shall become due either on bond, bill, promissory note or other instrument of writing," etc.

In *Billingsby v. Billingsby*, 24 Ala. 518, it was decided that where a note payable on a specified day stipulates that it shall not bear interest until another specified day after maturity, an action is maintainable after maturity notwith-

standing the judgment will bear interest from its rendition even prior to the day specified for interest to begin. See *Ijams v. Rice*, 17 Ala. 404.

¹¹ *Cook v. Clark's Committee*, 21 Ky. L. Rep. 316; *Gore v. Buck*, 1 B. Mon. 209.

¹² *Craig v. Pennick*, 3 J. J. Marsh. 16; *Webster v. British Empire Mut. L. Assur. Co.*, 15 Ch. Div. 169.

¹³ *Powell v. Guy*, 3 Dev. & Batt. 70; *Carter v. King*, 11 Rich. 125; *Rallman v. Baker*, 5 Humph. 406.

¹⁴ *Pollard v. Yoder*, 2 A. K. Marsh. 264.

¹⁵ *Bawder v. Bawder*, 7 Barb. 560.

¹⁶ *Honnett v. Williams*, 66 Ark. 148.

lent be taken payable on demand it has no advantage on account of that consideration, and only bears interest like all other similar notes from the time of demand;¹⁷ and so of a dishonored check.¹⁸ Besides moneys due on running accounts and demand notes there are various other kinds of what may be termed passive liabilities in respect to which the party liable cannot be placed in default and be charged with interest, until the money is demanded, or notice of some fact is given,¹⁹

¹⁷ *Adams v. Adams*, 55 N. J. Eq. 42; *In re Estate of King*, 94 Mich. 411; *Butler v. Austin*, 64 Cal. 3; *Schmidt v. Limehouse*, 2 Bailey 276; *Pullen v. Chase*, 4 Ark. 120; *Walker v. Wills*, 5 Ark. 166; *Bennett v. Palmer*, 128 Ill. App. 626; *Layman v. Detharding*, 106 id. 594; *Rosenberger v. Pacific Exp. Co.*, 129 Mo. App. 105; *Van Vliet v. Kanter*, 65 N. Y. Misc. 48, citing the text; *Ehrlich v. Brucker*, 121 Wis. 495. *Contra*, *Curtis v. Smith*, 75 Conn. 429.

The same rule applies to other contracts silent as to the time of payment and as to interest. *North & South R. S. Co. v. Nowland*, 73 Ill. App. 689.

¹⁸ *Andrus v. Bradley*, 102 Fed. 54.

¹⁹ Where no demand has been made upon a cotenant in possession of the premises, either for their possession or the value of their use he is not liable for interest. *West v. Weyer*, 46 Ohio St. 66, 15 Am. St. 552; *Sloan v. Hanson Mfg. Co.*, 150 Ill. App. 544 (loan for an indefinite period). See *Cully v. Isham*, 125 App. Div. (N. Y.) 97; *Baltimore T. Co. v. George's Creek C. & I. Co.*, 119 Md. 21 (interest on unpaid dividends); *In re Cole's Estate*, 85 Misc. (N. Y.) 630, allowing interest on a noninterest bearing claim against a decedent's estate from the date of death.

The sureties of a treasurer are

liable for interest on money openly retained under an erroneous interpretation of the law only after demand. *Whittemore v. People*, 227 Ill. 453.

Demand must be made upon surety on a guardian's bond. *Pennsylvania Co. v. Swain*, 189 Pa. 626.

Interest does not run on money deposited to secure the performance of a contract until demand made for it. *Kirkland v. Niagara Gorge R. Co.*, 109 App. Div. (N. Y.) 201.

If interest is not stipulated for and the transaction is not a mercantile loan a demand must be made before the right to interest accrues. *La Compania General de Tabacos, etc. v. Araza*, 7 Philip. Isl. 455; *Bautista v. Calixto*, id. 733; and so where the action is for money had and received. *York v. Farmers' Bank*, 105 Mo. App. 127; or payment has been made in excess of the contract price. *Fort Smith W. Co. v. Baker*, 84 Ark. 444; or one claims money as a donee of a decedent. *Chamberlain v. Eddy*, 154 Mich. 593; or an instrument with coupons payable to bearer attached is lost and no indemnity is tendered the maker, who keeps the money in hand to meet his liability. *Pensacola & A. R. Co. v. Hilton*, 147 Ky. 553.

Under a statute providing that all moneys shall bear interest after they become due the right to it is

as a note given in payment of a subscription for corporate stock, although it is not paid until after it is due, there being no promise to pay interest and no call made for the payment of subscriptions.²⁰ The question of notice has been much discussed and is by no means settled. It is not necessary to enter into it fully in this connection.²¹ In many cases, as in those of continuing guaranties, it is necessary to a complete cause of action; in others, to place the defendant in default so as to subject him to interest.²²

Bail are liable for interest on the judgment from the return of the *ca. sa.*, for they are fixed from that time and are bound to take notice of the proceedings.²³ So, on a replevin bond, the sureties are liable for interest on the value of the property adjudged against the principal from the date of the judgment. The undertaking in these and similar cases is specific, depending only on contingencies determinable by the proceedings in the case of which the sureties are bound to inform themselves. But in an action for the benefit of a creditor of an insolvent estate brought upon an administrator's bond against a surety it appeared that the creditor's claims had been allowed, the probate court had made a decree of distribution, and that the administrator died soon thereafter; it was held that interest

not affected by laches in bringing suit. *Denver v. Barber A. P. Co.*, 141 Fed. 69, 72 C. C. A. 402.

²⁰ *Seattle T. Co. v. Pitner*, 18 Wash. 401.

²¹ See 2 Am. Lead Cas. 33 *et seq.*; *Vinal v. Richardson*, 13 Allen 521; *Brown v. Curtis*, 2 N. Y. 225; *Bank v. Sinclair*, 60 N. H. 100, 49 Am. Rep. 307.

²² See *Orleans & J. R. Co. v. International C. Co.*, 113 La. 409.

A statutory provision that no interest accruing on a claim after a debtor's death shall be allowed against his estate unless the claim is verified and payment demanded within one year of the personal representative may be waived by the

latter if he alone will be affected by the waiver. *Croninger v. Marthen*, 83 Ky. 662. It is not waived by his making payment on an unverified claim. He may therefore insist on compliance with the statute as to the unpaid balance. *Jett v. Cockrill*, 85 Ky. 348.

A demand is waived if the personal representative requests the creditor to postpone the collection of his claim and assures him that it will be paid in full, at least where such representative is the only other creditor and the estate is not sufficient to pay both debts. *Boughner v. Brooks*, 7 Ky. L. Rep. 599.

²³ *Constable v. Golden*, 2 Johns. 480.

should be added to the sum found due by the decree of distribution only from the time payment was demanded of the surety.²⁴

It is a general rule that a party is not entitled to notice unless he has stipulated for it, or it is necessary by the very nature of the transaction, as where the act on which payment is to be made is indefinite and when it occurs will be peculiarly within the knowledge of the payee.²⁵ On a guaranty of payment of notes, not exceeding in all a certain amount that should be discounted by a bank for another, it was held that the guarantor was liable to the amount of the guaranty, but not for interest until notice given that the principal had failed to pay.²⁶ If the event on which the money is to be payable is one not particularly within the knowledge of the payee, as a death,²⁷ or a marriage, even though the payee be a party to it,²⁸ interest commences to run from the time when the event occurs.

The general rule that the debtor must seek his creditor and tender the amount due does not apply when the debtor is a municipal or *quasi*-municipal corporation. In such a case, if the creditor desires to secure interest on the obligation or claim he holds, he must present it; failing to do so, he will not be entitled to interest after its maturity, at least if funds were provided to pay the principal and interest due.²⁹ While it is the general rule that a depositor cannot maintain an action to recover his deposit until he has made a formal demand,³⁰ and that the bringing of an action is not a sufficient demand, yet, "if

²⁴ *Heath v. Guy*, 10 Mass. 371, overruling *Payne v. McInteer*, 1 id. 69.

²⁵ *Vyse v. Wakefield*, 6 M. & W. 442; *Hodges v. Holeman*, 2 Dana 396.

²⁶ *Washington Bank v. Shurtleff*, 4 Mete. (Mass.) 30; *Hennington's Case*, Cro. Jac. 432.

²⁷ *Troubar v. Hunter*, 5 Rawle 257; *Sumner v. Beebe*, 37 Vt. 562.

²⁸ *Fletcher v. Pynsett*, Cro. Jac. 102.

²⁹ *Appleton W. W. Co. v. Appleton*, 136 Wis. 395; *Holihan v. New*

York, 33 N. Y. Misc. 249; *Donnelly v. Brooklyn*, 121 N. Y. 9; *Friend v. Pittsburgh*, 131 Pa. 305, 17 Am. St. 811, 6 L.R.A. 636; *South Park Com'rs v. Dunlevy*, 91 Ill. 49. See § 214.

The commencement of suit is sufficient demand upon a city to make it liable for interest on warrants from that time. *New Orleans v. Warner*, 175 U. S. 120, 147, 44 L. ed. 96, 109.

³⁰ *Clark v. Farmers' Nat. Bank*, 124 Ky. 563.

the bank by words or conduct denies the depositor's right to his balance it becomes presently liable to an action without formal demand," and interest is recoverable as damages; as where it initiates proceedings which result in a transfer of the moneys of its depositors and thus puts it out of its own power to pay on their demand.³¹ If a bank goes into liquidation or suspends payment the necessity of a demand is dispensed with and interest on the liability of the shareholders runs from the time of liquidation.³² But this doctrine does not apply to a state bank for which a receiver is appointed at the instance of the superintendent of banks, there being no admission of insolvency on the part of the officers of the bank. In such a case the bringing of an action is a sufficient demand, and interposing a counter-claim by way of answer asking to have the deposit standing to the defendant's credit applied as a set-off against the plaintiff's claim should be treated as a demand.³³ Interest on claims against an insolvent bank should be computed to the time the assignee was appointed.³⁴ If the transaction between the parties was valid and was only void as against proceedings in insolvency and upon action by the assignee interest cannot be collected prior to demand.³⁵ The doctrine that taxes illegally assessed may be recovered with interest from the time of payment if paid under protest and from the time of demand if paid without protest,³⁶ is not applicable where payment has been made under protest and the taxpayer is entitled to an abatement, the sum to which he is entitled having been paid. In such a case interest runs only from the time repayment is demanded, and not from the date

³¹ *Chemical Nat. Bank v. Bailey*, 12 Blatch. 480; *Richmond v. Irons*, 121 U. S. 27, 64, 30 L. ed. 864, 876; *First Nat. Bank v. State Bank*, 15 N. D. 594.

Bringing action is a good demand. *Morse v. Rice*, 36 Neb. 212.

³² *Ex parte Stockman*, 70 S. C. 31, 106 Am. St. 731; *Richmond v. Irons*, 121 U. S. 27, 64, 30 L. ed. 864, 876. *Contra*, *Patten v. American Nat. Bank*, 15 Colo. App. 479. The case

first cited is not noticed by the Colorado court.

³³ *Sickles v. Herold*, 149 N. Y. 332; *Patten v. American Nat. Bank*, *supra*.

³⁴ *Bank Com'rs v. Security T. Co.*, 70 N. H. 536.

³⁵ *Lewis v. Burlington Sav. Bank*, 64 Vt. 626.

³⁶ *Boston & S. G. Co. v. Boston*, 4 Mete. (Mass.) 181; *Boston W. P. Co. v. Boston*, 9 Mete. (Mass.) 199.

of the abatement.³⁷ An agreement to pay a yearly salary, beginning on one date and expiring on another, is simply an agreement to pay so much for services by or for the year and does not import that the stipulated sum is to be paid at a particular time. Hence interest is not recoverable until demand is made.³⁸

There can be no question but that an action properly brought is a sufficient demand to entitle the creditor to interest.³⁹ But aside from this proposition, the adjudications are not numerous as to what constitutes a demand. No doubt the demand must be sufficiently specific to inform the debtor of the claim made so that he can ascertain therefrom the amount he ought to pay.⁴⁰ A demand made before anything is due is ineffectual, and so, if it denies the debtor's right to a set-off, he being entitled thereto.⁴¹ A demand is not effectual if it is for a much larger sum than was due.⁴² Accounts rendered the debtor were headed with these words, "five per cent. interest charged after twelve months' credit." This was not a sufficient demand for the payment of a bill made out of many items, extending over a considerable period. "If it is to mean anything specific it must be read as meaning that interest will be charged after one year from the date of each item, *reddendo singula singulis*. But, to my mind, it is impossible to read it like that. The intimation is general only."⁴³ A notice to a liquidator by a creditor demanding interest on his claim is not a sufficient demand under 3 and 4 Wm. IV., ch. 42, sec. 28, for present payment so as to make the debt carry interest from the date of the notice.⁴⁴ A claim sent in under a winding-up order is not a

³⁷ Boott C. Mills v. Lowell, 159 Mass. 383.

³⁸ Soule v. Soule, 157 Mass. 451.

³⁹ Freygang v. Vera Cruz & P. R. Co., 154 Fed. 640, 83 C. C. A. 414; Trimble v. Kansas City, etc. R. Co., 180 Mo. 574; Kervin v. Utter, 120 App. Div. (N. Y.) 610, and notes to this section.

⁴⁰ Lowe v. Ring, 123 Wis. 370; Laycock v. Parker, 103 Wis. 161.

⁴¹ Union Bank v. Morgan, 12 New Zeal. 672.

⁴² Hill v. South Staffordshire R. Co., L. R. 18 Eq. 154, disapproving Mildmay v. Methuen, 3 Drew. 91. See § 349.

⁴³ Williams v. French, 61 L. J. (Ch.) 22; Lantz v. Archdale, 11 T. L. Rep. 452.

⁴⁴ In re United Importers' Co., 7 New Zeal. 229.

demand within the statute.⁴⁵ But a summons taken out by a person claiming the refund of money paid under a void agreement is a sufficient demand under that statute.⁴⁶ Interest may be recovered in a mechanics' lien suit from the time the lien claim was filed, but not prior thereto unless notice was given that interest was demanded.⁴⁷

§ 352. **When allowed on money had and received.** The action for money had and received is equitable; whether interest shall be recovered depends upon the particular circumstances. In some cases it is said the defendant ought to refund the principal merely; and in others that he ought, *ex equo et bono*, to refund it with interest; each case depends on the justice and equity arising out of its facts.⁴⁸ If the defendant has derived an advantage from the money, or committed some wrong in obtaining or disposing of it, or is in default in not paying it over, he will be charged with interest.⁴⁹ Thus, where the common property is rented out by one tenant in common he is

⁴⁵ *In re Herefordshire B. Co.*, L. R. 4 Eq. 250.

⁴⁶ *Alison's Case*, L. R. 15 Eq. 394.

⁴⁷ *Cornelius v. Washington S. L.*, 52 Wash. 272; *Pittsburg P. G. Co. v. Leary*, 25 S. D. 256, 31 L.R.A. (N.S.) 746.

⁴⁸ *Pease v. Barber*, 3 Cal. 266; *Marvin v. McRae*, 1 Cheves 61; *Porter v. Nash*, 1 Ala. 452; *Carrington v. Basshor*, 119 Md. 378.

Where a mother was the custodian of her son's money, without instructions, and invested portions of it from time to time, keeping it separate from her own funds, and paid sums from time to time to him, she was liable for the interest actually received. *Hughes v. Miller*, 186 Pa. 381.

Interest on the claim of a principal against the estate of his deceased agent may be computed from the time demand is made upon the administrator. *Shepherd v. Shepherd's Est.* 108 Mich. 82.

The allowance of interest is within the discretion of the jury. *Catanzarodi di Giorgio Co. v. Stock*, 116 Md. 201.

⁴⁹ *Jifkins v. Schimpff*, 50 Pa. Super. 331; *Bialbloca's Petition*, id. 181 (at the legal, rather than the usual banking rate); *Willoek v. Hamilton*, 51 id. 1; *Deering v. Schreyer*, 110 App. Div. (N. Y.) 200; *State v. Knoxville*, 115 Tenn. 175.

One who has been paid for work as it progressed is liable for interest if the work does not correspond with the contract. *Ark-M. Z. Co. v. Patterson*, 79 Ark. 506. A garnishee who holds the proceeds of property is liable for interest. *Hubbard M. Co. v. Roche*, 133 Ill. App. 602. A creditor to whom money has been paid as a preference is not liable for interest to the trustee of his debtor until demand made. *Tredway v. Kaufman*, 21 Pa. Super. 256.

accountable to his co-tenants for their share of the rents received and liable for interest upon his receipts of rent from the end of the rent year, because, having another's money and using it, he should pay interest on it.⁵⁰ A person who bought a slave with notice of a better title was decreed to deliver him and pay profits; and interest was charged against him upon the hires actually received by him from other persons from the date of his receipts, but not upon the profits of such slave while in his own possession without being hired, these being unliquidated and conjectural sums which he was in no default in not paying.⁵¹ If money is paid to the defendant under a mutual mistake, and fraud is not imputable to either party, interest cannot be recovered until after a demand.⁵² So a party receiving from an administrator full payment of his debt against the estate on the supposition that it is solvent, when afterwards sued to recover the excess above the ratable part, on the estate proving insolvent, it was held that interest was not recoverable until after a demand.⁵³ But interest is recoverable from the time money was received if it was wrongfully obtained and fraudulently kept,⁵⁴ unless the plaintiff has

⁵⁰ *Early v. Friend*, 16 Gratt. 21; *Lowndes v. City Nat. Bank*, 82 Conn. 8, 22 L.R.A.(N.S.) 408; *Jones v. Williams*, 2 Call 85; *Dow v. Adams*, 5 Munf. 21; *Nuckit v. Lawrence*, 5 Rand. 571; *Currier v. Kretzinger*, 162 Ill. 511, aff'g 58 Ill. App. 288. See *Leete v. Pacific M. & M. Co.*, 89 Fed. 480, construing the statute of Nevada to cover interest in such a case.

⁵¹ *Baird v. Bland*, 5 Munf. 492.

⁵² *Arapahoe County v. Denver*, 30 Colo. 13; *Corse v. Minnesota G. Co.*, 94 Minn. 331; *Kean v. Landrum*, 72 S. C. 556; *Hall v. Graham*, 112 Va. 560; *Lee v. Laprade*, 106 Va. 594, 117 Am. St. 1021; *Vashon v. Barrett*, 105 Va. 490; *Moylan v. Moylan*, 49 Wash. 341; *Jacobs v. Adams*, 1 Dall. 52, 1 L. ed. 33; *Simons v. Walter*, 1 McCord 97; *Passenger R.*

Co. v. Philadelphia, 51 Pa. 465; *Lynch v. Debiar*, 3 Johns. Cas. 302; *Sanders v. Scott*, 68 Ind. 130; *Georgia R. & B. Co. v. Smith*, 83 Ga. 626; *Cummings v. Bradford*, 15 Ky. L. Rep. 155; *Grim's Est.*, 147 Pa. 190; *Craufurd v. Smith*, 93 Va. 623; *Ashhurst v. Field*, 28 N. J. Eq. 315; *Simons v. Walter*, 1 McCord 97; *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 264.

⁵³ *Walker v. Bradley*, 3 Pick. 261; *Stevens v. Goodell*, 3 Mete. (Mass.) 34.

⁵⁴ *Manufacturers' Nat. Bank v. Perry*, 144 Mass. 313; *Atlantic Bank v. Harris*, 118 Mass. 147; *Reynolds Elevator Co. v. Merchants' Nat. Bank*, 55 App. Div. (N. Y.) 1; *Southern Pac. R. Co. v. United States*, 186 Fed. 737, 108 C. C. A. 607 (allowed from date of

been guilty of laches in demanding it and the defendant has not derived advantage from its use.⁵⁵ A mere depositary, bailee, stakeholder or trustee is not liable for interest by merely having the money in his hands; there must be a wrongful use made of it, refusal to pay on proper demand or some neglect of duty by which the principal or interest was lost.⁵⁶

enactment of statute authorizing the recovery of lands erroneously patented); *Newburyport v. Fidelity Mut. L. Ins. Co.*, 197 Mass. 596; *Earle v. Whiting*, 196 Mass. 371; *McLain v. Parker*, 229 Mo. 68; *Lumber Co. v. Railroad*, 141 N. C. 171, 6 L.R.A.(N.S.) 225; *Mee v. Montclair*, 83 N. J. L. 274 (money obtained by officer's duress; town liable for it from the time money received by it). *Contra*. *American Mut. Ins. Co. v. Bertram*, 163 Ind. 51, 64 L.R.A. 935.

An action to recover money paid on a wager is not for a penalty, and interest may be recovered from the time the money was paid. *Motlow v. Johnson*, 151 Ala. 276.

A fraudulent grantee who receives property for the purpose of hindering the creditors of the grantor is liable for interest on its value. *Walker v. Montgomery*, 249 Ill. 378.

⁵⁵ *United States v. Sanborn*, 135 U. S. 271.

Under a statute allowing interest on money received to the use of another and retained without the owner's knowledge it need not be shown that any use was made of the money. *Underwood v. Whiteside County B. & L. Ass'n*, 115 Ill. App. 387.

⁵⁶ *DeWitt v. Keystone Nat. Bank of Pittsburgh*, 243 Pa. 534, 52 L.R.A.(N.S.) 522; *Woodward's App.*, 227 Pa. 191; *Lake v. Park*, 19 N. J. L. 108; *Ex parte Walsh*, 26 Md. 495; *Wade v. Wade*, 1 Wash. C. C. 477; *Huntley v. York Bank*, 21 Pa.

291; *Roach v. Jelks*, 40 Miss. 754; *Reynolds v. Walker*, 29 Id. 250; *Fitzgerald v. Jones*, 1 Munf. 150; *Mickle v. Cross*, 10 Md. 352; *Ruckman v. Pitcher*, 20 N. Y. 9; *Union Bank v. Solle*, 2 Strobl. 390; *Robinson v. Corn Exchange & Ins. Co.*, 1 Robert. 14; *Jacot v. Emmett*, 11 Paige 142; *Parsons v. Treadwell*, 50 N. H. 356; *Doxey v. Miller*, 2 Ill. App. 30; *Talbot v. National Bank*, 129 Mass. 67, 37 Am. Rep. 302; *Wood v. Robbins*, 11 Mass. 504, 6 Am. Dec. 182; *Bell v. Logan*, 7 J. J. Marsh. 593; *Vance v. Vance*, 5 T. B. Mon. 521; *Johnson v. Haggin*, 6 J. J. Marsh. 581; *Taylor v. Knox*, 1 Dana 391; *Johnson v. Eicke*, 12 N. J. L. 316; *Knight v. Reese*, 2 Dall. 182, 1 L. ed. 340; *Rayner v. Bryson*, 29 Md. 473; *Ingersoll v. Campbell*, 46 Ala. 282; *Dilliard v. Tomlinson*, 1 Munf. 183; *Karr v. Karr*, 6 Dana 5; *Dexter v. Arnold*, 3 Mason 284; *Candee v. Skinner*, 40 Conn. 464; *Stearns v. Brown*, 1 Pick. 530; *Wyman v. Hubbard*, 13 Mass. 232; *Newton v. Bennet*, 1 Bro. Ch. 359; *United States v. Curtis*, 100 U. S. 119, 25 L. ed. 571; *United States v. Denvir*, 106 id. 536; *Seo-field's Est.*, 99 Ill. 513; *Kattelman v. Guthrie*, 142 Ill. 357, rev'g 43 Ill. App. 188; *Mathewson v. Davis*, 191 Ill. 391; *Twohy M. Co. v. Melbye*, 83 Minn. 394; *Bell v. Rice*, 50 Neb. 547; *Estate of Smith*, 1 N. Y. Misc. 253; *Boughton v. Flint*, 74 N. Y. 476; *Miller v. Elder*, 7 Ohio C. C. 97; *Thurber v. Sprague*, 17 R. I. 634; *Kittel v. Au-*

One who deposits money given to indemnify against loss by reason of his signing an injunction bond is not liable to the principal in such bond for interest allowed him on such deposit, there being no contract between them as to interest, and no other consideration for signing the bond than the benefit expected from the deposit.⁵⁷ A debtor who allows judgment to be taken against him without claiming a credit to which he was entitled may recover the money paid for which he received no credit, and interest thereon at the legal rate from the time of payment; he cannot recover the rate borne by the contract upon which the payment was made.⁵⁸

§ 353. When allowed against agents, trustees and officers.

An agent who receives money for his principal in the transaction of the latter's business is not liable for interest on it before a demand is made unless he has received special instructions to remit as fast as collected, or is in default in neglecting to render his accounts; and the same rule applies to an attorney who has collected money for his clients.⁵⁹ But where an agent, having received money, unreasonably neglects

gusta, etc. R. Co., 28 C. C. A. 437, 84 Fed. 386; *Anderson v. Pacific Bank*, 112 Cal. 598, 53 Am. St. 228, 32 L.R.A. 479; *Barrere v. Soms*, 113 Cal. 97; *Winfield M. & T. Co. v. Robinson*, 89 Kan. 842; *Rosenbaum v. Drumm C. Co.*, 176 Ill. App. 205 (the form of the action is not material; thus, where assumption was brought, when the action might have been trover, liability for interest existed from the time of demand); *First Nat. Bank of Tipton v. Peck*, 180 Md. 649.

If the profit accruing to a bank from public money unauthorizedly deposited with it cannot be ascertained it will be charged with interest at the legal rate. *State v. Ohio Nat. Bank*, 7 Ohio N. P. (N. S.) 43; *State v. National Banks*, 4 id. 245.

⁵⁷ *Thouron v. Railway Co.*, 90 Tenn. 609; *Sampson v. Neely*, 106 Ill. App. 129 (appeal bond).

⁵⁸ *Walker v. Thomas*, 8 Ky. L. Rep. 700 (Ky. Super. Ct.).

⁵⁹ *Wood v. Claiborne*, 82 Ark. 514, 11 L.R.A. (N.S.) 913; *Fish v. Seeburger*, 154 Ill. 30, aff'g 47 Ill. App. 580; *Dale v. Richards*, 21 D. C. 312; *Bischoffsheim v. Baltzer*, 21 Fed. 531; *Porter v. Grimsley*, 98 N. C. 550; *Neal v. Freeman*, 85 N. C. 441; *Chase v. Union S. Co.*, 11 Daly 107; *Williams v. Storrs*, 6 Johns. Ch. 353, 10 Am. Dec. 340; *Crane v. Dygert*, 4 Wend. 675; *Hauxhurst v. Hovey*, 26 Vt. 544; *Lever v. Lever*, 2 Hill's Ch. 158; *Roland v. Martindale*, 1 Bailey's Eq. 226.

When a financial agent or attorney mixes the money of his principal with his own by depositing it in his general bank account and draws it out and uses it in his own business, it is presumed that he has gained a benefit, and on his failure to show how much he has derived

to inform his principal of it he is liable for interest from the time when he ought to have given such information.⁶⁰ Interest is allowed where the law by implication makes it the duty of the party to pay over money to the owner without previous demand.⁶¹

The liability of a trustee for interest depends upon general principles which may be varied according to the circumstances of each case.⁶² These principles are that he is not to make a profit out of the trust funds in his hands, and that he shall exercise that degree of diligence in relation to the trust estate which men of ordinary prudence exercise with respect to their own estates, and if any loss results from his failure in this re-

from its use he is chargeable with interest. When he has interest-bearing securities in his possession which belong to his principal it is presumed that he received interest thereon; and unless he explains away the presumption he will be charged therewith. *Blodgett's Est. v. Converse's Est.*, 60 Vt. 410.

An agent who is not allowed compensation should not be charged with interest on money of his principal which the former used in his business. *Riley v. Riley*, 14 Ky. L. Rep. 895.

⁶⁰ *Harsant v. Blaine*, 56 L. J. Q. B. 511; *Bayne v. Stephens*, 8 Aust. Com. L. R. 1; *Dodge v. Perkins*, 9 Pick. 368.

⁶¹ *Laird v. German Sav. Bank of Lake Park*, — Iowa —, 149 N. W. 90; *Farrell v. Garfield M., M. & S. Co.*, 49 Colo. 159; *Wahl v. Tracy*, 139 Wis. 668; *Simonds v. Coster*, 3 New Bruns. Eq. 329; *Dodge v. Perkins*, *supra*; *Miller v. McCormick II. Mach. Co.*, 84 Ill. App. 571; *Elbery v. Cunningham*, 1 Mete. (Mass.) 112; *Bidell v. Janney*, 9 Ill. 193; *Nisbet v. Lawson*, 1 Ga. 275; *Bank of South Carolina v. Buire*, 3 Strobb. 439; *Anderson v.*

Georgia, 2 Ga. 370; *Boyd v. Gilchrist*, 15 Ala. 849; *Harrison v. Long*, 4 Desaus. 111; *Hawkins v. Minor*, 5 Call 118; *Kimbrel v. Glover*, 13 Rich. 191; *McRae v. Malloy*, 87 N. C. 196; *Winslow v. People*, 117 Ill. 152 (demand need not be made upon a guardian for the money due his ward).

⁶² *In re Davis' Est.*, 35 Mont. 273.

In *Real Estate Co. v. Union T. Co.*, 102 Md. 41, a trustee who deposited funds with itself, without using them, though they were not set apart or earmarked, was held not liable for the legal rate of interest. *Mayer v. McCracken*, 245 Ill. 551, is to the same effect.

In equity a trustee who has long retained funds under an erroneous decree and been induced by the court and by counsel to believe they were his will not be charged with interest on being ordered to refund the principal. *Southern R. Co. v. Glenn*, 102 Va. 529.

A pledgor who ratifies an unauthorized sale of his property by the pledgee is bound by the terms of the sale and can recover interest only in accordance therewith. *Demars v. Hudon*, 33 Mont. 170.

spect he, and not his *cestui que trust*, must bear it.⁶³ Mere error of judgment is not sufficient to subject a trustee to punitive responsibility, nor does the law require of him extraordinary care, or make him an insurer of the trust property, or liable for losses upon an investment which may occur from depreciation of values if he has exercised reasonable care, diligence and prudence.⁶⁴ A trustee who has the custody and management of funds and uses them in his private business,⁶⁵ realizes interest by lending, neglects to render the fund productive when it was his duty to do so, fails to account when called upon, or is otherwise guilty of neglect, evasion, fraud or any wrong administration will be charged with interest, and even compound interest, according to the culpability of his conduct.⁶⁶

⁶³ In *re Jones*, 143 App. Div. (N. Y.) 692; *Albert v. Sanford*, 201 Mo. 117; *Becker's Est.*, 21 Pa. Dist. 97; *Brigham v. Morgan*, 185 Mass. 27; *Cheever v. Ellis*, 134 Mich. 645; *Clark's Est.*, 39 Pa. Super. 445; *Baker v. Lafitte*, 4 Rich. Eq. 392; *Dixon v. Hunter*, 3 Hill (S. C.), 204; *Tucker v. Richards*, 58 S. C. 22.

⁶⁴ *Estate of Cousins*, 111 Cal. 441; *Estate of Sarment*, 123 Cal. 331; *Estate of Marre*, 127 Cal. 128; *J. I. Case P. Works v. Edwards*, 71 Ill. App. 655; *Fitzgerald v. Paisley*, 110 Iowa 98; *Briggs v. Walker*, 102 Ky. 359; *Palmer v. Palmer*, 15 App. Div. (N. Y.) 609; *United States Rubber Co. v. Peterman*, 119 Ill. App. 610; *Martin v. Martin*, 43 Ore. 119. See *Goff v. Goff*, 123 Ky. 73.

The net result to the estate of unauthorized action by an administrator will be considered in determining his liability for interest. *Peterman v. United States Rubber Co.*, 221 Ill. 581.

⁶⁵ "Whatever the actual intention of the trustee may be the weight of

authority seems to be that where he invests trust money in his individual name he commits a breach of trust which subjects him to the same liability as if there had been a wilful conversion to his own use." *White v. Sherman*, 168 Ill. 589, 604, 61 Am. St. 132, citing *Morris v. Wallace*, 3 Pa. 319, 45 Am. Dec. 641; *Stanley's App.*, 8 Pa. 431, 49 Am. Dec. 530; *McAllister v. Commonwealth*, 30 Pa. 536; 2 *Pomeroy's Eq.*, sec. 1079; *Gilbert v. Welsch*, 75 Ind. 557; *Naltner v. Dolan*, 108 Ind. 500, 58 Am. Rep. 61, and cases cited; *De Jarnette v. De Jarnette*, 41 Ala. 708.

One who receives money under an agreement to pay it over to a party when the title to certain property should be cleared is not liable for interest before that time merely because he deposited the money, with other funds, in his own name, there never being a time when the amount would not have been paid by the bank in which the deposit was made. *Mathewson v. Davis*, 191 Ill. 391; *Matter of Barnes*, 140 N. Y. 468.

⁶⁶ *Bellevue Mills Co. v. Baltimore*

Trustees are also liable for interest on the principle that all profits made from the employment of the trust funds belong

Trust Co., 214 Fed. 817; Willis v. Rice, 157 Ala. 252, 131 Am. St. 55; McPhee's Est., 156 Cal. 335; Glassell v. Glassell, 147 Cal. 510; Tiffin v. Perry, 122 Ga. 120; Peterman v. United States Rubber Co., 221 Ill. 581; Aldrich v. Maher, 153 Ill. App. 413; Wobbe v. Schaub, 143 Ill. App. 361; Rimelin v. People, 147 Ill. App. 28; Stanley's Est., 160 Ind. 636; Boring v. Faris, 127 Ky. 67; Beugnot v. Tremoulet, 111 La. 1; In re Saier's Est., 158 Mich. 170; Union T. Co. v. Preston Nat. Bank, 144 Mich. 106; Owens v. Owens, 84 Miss. 673; Pullis v. Somerville, 218 Mo. 624; In re Bush's Est., 89 Neb. 334; In re Bullion's Est., 87 Neb. 700, 31 L.R.A.(N.S.) 350; Wyckoff v. O'Neil, 71 N. J. Eq. 729; In re Jones, 143 App. Div. (N. Y.) 692; In re Byrnes, 114 App. Div. (N. Y.) 532; In re Stanton, 41 N. Y. Misc. 278; Isler v. Brock, 134 N. C. 428; Godwin's Est., 22 Pa. Super. 469; In re Flynn's Est., 21 id. 126; Everett's Est., 19 Pa. Dist. 477; Wilvert's Est., 11 id. 660; Braeken's Est., 15 id. 71; Brockschmidt v. Becker (Tex. Civ. App.), 132 S. W. 111; Thomas v. Hawpe, 35 Tex. Civ. App. 311; Earle v. Burland, 6 Ont. L. R. 327; In re Thomas's Est., 26 Colo. 110; White v. Sherman, 168 Ill. 589, 61 Am. St. 132, 62 Ill. App. 271; Haines v. Hay, 169 Ill. 93; McCune v. Hartman S. Co., 87 Ill. App. 162; Hodge v. Quiry, 9 Ky. L. Rep. 650; In re Brewster's Est., 113 Mich. 561; In re Assignment of Murdoch, 129 Mo. 488, 499; Wolfort v. Reilly, 133 Mo. 463; Miles's Est., 2 Pa. Dist. 103; Noble's Est., 178 Pa. 460; Re Hodges' Est., 66 Vt. 70; Mathewson v. Davis, 191 Ill. 391; Wilkinson v. Washington T. Co., Suth. Dam. Vol. I.—71. 102 Fed. 28; Mades v. Miller, 2 D. C. App. Cas. 455; Adamson v. Reid, 6 Vict. L. R. (Eq.) 164; Eppinger v. Canepa, 20 Fla. 262; Cannon v. Apperson, 14 Lea 553; Grant v. Edwards, 93 N. C. 488; Aldridge v. McClelland, 36 N. J. Eq. 288; Jackson v. Shields, 87 N. C. 473; Wilson v. Lineberger, 88 id. 416; Thurston, Matter of, 57 Wis. 104; Crosby v. Merriam, 31 Minn. 342; In re Sanderson, 74 Cal. 199; May v. Green, 75 Ala. 162; Riley v. McInlear's Est., 61 Vt. 254; In re Hiliard, 83 Cal. 423; Moyer v. Fletcher, 56 Mich. 508; Brewer v. Ernest, 81 Ala. 435; Winslow v. People, 117 Ill. 152; In re Newcomb, 32 Fed. 826; Van Doren v. Van Doren, 45 N. J. Eq. 580; Filmore v. Reithman, 6 Colo. 120; Lomax v. Pendleton, 3 Call 465; Voorhees v. Stoothoff, 11 N. J. L. 145; Jones v. Ward, 10 Yerg. 160; Amos v. Heatherly, 7 Dana 48; Singleton v. Singleton, 5 Dana 97; Clay v. Hart, 7 Dana 17; Nixon v. Nixon, 8 id. 5; Hooper v. Winston, 24 Ill. 353; White v. White, 3 Dana 376; Miller v. Beverlys, 4 Hen. & Munf. 415; Quarles v. Quarles, 2 Munf. 321; English v. Harvey, 2 Rawle 305; Callaghan v. Hall, 1 S. & R. 241; Yundt's App., 13 Pa. 575, 53 Am. Dec. 496; Witman & Geisinger's App., 28 Pa. 376; Brouseman v. Frank, id. 475; Verner's Est., 6 Watts 250; Robert's App., 92 Pa. 407; Bruner's App., 57 id. 46; Kerr v. Laird, 27 Miss. 544; Pearson v. Darrington, 32 Ala. 227; Thomas v. School, 9 Gill & J. 115; Estate of Isaacs, 30 Cal. 105; Jemison v. Hapgood, 10 Pick. 77; Guardianship of Dow, 133 Cal. 446; St. Paul T. Co. v. Strong, 85 Minn. 1; Sinkler's

to the beneficiary, and that he is entitled to be indemnified for the loss, through their neglect or fraudulent management, of the profit and increase which would have arisen from a diligent and judicious performance of the trust. If interest is lost by negligence of the trustee he is charged with interest, either simple or compound, as may be required to compensate that loss, which may be greater or less according to the degree of the delinquency. If in violation of the trust he mingles the trust funds with his own and uses them in his business, he does so at his peril; and if he refuses or neglects to give an account of the profits made, or makes an evasive or unsatisfactory one, compound interest will be charged, with rests long or short, according to circumstances. The interest is thus compounded as a punishment for breach of trust and as a substitute for the undisclosed profits.⁶⁷ The rule is a

Est., 10 Pa. Dist. 399; *Cooper v. Cooper*, 256 Ill. 160; *Charles v. Witt*, 88 Kan. 484; *In re Fry*, 79 N. Y. Misc. 180; *Elton's Est.*, 48 Pa. Super. 585 (the rate is largely within the discretion of the court of original jurisdiction).

Where a solvent executor or administrator owes the estate the amount of the debt will be considered in law and equity as so much money in his hands; but if it is shown that he has been and is unable to pay he will not be charged with the debt as cash. *Harker v. Irick*, 10 N. J. Eq. 272; *Baucus v. Stover*, 24 Hun 109; *United States v. Eggleston*, 4 Sawyer 199; *Terhune v. Oldis*, 44 N. J. Eq. 146. But the proof of inability to pay must be complete and satisfactory; and if it does not show he could not pay interest he is chargeable with it. *Terhune v. Oldis*, *supra*.

As to the liability of executors and administrators for interest under the statutes of Illinois, see *Schofield's Est.*, 99 Ill. 513.

⁶⁷ *Primeau v. Granfield*, 184 Fed.

480; *St. Mary's Hospital v. Perry*, 152 Cal. 338; *Guardianship of Hoare*, 14 Hawaii 443; *Miller v. Lux*, 100 Cal. 609; *Bemmerly v. Woodward*, 124 Cal. 568; *Price v. Peterson*, 38 Ark. 494; *Barney v. Saunders*, 16 How. 539, 14 L. ed. 1049.

Profits may be recovered where executors have retained money in their hands for several years and invested it in business, making large profits, although no technical trust was created by the will. *Hertzler's Est.*, 192 Pa. 531.

In the *Matter of Harland's Accounts*, 5 Rawle 323, *Gibson, C. J.*, said: "It is a fundamental rule of equity that a trustee shall not make a profit of the fund for himself; and that substitution of interest for profits not ascertainable is but a modification of it. Such being the admitted basis of the rule, no colorable reason can be assigned why it should not be applied as well to an administrator who has used the trust moneys without having accounted for the profits, as to an

salutary one, calculated to protect the beneficiaries of trust funds from designing or negligent trustees. A trustee is not

executor or trustee bound by instructions or the nature of his office to invest for accumulation. If he trade with the moneys of the fund, he shall, like any other trustee, make good the loss or render the gain; and where it is indeterminate by reason of his refusal to account (always an index of fraud), the presumption is that it was at least equal to simple interest for the year, and that in his hands at the end of it, it became capital and made gain in its turn. If it were no greater in fact than simple interest for the period, he has no more to do, in order to get rid of the presumption of compound profits, than to show the truth by exhibiting the accounts. While he stands out the presumption that he made more than the sum obtained by the method of computation employed against him is an irresistible one, else the result would make it worth his while to disclose the truth. If he kept no accounts he cannot murmur at the adoption of that rule of computation which is most beneficial to the fund, and but a reasonable penalty for his negligence. Interest is payable periodically; and the matter resolves itself into a question whether a trustee may superinduce a state of things that shall give him the benefit of its earnings in prejudice of the fund. Take the case of an executor plainly bound to accumulate, who deliberately disregards his testator's directions to reinvest, and becomes a borrower from the fund at simple interest; shall not the interest, as it falls due, be principal in his hands, as it would have been if he

had received it of a stranger? In such a conjuncture, it is impossible to conjecture how the fund can be rightfully left in a less prosperous condition than it would have attained had he reinvested according to the terms of the will. To suffer a trustee to elude the conditions of the trust, by borrowing from it at simple interest, and using the proceeds for his own advantage, would offer an irresistible temptation to maladministration, by enabling him to benefit by his own wrong. That interest should not bear interest is not a dictate of justice; but the effect, in particular cases, of arbitrary enactment, founded, it is thought by some, on a questionable policy; and in a case distinctly out of the purview of the statute, where the statutory measure is arbitrarily but necessarily assumed for the computation of profits, there is no imaginable reason why the product should not be compounded where there is reason to believe that the profits were compounded; or why the party beneficially entitled should not be put in the condition that a conscientious discharge of the trust would have put him. In a case of negligence or omission consistent with good faith policy dictates a more indulgent course, such as was pursued in *Harvey v. English*, 2 Rawle 308." *Schieffelin v. Stewart*, 1 Johns. Ch. 620, 7 Am. Dec. 507; *Frost v. Winston*, 32 Mo. 489; *Ogden v. Larrabee*, 57 Ill. 389; *Raphael v. Boehm*, 11 Ves. 92; *Barclay v. Andrew*, [1899] 1 Ch. 674; *Knott v. Cottee*, 16 Beav. 77; *Smith v. Lump-ton*, 8 Dana 73; *Torbet v. Me-Reynolds*, 4 Humph. 215.

chargeable with compound interest unless he receives compound interest, or has been guilty of a gross abuse of his trust,⁶⁸

⁶⁸ *Kattelman v. Guthrie*, 142 Ill. 357, rev'g 43 Ill. App. 188; *Sutton v. Cotham*, 2 Tenn. Cas. 137; *Mathewson v. Davis*, 191 Ill. 391; *Ames v. Scudder*, 11 Mo. App. 168, 83 Mo. 189; *Thurston, Matter of*, 57 Wis. 104; *Alvis v. Oglesby*, 87 Tenn. 172; *Peelle v. State*, 118 Ind. 512; *Adams v. Lambard*, 80 Cal. 426; *Kalkner v. Henry*, 80 Cal. 636; *Rayner v. Bryson*, 29 Md. 473; *Vaughan v. Bibb*, 46 Ala. 153; *Armstrong v. Campbell*, 3 Yerg. 201, 24 Am. Dec. 556; *Turney v. Williams*, 7 Yerg. 172; *St. Paul T. Co. v. Strong*, 85 Minn. 1; *Parker v. Simpson*, 180 Mass. 334, 358.

Interest is only to be compounded where the trustee has speculated with the trust funds and no other method can be adopted to ascertain the profit he made. *Kane v. Kane*, 146 Mo. 605.

Bryant v. Craig, 12 Ala. 354, is an instructive case. Ormond, J., said: "As the guardian could not be guilty of negligence in not investing the money of his ward unless the law required him to invest it, the first question which naturally presents itself is, what is the law upon that subject. Our statute law, though very full and particular as to the mode of appointing guardians, making settlements with them, etc., is silent upon this particular. It results, however, necessarily from the nature of the trust that the estate of the ward should be profitably employed, as otherwise it would be consumed; and where it consists of money, this could only be by lending it out on good security. In England a trustee, whose duty it is to invest the money in his hands is exonerated from liability by in-

vesting it in the public funds, which, as the court would direct to be done on application, it will sanction if done without such application; and he will be exonerated from liability though the stock should fall in value. *Franklin v. Frith*, 3 Bro. Ch. 433; *Holmes v. Dung*, 2 Cox's Ch. 1. In *Smith v. Smith*, 4 Johns. Ch. 284, Chancellor Kent seems to think that personal security is insufficient and that a trustee lending money must require adequate real security or resort to public funds. Here are no public funds in which money may be safely and securely invested. At least there has been none until very recently, and it is not probable we shall be long burthened with a public debt. Personal security, no matter how good it was deemed at the time, would not be sufficient; and it may be added that, with us, real property is subject to such fluctuations that it is by no means an adequate security, and it may very well be doubted whether he would not be personally liable for any loan he may have made of the money without the sanction of the court, no matter what security he may have taken. Our statute appears to have intended to place the whole matter under the direction of the orphans' court, as it invests that court with power to direct a sale of the land of the ward, if the personal estate and the rents and profits of the realty were insufficient for his support; and it appears to follow necessarily that the same court would have the power to direct in what manner the money of the ward should be invested. It was the duty of the guardian, if he desired to exonerate himself

or, as is said in some cases, unless he has actually made such interest, or ought to have made it or is presumed to have made

from the payment of interest, to apply to the court for direction in the investment of the funds, who would have examined the proposed security, and whose approbation would have exonerated the guardian from liability, if afterwards lost without his neglect. The guardian having omitted to make this application must pay interest on the funds in his hands, whether they have been profitable to him or not; and we next proceed to inquire whether this is such gross negligence as will authorize rests to be made in the account for the purpose of charging him compound interest. The general rule undoubtedly is, that where it is the duty of the trustee to invest the trust funds, and he fails to do so, he is chargeable only with simple interest. See cases already cited, and *Newton v. Bennet*, 1 Bro. Ch. 359, in the note to which Mr. Eden has collected all the authorities, establishing conclusively that for neglect merely the practice of the court is to charge interest at the rate of four per centum. Where the trustee is guilty of fraud or corruption, or where, in open violation of the trust, he applies the funds to his own use in trade; converts the property or securities, as for example, stock into money, and applies it to his own use; or otherwise corruptly and fraudulently abuses the trust reposed in him, he may be charged with compound interest.

*The first case, it is said, in which compound interest was charged against an executor is *Raphael v. Boehm*, 11 Vesey 91. That was a case of gross misconduct, and violation of the terms of

the trust, by embarking the funds in trade instead of investing them for the purpose of accumulation as directed by the will. The principle established by this case does not appear to have been followed in cases where the facts appear to be very similar. See *Ashburnham v. Thompson*, 13 Ves. 402; and *Tebbs v. Carpenter*, 1 Madd. 201. In this last cited authority all the cases are collated and elaborately examined; and although there was in that case a direction in the will that the assets should be invested in the public funds, which was not done, yet the vice-chancellor refused to allow compound interest. He sums up an elaborate and able review of the authorities, thus: 'It appears, therefore, from this view of the authorities, that a distinction has been taken, as in every moral point of view there ought to be, between *negligence* and *corruption*, in executors. A special case is necessary to induce the court to charge executors with more than four per cent. upon the balances in their hands. The obligation on executors to lay out balances not wanted for the exigencies in the testator's affairs is now better understood, since it has been settled that they are indemnified against any loss, in laying them out in the fund which the court sanctions,—the three per cents. If the executor has balances which he ought to have laid out, either in compliance with the express directions of the will, or from his general duty, even where the will is silent on the general subject, yet if there be nothing more proved, in either case, the omission to lay out

it so gross as to amount to misfeasance or fraud in the performance of his duties, as distinguished from simple negli-

amounts only to a case of *negligence* and not of *misfeasance*.'

"Chancellor Kent, in *Schieffelin v. Stewart*, 1 Johns. Ch. 620, 7 Am. Dec. 507, adopts the stringent rule laid down in *Raphael v. Boehm*, *supra*, without adverting to the distinction between neglect and fraud; but in the subsequent case of *Clarkson v. De Peyster*, Hopk. Ch. 424, the chancellor refused to allow compound interest in a case in all its material features not distinguishable from the case before us, and the decision was affirmed on appeal.

"The cases cited from the Tennessee and Kentucky reports are not applicable in this state. In both these states statutes exist requiring the guardian to invest the money of his ward. *Hughes v. Smith*, 2 Dana 252; *Torbet v. McReynolds*, 4 Humph. 215; vol. 1, Ky. Statutes, 768; *Car. & Nicholson's Dig.* 368.

"The charge of compound interest seems to be adopted as a punishment in those cases where, from the gross mismanagement of the trustee, it is difficult, if not impossible, to ascertain what the income of the estate would otherwise have been; but it may safely be asserted that no estate in money, under the most judicious management, can be made to yield compound interest at the rate of eight per centum.

"If it had been annually invested under the direction of the court, some delay must have been encountered in finding a person desirous to borrow and able to give the necessary security. It is not reasonable to presume that where so lent it would always be punctually paid, so

as to be immediately reinvested; nor can it be doubted that it would frequently be necessary to coerce payment by suit; and that after every precaution had been taken, both principal and interest would occasionally be lost. The charge of compound interest, therefore, is unjust, because the estate could not have yielded that by any prudent management in the hands of the owner, had he been able to manage it himself. The mere omission of the guardian to apply to the court for authority to invest it, and the failure to make annual settlements, are not evidence of fraud, but establish negligence merely; and the court therefore, acted correctly in refusing to allow compound interest.

"We come to the consideration of the remaining question. In stating the account the judge of the orphans' court charged the guardian with interest on money received by him, and allowed him interest on the sums disbursed, calculating each from the time it accrued to the time of settlement. This was erroneous. The statute previously cited requires the guardian to render, at least once a year, an account of his receipts and disbursements. If this had been done, the disbursements would have been extinguished *pro tanto* by the interest which the guardian should have charged for the money of the ward in his hands, and he cannot place himself in a better condition by this neglect of duty than if he had performed it. It could not be tolerated that the guardian should hold the estate in his hands for a number of years, use the interest of the ward's capi-

gence.⁶⁹ The general rule is that an agent or trustee is chargeable with the legal rate of interest in the absence of proof that the

tal, or, what comes to the same thing, neglect to apply for its investment, and encroach annually upon the capital for the support of the ward; for this is the effect of the mode of accounting adopted by the court.

"If it was shown that the guardian was compelled to keep on hand a certain sum of money to meet the expenditures of his ward, it would be the duty of the court not to charge interest on such sum. In the absence of such necessity, which is not shown, and which probably did not exist, it was the duty of the court to charge the guardian with interest on all money of the ward in his hands from the time of its receipt, and allow him interest on all disbursements from the time they were made; the interest due from the guardian to extinguish *pro tanto*, or in full, as the case may be, the expenditure of the ward. For which purpose, if necessary, the court will make annual, or longer or shorter, rests in the account, so as to carry fully into effect the objects and purposes of the decree, but so as not in any manner to compound the interest against the guardian. These principles are clearly stated in the case of *De Peyster v. Clarkson*, 2 Wend. 77, and other cases."

In *Miller v. Beverlys*, 4 Hen. & Munf. 415, the court laid down this general rule: "that in all cases whatsoever, a trustee is liable to pay interest for the trust money in his hands, unless he can show that it was necessarily kept in hand for the purposes of the trust." *Banks v. Machen*, 40 Miss. 256; *Trotter v. Trotter*, id. 704; *Smithers v.*

Hooper, 23 Md. 273; *Garrett v. Carr*, 1 Rob. (Va.) 196; *Rosser v. Depriest*, 5 Gratt. 6, 50 Am. Dec. 94.

In *Layton v. Hogue*, 5 Ore. 93, an executor purchased, through an agent, a parcel of land belonging to the estate under his care as such, and afterwards made permanent improvements and paid taxes. In a suit by the heirs this sale was set aside as fraudulent, and allowance was made to the defendants, who were the heirs of the fraudulent trustee, for the permanent improvements and taxes, after deducting rents and profits; this, together with the amount paid at the fraudulent sale, was required to be paid back, but without interest. It was observed that to allow interest in such a case would be allowing them to reap advantage from the wrongful and inequitable act of their ancestor.

⁶⁹ *Cusick v. Langan*, 157 Ill. App. 472; *Hazard v. Durant*, 14 R. I. 25; *Burdick v. Garriek*, L. R. 5 Ch. 233; *Attorney-General v. Alford*, 4 De G., Maen. & G. 676; *Penny v. Avison*, 3 Jurist (N. S.), 62; *Cruce v. Cruce*, 81 Mo. 676. But see *Dissenger's Case*, 39 N. J. Eq. 227; *Eppinger v. Canepa*, 20 Fla. 262; *Latham v. Wilcox*, 99 N. C. 367.

Regardless of whether a trustee made profits in his business by the use of the trust funds, if he has used the money he is chargeable with compound interest (*Speiser v. Merchants' Exch. Bank*, 110 Wis. 507, 524), from the date of their appropriation until that of final judgment, notwithstanding the granting

profits he has made by his misconduct are in excess thereof.⁷⁰ A trustee invested funds in securities which were repudiated by the *cestui que trust* and condemned by the court. He was held liable for the legal rate of interest though the securities bore a higher rate.⁷¹ An agent who invests as his own the funds of his principal will be charged with interest at the legal rate in the jurisdiction where they were invested.⁷² Where an agent contracted to invest money at ten per cent and invested but part of it, using the balance, he was charged with that rate for the amount invested and the legal rate for the balance.⁷³ The liability of an agent for interest is dependent

of a new trial. *Faulkner v. Hendy*, 103 Cal. 15.

In England the profits made must be paid to the trust unless it is impossible to prove what they were, in which case the trustee will be liable for trade interest. *Davis v. Davis*, [1902] 2 Ch. 314.

A trustee should not be charged with compound interest unless it is necessary to do so to deprive him of all profit and to give the *cestui que trust* that which he is entitled to. *Silver King Consol. Min. Co. v. Silver King Coalition Min. Co.*, 122 C. C. A. 402, 204 Fed. 166.

⁷⁰ *McIntire v. McIntire*, 192 U. S. 116, 48 L. ed. 371; *Clapp v. Vatcher*, 9 Cal. App. 462; *Sidway v. American M. Co.*, 119 Ill. App. 502 (money not reported); *Estate of Cousins*, 111 Cal. 441; *In re Assignment of Murdoch*, 129 Mo. 488; *Sanguinett v. Webster*, 153 Mo. 343; *Re Hodges' Est.*, 66 Vt. 70, 44 Am. St. 820; *Speiser v. Merchants' Exch. Bank*, 110 Wis. 507; *Parker v. Nickerson*, 137 Mass. 487; *Cruce v. Cruce*, 81 Mo. 676; *Rochester v. Levering*, 104 Ind. 526, 54 Am. Rep. 334; *White v. Ditson*, 140 Mass. 351, 54 Am. Rep. 473. See *Munson v. Plummer*, 59 Iowa 136.

One of three executors with whom trust funds are deposited is liable only for the rate of interest paid by it on ordinary deposits. *Moore's Est.*, 211 Pa. 348.

For mere neglect to deposit funds interest will be charged at the rate they would have earned if deposited. *In re Smith*, 97 App. Div. (N. Y.) 157.

A person who possesses himself of the property of a bankrupt is liable for the legal rate of interest on its value at least from the time he disposes of it; a demand upon him for it is not necessary after he has knowledge that the trustee in bankruptcy regards his possession as wrongful. *Ommen v. Talcott*, 175 Fed. 261.

⁷¹ *Coghill v. Boyd*, 79 Va. 1.

⁷² *Bischoffsheim v. Baltzer*, 21 Fed. 531.

⁷³ *Rogers v. Priest*, 74 Wis. 538.

A decedent to whom money had been intrusted for investment informed its owner that it was earning five per cent. It was not shown that it earned more. The estate was liable for that rate until action was begun, and thereafter for the legal rate. *De Crano v. Moore*, 50 App. Div. (N. Y.) 361.

upon his detention of the funds of his principal without the latter's consent.⁷⁴

The law does not look with favor upon guardians who abuse their trust or neglect their duties. They are subject to the general rules of liability which follow the trust relationship, reinforced by the desire of the courts to protect the interests of their wards. A guardian *de facto* may be liable for compound interest.⁷⁵ The legal rate of interest will be charged against a guardian who improvidently invests the funds of a ward unless it is shown he could have obtained a higher rate on proper security.⁷⁶ While a guardian is usually not liable for both the profits made on an investment of his ward's funds and interest yet if the ward elect to recover the profits and there is a refusal to account for them the guardian is liable for interest on both principal and profits from the date of the ward's election.⁷⁷ Where a guardian's misconduct subjected him to liability for compound interest, he was charged with it at the highest legal rate up to the time the ward became of age and thereafter, because at that time the debt assumed the nature of an ordinary one, at the lowest legal rate.⁷⁸ If the loss resulting from the trustee's neglect is less than the income of the fund at the statute rate of interest he may be relieved on making it good.⁷⁹ The pendency of litigation against the

⁷⁴ Young v. Kimber, 44 Colo. 448, 28 L.R.A. (N.S.) 626.

⁷⁵ Watts v. Watts, 104 Va. 269.

⁷⁶ Parker v. Wilson, 98 Ark. 553.

⁷⁷ Meyers v. Martinez, 172 Ala. 641.

The highest legal rate may be collected if the funds have been used by a guardian. Fisher v. Brown, 135 N. C. 198.

⁷⁸ Armstrong v. Walkup, 12 Gratt. 608; Tanner v. Skinner, 11 Bush 120; Clay v. Clay, 3 Mete. (Ky.) 548; State v. Richardson, 29 Mo. App. 595; Stewart v. Sims, 112 Tenn. 296 (compound interest up to time of removal; thereafter the statutory rate).

Where executors allowed money to remain on deposit without interest for five years they were charged with interest at four per cent. for the first year, and at six per cent. subsequently, after they were bound to pay the money to the legatees. They were not relieved from this liability because they did not know to whom to pay. Almy v. Probate Court, 18 R. I. 612.

⁷⁹ Livermore v. Wortman, 25 Hun, 241.

If money is deposited subject to check, instead of upon certificate, he will be charged with interest at bank rates. In re Brewster's Est., 113 Mich. 561.

estate may affect the trustee's liability for interest on funds in his possession.⁸⁰

Trustees are not ordinarily chargeable with interest for failing to invest funds until the lapse of a reasonable time after they have come to their hands. No absolute rule can be announced as to what constitutes such time because the conditions vary, six months has been regarded as sufficient under ordinary circumstances.⁸¹ But there will be no exemption from the payment of interest during that period where the trust funds are mingled with those of the trustee.⁸² There is a tendency to lessen the time for making investments. The six months' rule grew out of the circumstances of an earlier time, and its applicability to existing conditions has been doubted.⁸³ Executors who act *bona fide*, under an irregular judgment, in retaining a larger sum than was necessary will not be liable for interest thereon after the reversal of such judg-

A trustee who withdraws funds from a bank paying interest on balances and deposits them in his own bank must pay such a rate of interest as he could reasonably have secured from the bank from which they were taken or from other reputable banks in the same region. *Dick's Est.*, 183 Pa. 647.

⁸⁰ *Howe v. Winn*, 150 Ky. 667.

⁸¹ *In re Thomas's Est.*, 26 Colo. 110; *Griffith's Est.*, 147 Pa. 274; *Crosby v. Merriam*, 31 Minn. 342; *Dunscumb v. Dunscumb*, 1 Johns. Ch. 508, 7 Am. Dec. 504; *Thurston, Matter of*, 57 Wis. 104; *Corcoran v. Renchan*, 24 App. D. C. 411; *McIntire v. Mower*, 204 Mass. 233. See *Price's Est.*, 18 Pa. Dist. 442.

The time allowed executors to settle estates varies according to the circumstances. Interest is not usually charged during the period necessary therefor; it has been charged thereafter and until the filing of the account. *Reed's Est.*, 22 Pa. Super. 635.

Guardians are not liable for inter-

est during the year following their appointment unless it is earned. *Griffin v. Collins*, 125 Ga. 159.

⁸² *Gay v. Whidden*, 64 Fla. 295; *Noble's Est.*, 178 Pa. 460. Compare *In re Sexton*, 61 N. Y. Misc. 569, and cases cited.

⁸³ About one year has been allowed, and allowance has also been made because all the money cannot be invested all the time. *Becker's Est.*, 21 Pa. Dist. 97.

"The time," it was said in *Witmer's App.*, 87 Pa. 120, "should be such as the circumstances of each particular case would show to be reasonable," and was fixed at two months. "But in view of the facility with which trust funds may now be deposited at interest until permanent investment can be had, it is at least questionable whether rests in the ordinary sense should be allowed at all." *Noble's Est.*, *supra*.

Trustees have been held liable for interest for the whole six months next after they received funds which they failed to invest, no excuse being

ment.⁸⁴ A trust for support and maintenance, if the trust does not direct that the expense thereof shall be paid out of the income, necessarily implies that a sufficient amount of cash is to be kept on hand to supply the current wants and expenses of the *cestui que trust*; and unless the trustee keeps an unnecessarily large balance on hand he is not chargeable with interest thereon.⁸⁵

If funds are converted,⁸⁶ or are not applied and paid over according to a trustee's duty,⁸⁷ he is chargeable with interest from the conversion or time when it was his duty to pay the money.⁸⁸ A failure to account is ground for charging interest from the time the account was acted upon because the extent of the executor's liability was then fixed.⁸⁹ An unjustifiable appeal from an order of distribution may afford cause for charging an executor with interest from the time the order was made.⁹⁰ The executor of a deceased trustee who has become liable for compound interest is not bound to keep unearmarked

offered. *Adamson v. Reid*, 6 Viet. L. R. (Eq.) 164.

In South Carolina the general rule is that an administrator is chargeable with interest from the beginning of the year in which he was appointed. *Koon v. Munro*, 11 S. C. 139. It is also a general rule that all funds received during the current year are to be regarded as unproductive until the end thereof, and all expenditures made during the course of the year should be regarded as made before the balance struck that is to bear interest. *Nicholson v. Whitlock*, 57 S. C. 36; *Anderson v. Silcox*, 82 S. C. 109.

Under the Illinois statute an executor who fails to make annual reports and thus bring to the notice of the court the fact that legacies are unpaid is liable for ten per cent. interest on the legacies after the expiration of two and one-half years. *Cox v. Cox*, 53 Ill. App. 84; *Boyd v. Swallows*, 59 id. 635.

An administrator who is prevented by litigation from distributing a

fund is not liable for interest because he deposits it to his individual credit if his account was much larger than the fund and he did not profit by the deposit. *Kerr's Est.*, 35 Pa. Super. 350.

⁸⁴ *Boys' Home v. Lewis*, 3 Ont. L. R. 208.

⁸⁵ *Griffith's Est.*, 147 Pa. 274.

A trustee whose sole duty it is to hold money until it is demanded is not liable for interest. *Strauss v. Gilbert*, 135 Ill. App. 130.

⁸⁶ *McKim v. Blake*, 139 Mass. 593.

⁸⁷ *Judd v. Dike*, 30 Minn. 380; *Yeatman's App.*, 102 Pa. 297; *McDonald v. People*, 222 Ill. 325; *Trotter's Est.*, 15 Pa. Dist. 352.

⁸⁸ *Shickler's Est.*, 13 Phila. 504; *Ramsey's App.*, 4 Watts 71; *Tomlinson's App.*, 90 Pa. 224; *Miller v. Lux*, 100 Cal. 609, 639; *Wyckoff v. O'Neil*, 71 N. J. Eq. 729.

⁸⁹ *Fuller v. Dupont*, 183 Mass. 596.

⁹⁰ *In re Settlement of Peters*, 128 Mo. App. 666.

funds which the trustee had mingled with his own invested, and inasmuch as the demand for the trust funds could not be satisfied until action by the probate court the estate is not liable for interest after the trustee's death.⁹¹ In an accounting by a trustee there is no inflexible mode of computing the interest on annual balances. If it appears that the disbursements in any given year exceed the year's receipts the whole of the balance in the trustee's hands at the beginning of the year does not bear interest for twelve months, but the interest-bearing balance must be ascertained by adding to the annual balance found to be in his hands at the beginning of the year the receipts for the next year and deducting from the sum thus ascertained the whole amount of the payments made during such year; the residue only will constitute the interest-bearing fund for that year.⁹²

If the conduct of the *cestui que trust* prevents the use of funds according to the judgment of the trustee his liability will be limited to the rate of interest they bore.⁹³ Public officers who fail to pay over money in their hands, according to duty will be charged with interest from the time they should have paid it; ⁹⁴ they are also liable for interest on the value of property lost by neglect,⁹⁵ and on claims allowed them in excess of the fees by law from the time of their allowance.⁹⁶ An

⁹¹ Bemmerly v. Woodward, 124 Cal. 568.

⁹² Tucker v. Richards, 58 S. C. 22, 29.

⁹³ Ford v. Wilson (Del. Ch.), 85 Atl. 1073.

⁹⁴ Zuelly v. Casper, 37 Ind. App. 186; Havre De Grace v. Fahey, 108 Md. 533; Adams v. Saunders, 93 Miss. 520; Gartley v. People, 28 Colo. 227; Sheridan v. Van Winkle, 43 N. J. L. 125; Cassady v. Trustees of Schools, 105 Ill. 560; Stern v. People, 102 id. 540; Commonwealth v. Porter, 21 Pa. 385; Magner v. Knowles, 67 Ill. 325; People v. Gasherie, 9 Johns. 71, 6 Am. Dec. 263; Slingerland v. Swart, 13

Johns. 255; Lawrence v. Murray, 3 Paige 400; Board of Justices v. Fennimore, 1 N. J. L. 242; Hudson v. Tenney, 6 N. H. 456; Crane v. Dygert, 4 Wend. 675; Board of Supervisors v. Clark, 25 Hun 282.

An exception has been made where the funds were not wilfully withheld, the object being to test the right of the officer thereto. People v. Maddox, 176 Ill. App. 480.

In some cases this has been taken to mean from the time of demand by the successor. State v. Keadle, 63 W. Va. 645; State v. McDermitt, 72 W. Va. 291.

⁹⁵ Hearn v. Ayres, 77 Ark. 497.

⁹⁶ Tucker v. State, 163 Ind. 403.

officer is not liable for interest on money held in his official capacity after the expiration of his term if he was prepared to pay it on demand.⁹⁷ A prothonotary who legally receives fees due other officers is not liable to them for interest until after demand.⁹⁸ If a public officer whose duty it is to collect and receive money is bound for it at all hazards unless the law requires him to place it in a depository as the money of the public, he is not liable for interest on it although he may have mingled it with his own funds and received interest.⁹⁹ But where the legal ownership of moneys coming into the hands of a public treasurer is in the state the interest paid for the deposit thereof by him may be recovered from the treasurer or his sureties.¹ The damages resulting to a creditor from the escape of his debtor, against whom he has recovered judgment, includes the amount of the judgment with interest, and the sheriff is liable for the latter.² In the case of a United States disbursing officer, from whom it is claimed funds were abstracted without his knowledge, he being innocent in reference thereto, interest cannot be recovered in a suit against him to recover the missing funds, no demand upon him being shown.³ A collector of internal revenue who unlawfully exacts taxes, which are paid under protest, must respond for interest thereon.⁴ The nonperformance of a duty by an officer which prevents the receipt of money by the person entitled to it is ground for charging the officer with interest on it.⁵ An officer

⁹⁷ *Strauss v. Gilbert*, 232 Ill. 441 (redemption money).

⁹⁸ *Shafer v. Mellhaney*, 1 Pa. Dist. 765, 154 Pa. 58.

⁹⁹ *State v. Walsen*, 17 Colo. 170, 15 L.R.A. 456; *Board of Education v. Cooper*, 98 Minn. 535; *Commonwealth v. Godshaw*, 92 Ky. 435; *Shelton v. State*, 53 Ind. 331; *Bocard v. State*, 79 Ind. 270; *Snapp v. Commonwealth*, 82 Ky. 173. See note to § 479.

¹ *New Haven v. Fresenius*, 75 Conn. 145; *Furnas County v. Evans*, 90 Neb. 37; *State v. McKinnon*, 9 Ohio N. P. (N. S.) 513; *State v.*

Schott, id. 522; *State McFetridge*, 84 Wis. 473, 505, 20 L.R.A. 223; *Board of Supervisors v. Verkerke*, 128 Mich. 202; *Eshelby v. Cincinnati Board of Education*, 66 Ohio St. 71. See note to § 479.

² *Dunford v. Weaver*, 84 N. Y. 445. See § 489.

³ *United States v. Denvir*, 106 U. S. 536, 27 L. ed. 264; *United States v. Butler*, 114 Fed. 582.

⁴ *Treat v. Farmers' L. & T. Co.*, 185 Fed. 760.

⁵ *Hupe v. Sommer*, 88 Kan. 561, 43 L.R.A. (N.S.) 565.

who holds funds as a statutory trustee must account for interest received on them.⁶

§ 354. **On money obtained by extortion or fraud, or wrongfully withheld or disposed of.** Money obtained wrongfully or by extortion or fraud is recoverable with interest from the time it was obtained;⁷ and if money received to another's use is wrongfully withheld or disposed of it carries interest,⁸ and so does money received by a party for property tortiously taken or converted by him.⁹ On the setting aside of a sale for fraud interest may be allowed from the time of rescission.¹⁰ Where

⁶ McKane v. O'Brien, 40 New Bruns. 392.

⁷ United States Home Co. v. O'Connor, 48 Colo. 354; Siltz v. Springer, 236 Ill. 276; Meyer v. Johnson, 122 Ill. App. 87; Robbins v. Selby, 144 Iowa, 407; Whitcomb v. Collier, 133 Iowa 303; Steele v. Kellogg, 163 Mich. 132; Corse v. Minnesota G. Co., 94 Minn. 331; Goldberg v. West End H. Co., 78 N. J. L. 70; Sykes v. Life Ins. Co., 148 N. C. 13; Webster v. Douglas County, 102 Wis. 181, 196, 72 Am. St. 870; Burrough v. Abel, 105 Fed. 366 (in the absence of laches; if that has existed the recovery may not extend beyond the time suit was brought); Woldert v. Nedderhut P. P. Co., 18 Tex. Civ. App. 602; Commonwealth v. Press Co., 156 Pa. 516; Arthur v. Wheeler & W. Mfg. Co., 12 Mo. App. 335; Atlantic Nat. Bank v. Harris, 118 Mass. 147; Conyer v. Magrath, 4 McCord, 218; Winslow v. Hathaway, 1 Pick. 211; Trustees, etc. v. Lawrence, 11 Paige, 80; Boston & S. G. Co. v. Boston, 4 Metc. (Mass.) 181; Greenly v. Hopkins, 10 Wend. 96; Adkins v. Ware, 35 Tex. 577; Wood v. Robbins, 11 Mass. 504, 6 Am. Dec. 182; Clayton v. O'Connor, 35 Ga. 193;

Kornegay v. White, 10 Ala. 255; Goddard v. Bulow, 1 Nott & MeCord 45, 9 Am. Dec. 663; Greggs v. Greggs, 56 N. Y. 504; Mason v. Waite, 17 Mass. 560; Shaw v. Gilbert, 111 Wis. 165, 195; John V. Farwell Co. v. Wolf, 96 Wis. 10, 20, 37 L.R.A. 138.

In Chew v. Bank, 14 Md. 299, a transfer of stock under a bill of sale and power of attorney executed by a lunatic was avoided, and it was held that the defendant should pay simple interest on the dividends accrued on the stock since the transfer, from the time the defendant knew of the lunacy. See Lincoln v. Claflin, 7 Wall. 132, 19 L. ed. 106.

⁸ Rapelie v. Emory, 1 Dall. 349, 1 L. ed. 170; Shipman v. Miller, 2 Root, 405; Black v. Goodman, 1 Bailey, 201; Simpson v. Feltz, 1 McCord's Eq. 213, 16 Am. Dec. 602; Commonwealth v. Crevor, 3 Bin. 121; Crosby L. Co. v. Smith, 2 C. C. A. 97, 51 Fed. 63; American T. & B. Co. v. Boone, 102 Ga. 202, 66 Am. St. 167, 40 L.R.A. 250.

⁹ McBeth v. Craddock, 28 Mo. App. 380; Chauncey v. Yeaton, 1 N. H. 151.

¹⁰ Felt v. Bell, 205 Ill. 213.

the damages are unliquidated, interest is within the discretion of the jury.¹¹

§ 355. **Interest in actions for torts.** In actions for torts, in order to give the injured party full indemnity, interest is allowed in trover, or where any analogous remedy is sought, on the value of the property from the date of conversion;¹² in trespass, also, on the value from the date of the taking.¹³ In case of injury to real property interest will be computed from the time of such injury,¹⁴ and if the wrong was done in good faith it will be allowed only from the time the action was be-

¹¹ *Nichols v. Coleman*, 96 App. Div. (N. Y.) 353.

¹² *Brown v. First Nat. Bank*, 49 Colo. 393; *Davis v. Gott*, 130 Ky. 486; *East Tennessee L. Co. v. Leeson*, 183 Mass. 37; *Durham v. Commercial Nat. Bank*, 45 Ore. 385; *Arpin v. Burch*, 68 Wis. 619; *Bonesteel v. Orvis*, 22 Wis. 523; *Schmidt v. Nunan*, 63 Cal. 371; *Hudson v. Wilkinson*, 61 Tex. 610; *Grimes v. Watkins*, 59 id. 140; *Watson v. Harmon*, 85 Mo. 443; *Kamerick v. Castleman*, 29 Mo. App. 658; *Hyde v. Stone*, 7 Wend. 354, 22 Am. Dec. 582; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; *Dows v. National Exch. Bank*, 91 U. S. 618, 23 L. ed. 214; *Taylor v. Knox*, 1 Dana 400; *Bissell v. Hopkins*, 4 Cow. 53; *Richmond v. Bronson*, 5 Denio 55; *Garrard v. Dawson*, 49 Ga. 434; *Wehl v. Butler*, 43 How. Pr. 5; *Schwerin v. McKie*, 51 N. Y. 180, 10 Am. Rep. 581; *Beals v. Guernsey*, 8 Johns. 446, 5 Am. Dec. 348; *Kennedy v. Whitwell*, 4 Pick. 466; *Johnson v. Sumner*, 1 Mete. (Mass.) 172; *Hogg v. Zanesville C. & Mfg. Co.*, 5 Ohio 410; *Hepburn v. Sewell*, 5 Harr. & J. 212, 9 Am. Dec. 512; *Kennedy v. Strong*, 14 Johns. 128; *Ekins v. East India Co.*, 1 P. Wms. 395; *Thomas v. Sternheimer*, 29 Md. 268; *Fowler v.*

Davenport, 21 Tex. 626; *Pease v. Smith*, 5 Lans. 519; *Vaughan v. Howe*, 20 Wis. 497; *Chauncey v. Yeaton*, 1 N. H. 151; *Vareo v. Chicago, etc. R. Co.*, 30 Minn. 18; *Swanson v. Andrus*, 83 Minn. 505. See *Pierce v. Rowe*, 1 N. H. 179; *Hamer v. Hathaway*, 33 Cal. 117; *Northern T. Co. v. Sellick*, 52 Ill. 249; *Tarpley v. Wilson*, 33 Miss. 467; *Isabella G. M. Co. v. Glenn*, 37 Colo. 165, § 1109.

If there has been a recovery of profits lost by reason of the wrong done, the property interest cannot be allowed. *McGuire v. Galligan*, 53 Mich. 453.

In Montana interest cannot be recovered in an action for conversion for any period before judgment. *Randall v. Greenhood*, 3 Mont. 506; *Palmer v. Murray*, 8 id. 174, 8 Mont. 312.

¹³ *Callen v. Collins*, (Tex. Civ. App.) 154 S. W. 673; *Baker v. Railroad Co.*, 56 Vt. 302; *Platt v. Continental Ins. Co.*, 62 Vt. 166; *Blackie v. Cooney*, 8 Nev. 41; *Shepherd v. McQuilkin*, 2 W. Va. 90; *Beals v. Guernsey*, 8 Johns. 446, 5 Am. Dec. 348; *Bradley v. Geiselman*, 22 Ill. 494. See § 1096, also § 1026.

¹⁴ *Union W. P. Co. v. Lewiston*, 101 Me. 564.

gun.¹⁵ Where a statute fixes the damages for the wrongful cutting of timber at the highest market value thereof in whatsoever place, shape or condition, manufactured or unmanufactured, the same may have been at any time before the trial while in possession of the defendant, interest is not allowed on the value so found before judgment. By pursuing his statutory right the plaintiff waives that which he had independently of it.¹⁶ In replevin interest is allowed to the plaintiff on the value of the property during the period of wrongful detention, and this is the ordinary measure of damages where no special damage is shown;¹⁷ but in the absence of any statute allowing damages to the defendant for wrongful detention by means of the suit interest is not recoverable by him in that action.¹⁸ Where property is destroyed, or its value diminished by negligence interest is, in some jurisdictions, likewise a part of the compensation to which the injured party is entitled.¹⁹

¹⁵ *Gulf, etc. R. Co. v. Moseley*, 6 Ind. T. 369

¹⁶ *Smith v. Morgan*, 73 Wis. 375.

¹⁷ *Sheffield v. Hanna*, 136 Iowa 579; *Pierce v. Banton*, 98 Me. 553, 64 L.R.A. 551; *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242; *Schmidt v. Nunan*, 63 Cal. 371; *Brizsee v. Maybee*, 21 Wend. 144; *Bigelow v. Doolittle*, 36 Wis. 115; *Gillies v. Wofford*, 26 Tex. 76; *McDonald v. Scaife*, 11 Pa. 381, 51 Am. Dec. 556; *Scott v. Elliott*, 63 N. C. 45; *McDonald v. North*, 47 Barb. 530; *Robinson v. Barrows*, 48 Me. 185; *Oviatt v. Pond*, 29 Conn. 479. See § 1144.

In Delaware the allowance of interest is discretionary with the jury. *Boyce v. Cannon*, 5 Houst. 409.

¹⁸ *Chapman v. Kerr*, 80 Mo. 158, following *Pope v. Jenkins*, 30 id. 528, and disapproving *Woodburn v. Cogdall*, 39 id. 228, and *Miller v. Whitson*, 40 id. 101; *Andrews v. Costican*, 30 Mo. App. 29; *McCarty v. Quimby*, 12 Kan. 494; *New York, etc. R. Co. v. Estill*, 147 U. S. 591,

622, 37 L. ed. 292, 306, citing the text, but, following Missouri authority, holding that interest was not recoverable.

Interest not recoverable as of right. *American S. F. Co. v. Shell*, 160 N. C. 529. See *Booth v. Ableman*, 20 Wis. 602.

¹⁹ *Albany & N. R. Co. v. Wheeler*, 6 Ga. App. 270; *Buel v. Chicago, etc. R. Co.*, 81 Neb. 430; *New York, etc. R. Co. v. Roper*, 176 Ind. 497, 36 L.R.A.(N.S.) 952; *Chicago, etc. R. Co. v. Schultz*, 55 Ill. 421; *Chapman v. Chicago, etc. R. Co.*, 26 Wis. 295, 7 Am. Rep. 81; *Whitney v. Same*, 27 Wis. 327; *Buffalo & H. T. Co. v. Buffalo*, 58 N. Y. 639; *Parrott v. Knickerbocker I. Co.*, 46 id. 361; *Hogg v. Zanesville C. & Mfg. Co.*, 5 Ohio 410; *Walrath v. Redfield*, 18 N. Y. 457; *Hinds v. Barton*, 25 id. 544; *Kendrick v. Towle*, 60 Mich. 363, 1 Am. St. 526; *Mote v. Chicago, etc. R. Co.*, 27 Iowa 22, 1 Am. Rep. 212 (carrier liable for interest on value of baggage stolen); *Arthur v. Chicago, etc. R. Co.*, 61

This rule is not established in some states. The question was recently passed upon for the first time in Massachusetts.²⁰ The court, by Holmes, J., said: Interest "is allowed as of right in trover and other like actions; and although it is suggested that in such cases the defendant may be presumed to have had the use of the goods since the conversion, this is not necessarily the fact, and if it were would have no bearing on the indemnity due the plaintiff. . . . We will assume that the sum ultimately found by the jury cannot be said to have been wrongfully detained before the finding in such a sense that interest is due *eo nomine*. But we have heard no reason suggested why, if a plaintiff has been prevented from having his damages ascertained, and, in that sense, has been kept out of the sum that would have made him whole at the time, so long that that sum is no longer an indemnity, the jury, in their discretion, and as incident to determining the amount of the original loss, may not consider the delay caused by the defendant. In our opinion they may do so; and, if they do, we do not see how they can do it more justly than by taking interest on the original damage as a measure." The enjoyment of the rents and profits of land by the vendee is cause for denying him interest against an abstractor for negligently certifying to the title thereto.²¹ In the federal courts the allowance of interest in tort actions is for the discretion of the jury.²²

Iowa 648; Johnson v. Same, 77 id. 666; Fremont, etc. R. Co. v. Marley, 25 Neb. 138, 13 Am. St. 482; Galveston, etc. R. v. Horne, 69 Tex. 643; Varco v. Chicago, etc. R. Co., 30 Minn. 18; Houston, etc. R. Co. v. Jackson, 62 Tex. 209; T. & P. R. v. Tankersley, 63 id. 57; Toledo v. Grasser, 12 Ohio C. C. 520; Watkins v. Junker, 90 Tex. 584. *Contra*. Damhorst v. Missouri Pac. R. Co., 32 Mo. App. 350, and Missouri cases cited; Latta v. New Orleans, etc. R. Co., 131 La. 272. See Black v. Camden & A. R. & T. Co., 45 Barb. 40; Richmond v. Bronson, 5 Denio, 55; Lakeman v. Grinnell, 5 Bosw. 625; Suth. Dam. Vol. I.—72.

Keith Co. v. Booth F. Co. (Del.) 87 Atl. 715.

The allowance of interest is within the discretion of the jury. Seekerson v. Sinclair, 24 N. D. 625.

²⁰ Fraser v. Bigelow C. Co., 141 Mass. 126, followed in Ainsworth v. Lakin, 180 Mass. 397, 57 L.R.A. 132, and in Atwood v. Boston F. & T. Co., 185 Mass. 557; Union Pac. R. Co. v. Holmes, 68 Kan. 810; Missouri, etc. R. Co. v. Cherry, 44 Tex. Civ. App. 232, and Missouri case cited in preceding note.

²¹ Keuthan v. St. Louis T. Co., 101 Mo. App. 1.

²² Edely v. LaFayette, 163 U. S.

In an action to recover for the value of goods destroyed, they having a market value susceptible of easy proof, the court thus vindicated the right to interest. A loss of property having a definite money value is practically the same as the loss of so much money; the loss of the use of the property is practically the same as the loss of the use (or interest) of so much money. A just indemnity to the plaintiff required the addition to the value of the goods at the time of their destruction of the interest from that time to the date of judgment.²³ Interest is recoverable on the damages found for the destruction of growing crops.²⁴ In Georgia the code provides that where an amount ascertained would be the damages at the time of the breach it may be increased by the addition of interest from that time till the recovery. Though limited to breach of contract the rule may be applied in actions *ex delicto* for the destruction of property, the measure of damages being the value of it; but this must be done by the jury, in its discretion, in the form of damages and not as interest.²⁵ In Pennsylvania there are discordant expressions in the opinions as to the right to interest

458, 41 L. ed. 226; *White v. United States*, 202 Fed. 501, 121 C. C. A. 33 (aches in beginning suit for conversion). In *Fetzer v. South Side L. Co.*, 202 Fed. 878, 121 C. C. A. 236, the court said it could not see why interest should not be allowed from the date of the conversion. In 202 Fed. 491, 123 C. C. A. 1, interest in favor of the government against an innocent purchaser from a trespasser was allowed from the time suit was brought, no previous demand having been made.

²³ *Regan v. New York, etc. R. Co.*, 60 Conn. 124, 142, 25 Am. St. 306; *Burdick v. Chicago, etc. R. Co.*, 81 Iowa 384; *Union Pac. R. Co. v. Ray*, 46 Neb. 750; *Coan v. Brownstown*, 126 Mich. 626; *Jacksonville, etc. R. Co. v. Peninsular L., etc. Co.*, 27 Fla. 1, 140, 17 L.R.A. 33, disapproving *Ancrum v. Stone*, 2 Speers, 594;

Vareo v. Chicago, etc. R. Co., 30 Minn. 18; *St. Louis, etc. R. Co. v. Miggs*, 50 Ark. 169; *Parrott v. Knickerbocker, etc. I Co.*, 46 N. Y. 361; *Georgia Pac. R. Co. v. Fullerton*, 76 Ala. 298; *Atlanta & B. A. L. R. Co. v. Brown*, 158 Ala. 607.

In Tennessee the question of interest is discretionary with the jury. *Louisville & N. R. Co. v. Fort*, 112 Tenn. 432.

The jury may allow interest from the time the property was destroyed. *Harper v. Atlantic C. L. R. Co.*, 161 N. C. 451.

²⁴ *Trinity, etc. R. Co. v. Duke*, (Tex. Civ. App.), 152 S. W. 1174.

²⁵ *Maryland Cas. Co. v. Lanham*, 124 Ga. 859; *Mayor, etc. v. Stembridge*, 139 Ga. 692; *Western & A. R. Co. v. Brown*, 102 Ga. 13, 3 Am. Neg. Rep. 793; *Snowden v. Waterman*, 110 Ga. 99.

in tort actions;²⁶ the latest cases, however, establish the rule that it cannot be allowed as such, but that in computing the damages the time elapsed since the cause of action arose may be considered.²⁷ There the right to recover interest may be lost by insisting upon the payment of a sum much larger than was awarded by the jury.²⁸ In Indiana the jury in ascertaining the damages resulting to lands from the wrongful removal of material therefrom may, in their discretion, add interest to the damages without finding that there has been unreasonable delay of payment.²⁹

Where, through the defendant's negligence, a break in its

²⁶ See *Pittsburgh R. Co. v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580; *Alleghany v. Campbell*, 107 Pa. 530, 52 Am. Rep. 478; *Railroad Co. v. Gesner*, 20 Pa. 242; *Delaware, etc. R. Co. v. Burson*, 61 id. 380.

²⁷ *Plymouth v. Graver*, 125 Pa. 24, 11 Am. St. 867; *Pennsylvania, etc. R. Co. v. Ziemer*, 124 Pa. 560; *Emerson v. Schoonmaker*, 135 Pa. 437; *Richards v. Citizens' N. G. Co.*, 130 Pa. 37; *Reading & P. R. Co. v. Balthaser*, 126 Pa. 1; *Brent v. Thornton*, 45 C. C. A. 214, 106 Fed. 35.

In *Richards v. Citizens' N. G. Co.*, *supra*, Mitchell, J., said interest cannot "be recovered in actions of tort or in actions of any kind where the damages are not in their nature capable of exact computation, both as to time and amount. In such cases the party chargeable cannot pay or make tender until both the time and the amount have been ascertained, and his default is not therefore of that absolute nature that necessarily involves interest for the delay. But there are cases sounding in tort and cases of unliquidated damages, where not only the principle on which the recovery is to be had is compensation, but where also the compensation can be measured by market value or other

definite standards. Such are cases of the unintentional conversion or destruction of property, etc. Into these cases the element of time may enter as an important factor and the plaintiff will not be fully compensated unless he receive, not only the value of his property, but receive it, as nearly as may be, as of the date of his loss. Hence it is that the jury may allow additional damages in the nature of interest for the lapse of time. It is never interest as such, nor as a matter of right, but compensation for the delay, of which the rate of interest affords the fair legal measure."

In cases of personal injury there can be no general compensation for delay, and it cannot exceed the legal rate of interest. *McGonnell v. Pittsburgh R. Co.*, 234 Pa. 396.

Damages for delay in settling a claim for unlawful discrimination by a carrier may be awarded by the court which hears the case. *Puritan C. M. Co. v. Pennsylvania R. Co.*, 237 Pa. 420.

²⁸ *Pierce v. Lehigh Valley C. Co.*, 232 Pa. 170.

²⁹ *Pittsburgh, etc. R. Co. v. Swinney*, 97 Ind. 586.

reservoir wall occurred, in consequence of which there was a washout of the plaintiff's road-bed, interest was recoverable as matter of law on the ground that the cost of the necessary repairs was a definite sum which could have been approximately ascertained immediately after the injury was done. In consequence of the injury the plaintiff incurred cost in transferring passengers around the place where the washout occurred. As to this, the sum in which it was damaged was not definitely ascertainable until a bill of particulars was rendered; from that time the defendant was liable for interest. Though distinct and separable items of damage resulted from the same cause each could be dealt with separately for the purpose of determining the right to interest.³⁰

The tendency is to increase the number of actions in which the jury may allow interest as damages;³¹ but this may not be done where exemplary damages are given at discretion.³² There is a divergence of view as to the right to interest on damages resulting from the killing of animals by the negligence of railroad companies. Under the statute of Missouri,³³ Colorado,³⁴ Georgia,³⁵ Kansas,³⁶ Texas,³⁷ Indiana,³⁸ and Illinois³⁹

³⁰ *New York, etc. R. Co. v. Ansonia L. & W. P. Co.*, 72 Conn. 703.

³¹ *Lawrence R. Co. v. Cobb*, 35 Ohio St. 94; *Duryee v. Mayor*, 96 N. Y. 477; *Central R. Co. v. Sears*, 66 Ga. 499 (negligent killing of husband; time elapsed between death and trial, considered by jury).

³² *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 36 L.R.A.(N.S.) 263; *Schulte v. Louisville & N. R. Co.*, 128 Ky. 627; *Western & A. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. 318; *Ratteree v. Chapman*, 79 Ga. 574, 11 Am. Neg. Cas. 350.

³³ *De Steiger v. Hannibal, etc. R. Co.*, 73 Mo. 33.

³⁴ *Denver, etc. R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537.

³⁵ *Western & A. R. Co. v. McCauley*, 68 Ga. 818; *Macon, etc. R. Co.*

v. Hasty, 10 Ga. App. 103 (in the discretion of the jury).

³⁶ *Atchison, etc. R. Co. v. Gabbert*, 34 Kan. 132.

³⁷ *St. Louis S. R. Co. v. Chambliss*, 93 Tex. 62; *International, etc. R. Co. v. Barton*, 93 Tex. 63. *Contra*, *Houston, etc. R. Co. v. McMillan*, 37 Tex. Civ. App. 483.

In the later cases interest is allowed where the injuries are sustained during transportation. *Kansas City, etc. R. Co. v. West* (Tex. Civ. App.) 149 S. W. 206, and cases cited.

³⁸ *New York, etc. R. Co. v. Zumbaugh*, 12 Ind. App. 272. Compare *Wabash R. Co. v. Williamson*, 3 Ind. App. 190, 205.

³⁹ *Toledo, etc. R. Co. v. Johnston*, 74 Ill. 83.

interest is not allowed. It is otherwise in Minnesota,⁴⁰ Arkansas,⁴¹ and Alabama⁴² from the time of the injury, and in Wisconsin,⁴³ and Utah⁴⁴ from the commencement of the action. If the statute makes the company liable for double the damage the owner of the animal has sustained, interest on the value of it is not recoverable.⁴⁵

In actions to recover for personal injuries juries have, according to many authorities, no discretion to allow interest. The sum awarded in gross for mental suffering and physical pain, loss of time and expenses incident to the injury, and for prospective suffering and disability is the full measure of recovery and it cannot be added to by including damages for the detention of the sum awarded.⁴⁶ According to others, it is dis-

⁴⁰ *Varco v. Chicago, etc. R. Co.*, 30 Minn. 18.

⁴¹ *St. Louis, etc. R. Co. v. Biggs*, 50 Ark. 169.

⁴² *Alabama, etc. R. Co. v. McAlpine*, 75 Ala. 113; *Georgia Pac. R. Co. v. Fullerton*, 79 id. 298.

⁴³ *Chapman v. Chicago, etc. R. Co.*, 26 Wis. 295, 7 Am. Rep. 81.

⁴⁴ *Woodland v. Union Pac. R. Co.*, 27 Utah 543.

⁴⁵ *Brentner v. Chicago, etc. R. Co.*, 68 Iowa 530.

⁴⁶ *The Argo*, 127 C. C. A. 456, 210 Fed. 872; *Seaboard A. L. R. v. Bishop*, 132 Ga. 71; *Jacobson v. United States G. Co.*, 150 Iowa 330; *Missouri & K. Tel. Co. v. Vandervort*, 71 Kan. 101; *Leisenring v. La Croix*, 68 Neb. 803; *Sorenson v. Oregon P. Co.*, 47 Ore. 24; *Holtham v. Scranton R. Co.*, 15 Pa. Dist. 401; *Cochran v. Boston*, 211 Mass. 171, 39 L.R.A.(N.S.) 120; *Railroad v. Wallace*, 91 Tenn. 35, 14 L.R.A. 548; *Sargent v. Hampden*, 38 Me. 581; *Ratteree v. Chapman*, 79 Ga. 574; *Western & A. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. 320, 11 Am. Neg. Cas. 350; *Pittsburgh, etc. R.*

Co. v. Taylor, 104 Pa. 306, 49 Am. Rep. 580; *State v. Harrington*, 44 Mo. App. 301; *Sonnenfeld M. Co. v. People's R. Co.*, 59 id. 668; *Texas, etc. R. Co. v. Carr*, 91 Tex. 332; *Penny v. Atlantic C. L. R. Co.*, 161 N. C. 523.

Interest has been allowed as compensation for delay in receiving the sum allowed for loss of earnings. *Bentz v. Johnson*, 21 Pa. Dist. 1068. And such allowance has been recognized as proper in *McPherson v. Pittsburg R. Co.*, 50 Pa. Super. 233.

In Virginia a verdict, silent as to interest, bears interest from its date. *Atlantic C. L. R. Co. v. Grubbs*, 113 Va. 214.

Where the damages consist of several elements and the sum claimed is grossly in excess of the award made, interest cannot be recovered. *McPherson v. Pittsburg R. Co.*, 50 Pa. Super. 233.

The damages are assessed as of the date of the trial and not of the injury; hence there can be no general compensation for delay. *McGonnell v. Pittsburg R. Co.*, 234 Pa. 396.

cretionary with the jury to award interest.⁴⁷ In some states the jury may consider the time which has elapsed since the injury was sustained.⁴⁸ In West Virginia interest from the time of verdict, there being one, or, if not, from the time of judgment, is recoverable under a statute.⁴⁹ In Texas and South Carolina interest may be recovered from the date of bringing suit against a telegraph company to recover for a loss sustained in buying property because of the failure to deliver a message.⁵⁰ In Missouri and Kansas liability for interest in actions *ex delicto*, based upon mere negligence, is not determined by the injury sustained by the plaintiff, but depends upon whether any benefit accrued to the defendant by reason of the wrong done by him.⁵¹ Interest has been recovered for causing death from the time thereof to the date of recovery;⁵² and it has been allowed from the time of verdict in a

⁴⁷ *Wilson v. Troy*, 135 N. Y. 96, 31 Am. St. 817, 18 L.R.A. 449; *Dur-ye v. Mayor*, 96 N. Y. 477; *Mansfield v. New York, etc. R. Co.*, 114 N. Y. 331, 4 L.R.A. 566; *Jamieson v. New York, etc. R. Co.*, 11 App. Div. (N. Y.) 50, affirmed without opinion, 162 N. Y. 630; *Ell v. Northern Pac. R. Co.*, 1 N. D. 336, 17 Am. Neg. Cas. 136, 12 L.R.A. 97, 26 Am. St. 621; *Johnson v. Same*, 1 N. D. 354; *Uhe v. Chicago, etc. R. Co.*, 3 S. D. 563; *Taylor v. Coolidge*, 64 Vt. 506; *King v. Southern Pac. Co.*, 109 Cal. 96; *Eddy v. Lafayette*, 163 U. S. 456, 41 L.R.A. 225; *Brent v. Thornton*, 45 C. C. A. 214, 106 Fed. 35; *Western & A. R. Co. v. Calhoun*, 104 Ga. 384. See § 1265.

⁴⁸ *Zipperlein v. P. C. & St. L. R. Co.*, 8 Ohio Dec. 587. See § 1256.

In a tort action the verdict specified the damages to which the plaintiff was entitled at the time the wrong was done, and how much the interest thereon would amount to, and gave the total sum as its ver-

dict. The verdict was sustained, though interest was not recoverable as such. *Norton v. Parker*, 17 Ohio C. C. 715, following *Railroad Co. v. Cobb*, 35 Ohio St. 94.

⁴⁹ *Campbell v. Elkins*, 58 W. Va. 308, 2 L.R.A.(N.S.) 159.

⁵⁰ *Western U. Tel. Co. v. Carver*, 15 Tex. Civ. App. 547; *Eureka Cotton Mills v. Western U. Tel. Co.*, 88 S. C. 498. Compare *Pacific Postal Tel. C. Co. v. Fleischner*, 14 C. C. A. 166, 66 Fed. 899.

⁵¹ *Marshall v. Schrieker*, 63 Mo. 308; *Wiggins F. Co. v. Chicago & A. R. Co.*, 128 Mo. 224, 255, 16 Am. Neg. Cas. 426, and cases referred to; *Atehison, etc. R. Co. v. Ayers*, 56 Kan. 176; *Gerst v. St. Louis*, 185 Mo. 191, 105 Am. St. 580.

Interest in a personal injury action is not to be computed from the time of the injury. *Staley v. Forest*, 157 Iowa 188. But compare *Stoddart v. Myers*, 52 Pa. Super. 179.

⁵² *St. Louis, etc. R. Co. v. Cleere*, 76 Ark. 377.

state court in a personal injury action in proceedings in admiralty by the vessel owner for the limitation of his liability.⁵³

A distinction has been made in respect to interest in cases of an agent or trustee becoming liable for property in his hands between loss by negligence and malfeasance. Where his liability is not for any actual or intended benefit to himself, as by conversion of the property to his own use, he is only liable for the value without interest; but if he has derived a private advantage out of it he will be liable for interest.⁵⁴

In actions for damages caused by collision interest is allowed on the cost of repairs and rental value while the vessel is undergoing repairs.⁵⁵ It is allowed on all pecuniary elements of damage resulting from torts, consisting of moneys, property or labor, the value of which is reasonably certain.⁵⁶ The rate of interest allowable in an action of tort is governed by the statute in force when the verdict is rendered⁵⁷ and the law of the forum.⁵⁸

SECTION 6.

THE LAW OF WHAT PLACE AND TIME GOVERNS.

§ 356. **Importance of subject.** As interest is generally regulated by statutes and these are not the same in all jurisdictions

⁵³ *The City of Boston*, 182 Fed. 174.

⁵⁴ *Marshall v. Schrieker*, 63 Mo. 308; *Dawes v. Winship*, 5 Pick. 97, note; *Thompson v. Stewart*, 3 Conn. 171, 8 Am. Dec. 168; *Rootes v. Stone*, 2 Leigh, 650; *Ricketson v. Wright*, 3 Sumner 335; *Short v. Skipwith*, 1 Brock. 103.

⁵⁵ *Straker v. Hartland*, 2 H. & M. 570; *The Mary J. Vaughan*, 2 Bene. 47; *Mailler v. Express Propeller Line*, 61 N. Y. 312; *Warrall v. Munn*, 38 id. 151; *Whitehall T. Co. v. New Jersey S. Co.*, 51 id. 369. See § 1294.

But where both vessels are at fault interest on the amount awarded is chargeable only from the date

of the decree. *The Manitoba*, 122 U. S. 97, 30 L. ed. 1095.

If strippings are rescued from the offending ship and the owners realize large sums therefrom the court will exercise its discretion in allowing interest thereon. *The Scotland*, 118 U. S. 507, 30 L. ed. 153.

⁵⁶ *Mailler v. Express Propeller Line*, *supra*; *Jay v. Almy*, 1 Woodb. & M. 262; *Remke v. Clinton*, 2 Utah 230; *Grosvenor v. Ellis*, 44 Mich. 452; *Snow v. Nowlin*, 43 Mich. 383.

⁵⁷ *Salter v. Utica, etc. R. Co.*, 86 N. Y. 401, 12 Am. Neg. Cas. 362, disapproving *Ewing v. Neversink S. Co.*, 23 Hun 578.

⁵⁸ *Bischoffsheim v. Baltzer*, 21 Fed. 531.

and fluctuate more or less in each, it is of great practical importance that definite rules or principles should exist for determining the force and effect of these laws and by which of them any contract or liability is to be governed. Owing to the wide domain of commerce, international and interstate, questions of interest arising under statutory regulations and restrictions are not of local concern. They arise upon every form of indebtedness incident to that commerce; and often between parties widely separated, not only by distance but by national and state lines, each performing his part of the transaction at home or in different jurisdictions and under the influence of dissimilar laws. These transactions involve expenditures, independent or subsidiary contracts, and the performance of them in places having no common rate of interest.

§ 357. **General rule as to contracts.** The general rule is that the contract, in respect to its construction and force, in other words its meaning and validity, is governed by the law of the place where it is made and to be performed.⁵⁹ This rule rests on the theory that it accords with the intention of the parties if such intention was a legal one. The other rules which are applied are also based on the same theory. Lord Herschell said in a recent case: Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question in each case with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary

⁵⁹ Wittkowski v. Harris, 64 Fed. 712; Archer v. Dunn, 2 W. & S. 327; Ralph v. Brown, 3 id. 395; Findlay v. Hall, 12 Ohio St. 610; Land Title & T. Co. v. Fulmer, 24 Pa. Super. 256. (A foreign corporation which loans money and takes security on property situated in an-

other state may claim only such interest as is allowed by the laws of the latter, and not the rate authorized by its by-laws or permitted to be charged by similar corporations of the state in which the loan was made.)

to enter upon the inquiry to which of these considerations the greatest weight is to be attributed, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated, are entering into a contract, to indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it.⁶⁰ If it is valid where made it is *jure gentium*, valid everywhere,⁶¹ if it is not injurious to the public rights of the people in the jurisdiction in which its enforcement is sought, or does not offend their morals, contravene their policy or violate public law,⁶² and if valid where made is so everywhere.⁶³

⁶⁰ Hamlyn v. Talisker D. Co., [1894] App. Cas. 202. See Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104; Wayman v. Southard, 10 Wheat. 1, 48; Robinson v. Bland, 2 Burr. 1077; Lloyd v. Guibert, L. R. 1 Q. B. 115, 120; Bigelow v. Burnham, 83 Iowa 120, 32 Am. St. 294; Minor on Conf. L., § 181.

⁶¹ Reiff v. Bakken, 36 Minn. 333; Matthews v. Paine, 47 Ark. 54; Pearsall v. Dwight, 2 Mass. 88, 3 Am. Dec. 35; Willings v. Consequa, 1 Pet. C. C. 317; De Sobry v. De Laistre, 2 H. & J. 193, 3 Am. Dec. 535; Trimby v. Vignier, 1 Bing. N. C. 151; Houghton v. Page, 2 N. H. 42, 9 Am. Dec. 30; Dyer v. Hunt, 5 N. H. 401; Andrews v. Pond, 13 Pet. 65; Whiston v. Stodder, 8 Mart. 95, 13 Am. Dec. 281; Bank of United States v. Donnelly, 8 Pet. 361, 8 L. ed. 974; Wilcox v. Hunt, 13 id.

378; French v. Hall, 9 N. H. 137, 32 Am. Dec. 341; Andrews v. Creditors, 11 La. 464; Smead v. Mead, 3 Conn. 253, 8 Am. Dec. 183; Medbury v. Hopkins, 3 Conn. 472; 2 Kent's Com. 457 *et seq.*; Story's Conf. L., § 242; Andrews v. Herriot, 4 Cow. 510; Watson v. Orr, 3 Dev. 161; Chartres v. Cairnes, 4 Mart. (N. S.) 1; Courtois v. Carpenter, 1 Wash. C. C. 376; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Palmer v. Yarrington, 1 Ohio St. 253; Harper v. Hampton, 1 H. & J. 453, 622; Warrender v. Warrender, 9 Bligh 110.

⁶² Bartlett v. Collins, 109 Wis. 477; Edgerly v. Bush, 81 N. Y. 199; Rousillon v. Rousillon, 14 Ch. Div. 351; Hallam v. Telleren, 55 Neb. 255.

⁶³ Cases cited in next to last preceding note; United States v. La

What is the place of contract is not always easy to determine; nor have the courts arrived at the same conclusion from the same or similar facts. The inquiry is made for two objects—one to ascertain the amount of interest which the creditor is entitled to receive on an agreement for interest generally, specifying no rate; the other to determine whether the contract, when it contains an agreement for a specific rate of interest or on one which at its inception interest was taken is usurious. It is a general rule that where the contract stipulates for interest it is payable agreeably to the law of the place where made, but if it is made with reference to the laws of another state or country and is to be performed there the interest is to be calculated according to the law of the place where the contract is to be performed or the money paid. The place of performance is chiefly regarded; it locates the contract; the parties are presumed to have the law there in force in view in making their contract.⁶⁴ Where no other place is specified for

Jenne Eugenie, 2 Mason 409; *Van Schaick v. Edwards*, 2 Johns. Cas. 355; *Robinson v. Bland*, 2 Burr. 1077; *Touro v. Cassin*, 1 N. & McC. 173, 9 Am. Dec. 680; *Van Rumsdyk v. Kane*, 1 Gall. 371; *Alves v. Hodgson*, 7 T. R. 241; *McAllister v. Smith*, 17 Ill. 328, 65 Am. Dec. 651; *Kanaga v. Taylor*, 7 Ohio St. 134; *Nichols & S. Co. v. Marshall*, 108 Iowa 518.

⁶⁴ *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424; *Scotland County v. Hill*, 132 U. S. 107, 33 L. ed. 261; *Eastfield S. S. Co. v. McKeon*, 208 Fed. 580; *Sloss-Sheffield Steel & Iron Co. v. Tacony Iron Co.*, 183 Fed. 645, case affirmed 110 C. C. A. 530, 188 Fed. 896; *The Mary N. Bourke*, 145 Fed. 909, 76 C. C. A. 441; *Robinson v. Queen*, 87 Tenn. 445, 3 L.R.A. 214, 10 Am. St. 690; *Baum v. Birchall*, 150 Pa. 164, 30 Am. St. 797; *Stevens v. Gregg*, 89 Ky. 461; *Abt v. American Bank*, 159 Ill. 467, 50 Am. St. 175; *Shoe & L*

Bank v. Wood, 142 Mass. 563; *Liverpool & G. W. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 458, 32 L. ed. 788, 799; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *Sutro T. Co. v. Segregated B. M. Co.*, 19 Nev. 121, quoting the text; *Jaffray v. Dennis*, 2 Wash. C. C. 253; *Cowqua v. Landeburn*, 1 id. 521; *Bushby v. Camac*, 4 id. 296; *Bank v. Brady*, 3 McLean 268; *Moore v. Davidson*, 18 Ala. 209; *Leffler v. McDermotte*, 18 Ind. 246; *Van Hemert v. Porter*, 11 Mete. (Mass.) 210; *Winthrop v. Carleton*, 12 Mass. 4; *Ferguson v. Fyffe*, 8 Cl. & F. 121; *Cubbedge v. Napier*, 62 Ala. 518; *Cash v. Kennion*, 11 Ves. 311; *Robinson v. Bland*, 2 Burr. 1077; *Fanning v. Consequa*, 17 Johns. 511, 8 Am. Dec. 442, 3 Johns. Ch. 587; *Houghton v. Page*, 2 N. H. 42, 9 Am. Dec. 30; *Lapice v. Smith*, 13 La. 91, 33 Am. Dec. 555; *Mullen v. Morris*, 2 Pa. 85; *Slaemm v. Pomery*, 6 Cranch 221, 3 L. ed. 205;

the performance of a contract, it is to be performed where made.⁶⁵ The law of that place determines its construction, obligation and place of payment.⁶⁶ If a contract is to be partly performed where made and partly in other countries or states, the law of the place where it is made will govern unless a clear mutual intention is manifested that it shall be governed by the law of some other jurisdiction.⁶⁷

Champan v. Ranelagh, Prec. Ch. 128; Thompson v. Ketcham, 4 Johns. 285; Smith v. Smith, 2 id. 235, 3 Am. Dec. 410; Ruggles v. Keeler, 3 Johns. 263, 3 Am. Dec. 482; Van Schaick v. Edwards, 2 Johns. Cas. 355; Licardi v. Cohen, 3 Gill 430; Lewis v. Owen, 4 B. & Ald. 654; Quin v. Keefe, 2 H. Bl. 553; Bainbridge v. Wilcocks, Baldw. C. C. 536; Boyce v. Edwards, 4 Pet. 111, 7 L. ed. 799; Smith v. Buchanan, 1 East 6; Frazier v. Warfield, 9 Sm. & M. 220; Lloyd v. Scott, 4 Pet. 205; Hosford v. Nichols, 1 Paige 220; Boyle v. Zacharie, 6 Pet. 635, 648, 8 L. ed. 527, 532; Elkins v. East India Co., 1 P. Wms. 395; Barnes v. Newcomb, 9 Cush. 46; Bell v. Bruen, 1 How. 169, 11 L. ed. 89; Andrews v. Pond, 13 Pet. 77, 10 L. ed. 67; Scofield v. Day, 20 Johns. 102; Healy v. Gorman, 15 N. J. L. 328; Arrington v. Gee, 5 Ired. 590; Irvine v. Barrett, 2 Grant's Cas. 73; Roberts v. McNeeley, 7 Jones 506, 78 Am. Dec. 261; Swett v. Dodge, 4 Sm. & M. 667; Gaillard v. Ball, 1 N. & McC. 67; Peek v. Mayo, 14 Vt. 33, 39 Am. Dec. 205; Hunt v. Hall, 37 Ala. 702; Haurick v. Andrews, 9 Port. 9; Chumasero v. Gilbert, 24 Ill. 293; Hawley v. Sloo, 12 La. Ann. 815; Little v. Riley, 43 N. H. 109; Bolton v. Street, 3 Cold. 31; Summers v. Mills, 21 Tex. 77; Whitlock v. Castro, 22 Tex. 108; Butler v. Myer, 17

Ind. 77; Bent v. Lauve, 3 La. Ann. 88; Howard v. Brauner, 23 id. 369.

⁶⁵ Shipman v. Bailey, 20 W. Va. 140; Kavanaugh v. Day, 10 R. I. 393, 14 Am. Rep. 691; Pomeroy v. Ainsworth, 22 Barb. 119; Davis v. Coleman, 11 Ired. 303; Don v. Lippman, 5 Cl. & F. 1; De Wolf v. Johnson, 10 Wheat. 367, 383, 6 L. ed. 343, 347; Wilson v. Lazier, 11 Gratt. 477; Blodgett v. Durgin, 32 Vt. 361, 78 Am. Dec. 597; Thompson v. Ketcham, 8 Johns. 189; Short v. Trabue, 4 Mete. (Ky.) 299; Peck v. Hibbard, 26 Vt. 698, 62 Am. Dec. 605; Gage v. McSweeney, 74 Vt. 370.

⁶⁶ Pritchard v. Norton, 106 U. S. 124, 140, 27 L. ed. 104, 110; Bryant v. Edson, 8 Vt. 325, 30 Am. Dec. 472; Bank v. Colby, 12 N. H. 520; Sherrill v. Hopkins, 1 Cow. 103; Clark v. Searight, 135 Pa. 173, 20 Am. St. 868; Bank v. Gibson, 60 Ark. 269; Farmers' Sav. B. & L. Ass'n v. Ferguson, 69 Ark. 352. See Union Nat. Bank v. Chapman, 169 N. Y. 538, 57 L.R.A. 513. In this case an accommodation note, payable in Illinois, had been signed by a married woman in Alabama as surety for her husband. It was held that the contract was made in Alabama though the note was first negotiated in Illinois.

⁶⁷ Bartlett v. Collins, 109 Wis. 477; Morgan v. New Orleans, etc. R., 2 Woods 244; Edwards B. Co. v. Stevenson, 160 Mo. 516, is similar

The place of contracting is, *prima facie*, where the instrument is dated; but if written, dated and signed in one place and delivered at another the latter is the place of its consummation. A contract takes effect according to the law of the place where it is consummated or where, if it is written, it is delivered and put in force.⁶⁸ Where a note is expressly made payable at a designated place its legal effect in this particular cannot be changed by parol evidence.⁶⁹ But if it is payable generally extrinsic evidence may be resorted to to show that it was intended to be paid at a particular place and thereby subject it to the law of that place. In such case interest will be allowed at the rate established by the law in force there.⁷⁰ A debt was payable in Great Britain, and the creditor agreed with the debtor, for the latter's accommodation, that it might be paid in one of the states in this country. It was held that the interest accruing upon it thereafter should be computed according to the rate in that state.⁷¹ If no place of payment or rate of interest is specified and there is no proof of the intention of the parties as to the former, the instrument is payable anywhere and the rate of interest is determinable by the law of the jurisdiction in which suit is brought upon it.⁷² Contracts relating to real property are governed by the *lex rei sitæ*.⁷³

to the Wisconsin case on the facts, but announces the opposite conclusion.

The rule as stated has been applied to a contract silent respecting interest, which was made in Missouri and wholly performed in Mexico. *Freygang v. Vera Cruz & P. R. Co.*, 154 Fed. 640, 83 C. C. A. 414.

⁶⁸ *Walker v. Lovitt*, 250 Ill. 543; *Baum v. Birchall*, 150 Pa. 164, 30 Am. St. 797; *Hyde v. Goodnow*, 3 N. Y. 266; *Cook v. Litchfield*, 5 Sandf. 330; *Davis v. Coleman*, 7 Ired. 424; *Fant v. Miller*, 17 Gratt. 47; *Cook v. Moffat*, 5 How. 295, 12 L. ed. 159; *Whiston v. Stodder*, 8

Mart. (La.) 95, 13 Am. Dec. 291; *Snaith v. Mingay*, 1 W. & S. 87; *Lenwig v. Ralston*, 1 Pa. 139.

⁶⁹ *Thompson v. Ketcham*, 8 Johns. 189; *Frazier v. Warfield*, 9 Sm. & M. 220.

⁷⁰ *Austin v. Imus*, 23 Vt. 286; *McKay v. Belknap Sav. Bank*, 27 Colo. 50; *Eccles v. Herrick*, 15 Colo. App. 350. See *Senter v. Bowman*, 5 Heisk. 14.

⁷¹ *Pearce v. Wallace*, 1 Har. & J. 48.

⁷² *Kopelke v. Kopelke*, 112 Ind. 435.

⁷³ *Baum v. Birchall*, *supra*. See § 362.

§ 358. Rule as to notes and bills. Bills of exchange and promissory notes illustrate these principles in respect to the *lex loci contractus*. The maker of a note and the acceptor of a bill are bound to pay the money therein mentioned at the places severally specified for payment; to those places they have given express assent. They are the parties primarily bound and the agreements appearing by the face of the paper are respectively theirs. The place of making the note or accepting the bill is that where the contract is made, and where, but for the appointment of another place for payment, they would be bound to perform it. As the place of performance, when expressly fixed, is the place of contract within the sense of the *lex loci*, these parties are held to pay the bill or note according to its interpretation and force by the law of that place.⁷⁴ Bills of exchange are usually addressed to a drawee at a particular place; the place so mentioned is that at which the drawer agrees that his bill shall be honored; and, when accepted, it is the place where the acceptor agrees to pay it unless the bill specifies another place of payment; the place of payment is the place of contract and the laws there in force govern it.⁷⁵

The drawer of a bill and the indorser of a note or bill contract by the act of drawing and indorsing. Their contracts are implied. The undertaking of the former is that the drawee will accept the bill and pay the amount of it where, according to its face, it is payable; and that if the bill is dishonored and due notice of the dishonor is given him he will himself pay the amount to the holder. His agreement, so implied, is not to pay at the place mentioned in the bill; but at the place where he draws it and where, consequently, he is legally

⁷⁴ Joseph v. Lyon, 9 Ky. L. Rep. 324 (Ky. Super. Ct.). See § 357.

A clause in a note providing for the payment of attorney's fees if suit should be begun, they to be taxed as part of the costs, relates to the remedy and will not be enforced by the courts of a state which hold such provisions void though the

agreement was valid in the state in which it was made. Hallam v. Telleren, 55 Neb. 255.

⁷⁵ Harrison v. Pike, 48 Miss. 46; Sturdivant v. Memphis Nat. Bank, 9 C. C. A. 256, 60 Fed. 730; Todd v. Bank, 3 Bush. 626; Baxter v. Beckwith, 25 Colo. App. 322.

bound to perform, no other place of performance being implied or specified.⁷⁶ The act of drawing is interpreted by the law of the place where it is drawn. Its validity and effect are determined by that law;⁷⁷ and the money due there, by reason of

⁷⁶ Story on Prom. Notes, § 339. note; Story on Bills, § 154.

Rothschild v. Currie, 1 Q. B. 43, proceeded upon the opposite theory, that the law of the place of payment governed as to all the parties. It was the case of a bill drawn in England on, and accepted by, a house in France, payable at Paris, in favor of a payee domiciled in England, by whom it was indorsed there to an indorsee who was also domiciled there. The bill was dishonored at maturity, and due notice was given to the payee according to the law of France; but not, as it was suggested, according to the law of England. And it was held, in a suit brought by the indorsee against the payee, that the notice was good, being according to the law of France, the *lex loci contractus* of acceptance. In a note to § 339 of Story on Prom. Notes this decision is criticised by the author: "With the greatest deference for that learned judge (who delivered the opinion), it seems to me that the decision of the court is not sustained by the reasoning on which it purports to be founded. The court there admit that the notification of the dishonor is a parcel of the contract of the indorser; and, if so, then it must be governed by the law of the place where the indorsement was made, upon the very rules cited by the court from Pothier. The error (if it be such) seems to have arisen from confounding the contract of the acceptor with the contract of the drawer and the indorser." In a preceding part of the same note the

learned author says: "The acceptor agrees to pay in the place of acceptance, or the place fixed for the payment (Cooper v. Waldegrave, 2 Beav. 272); but upon his default, the drawer and the indorser do not agree, upon due protest and notice, to pay the like amount in the same place; but agree to pay the like amount in the place where the bill was drawn or indorsed by them respectively. Hence it is that the notice to be given to each of them must and ought to be notice according to the law of the place where he draws or indorses the bill, as a part of the obligations thereof. The drawer and indorser, in effect, contract in the place where the bill is drawn or indorsed a conditional obligation; that is, if the bill is dishonored, and due notice is given to them of the dishonor according to the law of the place of their contract, they will respectively pay the amount of the bill at that place. The law of the place of the acceptance or payment of the bill has nothing to do with their contract; for it is not made there, and has no reference to it." See Shanklin v. Cooper, 8 Blackf. 41, overruled in Hunt v. Standart, 15 Ind. 33, 77 Am. Dec. 79.

⁷⁷ Coghlan v. South Carolina R. Co., 142 U. S. 101, 111, 35 L. ed. 951, 955, and cases cited; Cooper v. Waldegrave, 2 Beav. 282; Ayerman v. Sheldon, 12 Wend. 439; Everett v. Vendryes, 19 N. Y. 436; Yeatman v. Cullen, 5 Blackf. 240; Slacum v. Pomery, 6 Cranch, 221, 3 L. ed. 205; Powers v. Lynch, 3 Mass. 77; Williams v. Wade, 1 Mete. (Mass.)

the violation of the drawer's undertaking that the drawee should accept and pay according to the tenor of the bill, is the amount specified in it, together with interest, after his own default, if not fixed by the bill, at the rate allowed by the law of the place of drawing.⁷⁸ The damages are to be ascertained by the same law,⁷⁹ for not having the money for the holder at the place where, according to the bill, it should have been paid. The contract implied from indorsement is in legal effect the same as that implied from drawing a bill; the language of an indorsement expressed in full is a bill of exchange.⁸⁰ It is a new and substantive contract;⁸¹ and the obligations of

82; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Potter v. Brown*, 5 East 124; *Hicks v. Brown*, 12 Johns. 142; *Hunt v. Standart*, *supra*; *Van Raugh v. Van Arsdahn*, 3 Cal. 154, 2 Am. Dec. 259; *Burrows v. Hannegan*, 1 McLean, 315.

⁷⁸ *Bailey v. Heald*, 17 Tex. 102; *Bank of United States v. United States*, 2 How. 711, 11 L. ed. 439; *Raymond v. Holmes*, 11 Tex. 54; *Crawford v. Branch Bank*, 6 Ala. 12, 41 Am. Dec. 33.

In *Gibbs v. Fremont*, 9 Ex. 25, the action was by the indorsers of several bills of exchange drawn by the defendant in California on B. at Washington, D. C. The bills were made payable to H., and were discounted by him at the place where they were drawn; they were dishonored, and the question was whether the plaintiff was entitled to recover against the defendant six per cent., the rate in W., where they were payable, or twenty-five per cent., the rate of interest in C., where they were drawn. The court gave interest according to the rate in C.

In *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79, a note made and indorsed in Indiana was payable in New York. The indorsement was sufficient according to the laws of N. Y., but it was not suf-

ficient under the laws of Indiana. The question was by what law the sufficiency of the indorsement was to be tested. It was held that the indorsement was governed by the law of Indiana, where it was made. The following cases involved a similar question and were decided in the same way: *Ayrman v. Sheldon*, 12 Wend. 439; *Everett v. Vendryes*, 19 N. Y. 436; *Yeatman v. Cullen*, 5 Blackf. 240; *Williams v. Wade*, 1 Mete. (Mass.) 82; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Burrows v. Hannegan*, 1 McLean, 315; *Holbrook v. Vibbard*, 3 Ill. 465; *Currie v. Lockwood*, 40 Conn. 349; *Lowry v. Western Bank*, 7 Ala. 120. See *Trabue v. Short*, 5 Cold. 293; *Short v. Trabue*, 4 Mete. (Ky.) 299; *Artisans' Bank v. Park Bank*, 41 Barb. 599; *Trabue v. Short*, 18 La. Ann. 257; *Allen v. Kemble*, 6 Moore P. C. 314; *Allen v. Merchants' Bank*, 22 Wend. 215.

⁷⁹ *Slacum v. Pomery*, 6 Cranch 221, 3 L. ed. 205.

⁸⁰ *Bayley on Bills*, ch. 5, § 3; *Story on Bills*, § 108; *Ayrman v. Sheldon*, 12 Wend. 439; *Ballingallis v. Gloster*, 3 East, 482; *Heylyn v. Adamson*, 2 Burr. 674; *Ogden v. Saunders*, 12 Wheat. 213, 341, 6 L. ed. 606, 650.

⁸¹ *Slacum v. Pomery*, 6 Cranch

the parties are to be determined according to the law of the country in which it is made.⁸² This seems now to be the doctrine of both the English and American courts; but it has not been established without dissent.⁸³

The contract of the drawer or indorser in relation to the payment is twofold: that the acceptor or maker will pay according to the tenor of the paper the amount therein mentioned, at the specified time and place; and that in case the parties primarily bound fail to make such payment, then, upon due notice of such default, the drawer or indorser will pay that amount. The measure of their liability rests upon the theory that they should pay a sum which will be a full compensation to the holder for the acceptor's and maker's default, consisting of damages for being obliged to receive the money at a different place, and interest during the delay of payment. The interest that the primary parties are chargeable with is the rate of the country or state where the paper was payable. They are liable to that rate because the contract was to be there performed. Although these secondary parties did not agree to pay at the same place, they agreed to pay the same debt; that is, the face of the paper. Now, if the interest which the primary parties are liable for is an incident to that debt, and follows it as the shadow follows the substance, why should not the subsidiary obligation in respect to the amount be the same as the primary? But the cases appear to proceed upon the principle that on the default of the primary parties, the immediate requisite steps being taken to render the conditional liability of the drawer and indorser absolute, the amount specified in the bill or note becomes their debt; that they are not responsible for the continued default of the principals; nor, therefore, liable for the interest chargeable to

221, 3 L. ed. 205; *Edwards on Bills*, 263; *Everett v. Vendryes*, 19 N. Y. 436.

⁸² *Id.*; *McClintock v. Cummins*, 3 McLean, 158; *Mix. v. State Bank*, 13 Ind. 521; *Butters v. Olds*, 11 Iowa, 1.

⁸³ *Shanklin v. Cooper*, 8 Blackf.

41, overruled in *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79; *Mullen v. Morris*, 5 Pa. 87; *Hanrick v. Andrews*, 9 Port. 10; *Peck v. Mayo*, 14 Vt. 33, 39 Am. Dec. 205; *Rothschild v. Currie*, 1 Q. B. 43; *Phillips v. Im Thurn*, L. R. 1 C. P. 463; *Able v. McMurray*, 10 Tex. 350.

them; but only for their own default in not paying the sum which becomes their absolute debt, in pursuance of their contract as drawer or indorser. And their agreement is to pay at the place where their contract was made. They are liable on account of their own default to pay interest according to the law of that place. Their default for which interest is computed against them dates from receiving notice of the dishonor of the bill or note.⁸⁴

§ 359. Bonds to the United States. An apparent exception exists in the case of official bonds executed to the federal government. It sometimes happens that they are executed by the principals in one state and by the sureties in another or in different states. The rights and duties of sureties are known to be dissimilar in the several states. It has been decided, however, that such bonds must be treated as made and delivered and to be performed by all the parties at the seat of government, upon the ground that the principal is bound to account there, and therefore, by necessary implication, all the parties look to that as the place of performance, by the law of which they are to be governed.⁸⁵

§ 360. Between parties in different states. Where parties meet together and face to face make contracts the place of making is fixed with certainty; and also the place of performance where no other is designated. But all obligations to pay money are not initiated in this manner. The same rule, however, applies to less formal or more complicated transactions. Interest is allowed according to the law of the place where an indebtedness arises and where the money ought to be paid. In cases of accounts and advances between parties residing in different countries inquiry is made to ascertain, as a matter of fact, where, by their intention, the balance is to be repaid, whether in the country of the creditor or that of the debtor.⁸⁶

⁸⁴ Walker v. Barnes, 5 Taunt. 540. It was held in this case that the drawer of a bill which is dishonored by the acceptor is not liable to pay interest for the time which elapses between the day when the bill becomes due and the day when the

drawer receives notice of the dishonor.

⁸⁵ Story Conf. L., § 290; Cox v. United States, 6 Pet. 172, 202; Duncan v. United States, 7 Pet. 435.

⁸⁶ Grant v. Healey, 3 Summ. 523.

When ascertained, the law of that place governs as to interest. In the absence of any stipulation on the subject, or circumstances indicating a different intention, the party advancing money for another is entitled to interest at the rate established at the place where the advance is made; for the contract to refund, implied by law, is to pay with interest according to the rate which prevails where the transaction takes place.⁸⁷ This rule was applied in favor of the consignee of a ship in South Carolina who paid certain charges on account of the last sickness and funeral of the master in accordance with the custom of the port where the ship was. The owner, a resident of Massachusetts, was held liable to reimburse him according to the rate of interest of the place where the money was advanced.⁸⁸ So when a balance of account exists in favor of a commission merchant residing and doing business in one state against his correspondent in another the cause of action is deemed to arise where the creditor resided and did the business.⁸⁹ And in a case where an agent advanced his money at New Orleans for his principal, residing in another state, upon an undertaking of the principal to replace it by accepting and paying drafts drawn by the agent at New Orleans it was held that the debtor was liable to pay New Orleans interest if he suffered the bills to be dishonored as well as to meet any necessary loss on account of the difference of exchange.⁹⁰

A Chinese merchant, residing at Canton, consigned goods to a merchant in New York to be sold by him, the net proceeds to be remitted to the consignor at Canton, at which place the goods were delivered to the agent of the consignee. The question was whether interest at twelve per cent., according to the custom of Canton, should be charged during the delay of payment or whether the creditor was entitled only to the rate in New York. It was held that the goods consigned were at the risk of the consignor on their voyage to New York, and

⁸⁷ *Winthrop v. Carleton*, 12 Mass. 4; *Arnott v. Redfern*, 2 C. & P. 88; *Edwards on Bills*, 713.

⁸⁸ *Winthrop v. Carleton*, 12 Mass. 4.

⁸⁹ *Coolidge v. Poor*, 15 Mass. 427.

⁹⁰ *Lanusse v. Barker*, 3 Wheat. 101; *Milne v. Moreton*, 6 Bin. 353, 6 Am. Dec. 466; *Bainbridge v. Wilcocks*, Baldw. C. C. 536

the entire duty of the consignee to make sale and remittance of the net proceeds was to be performed there. The duty of remitting meant no more than a delivery of the money on board a proper vessel at New York to a suitable agent for the purpose of being transported to Canton by the usual route and duly consigned to the principal.⁹¹ Hence the place of contract may be determined in cases of this sort, where no other intention is manifest, by a rule of easy application: that advances ought to be deemed reimbursable at the place where they are made, and sales of goods to be accounted for where they take place or are authorized to be made.⁹² So it has been held that if a trustee receives money as such in a foreign state and applies it to his own use he must account for interest according to the law of the place where it was received.⁹³ Loans bear the interest of the place where made unless payable elsewhere.⁹⁴

§ 361. Same subject. On the same principle of paying indebtedness where it arises, moneys due on purchases will be referred to the law of the place where a party, personally or by letter, orders or requests to be supplied, or a seller negotiates and completes a sale unless there is an agreement by note or otherwise to pay somewhere else.⁹⁵ If a written obligation for the purchase-money, payable generally, is dated and delivered where the sale is actually consummated by negotiation of its terms and delivery of the property, and especially if one of the parties resides there, it is the place of

⁹¹ *Fanning v. Consequa*, 17 Johns. 511, 8 Am. Dec. 442; *Cartwright v. Greene*, 47 Barb. 9.

⁹² *Id.*; *Grant v. Healey*, 3 Sumn. 523; *Bainbridge v. Wilcocks*, *supra*; *Story Conf. L.*, §§ 283-285; *Hall v. Woodson*, 13 Mo. 462.

⁹³ *Bischoffsheim v. Baltzer*, 21 Fed. 531; *Neill v. Neill*, 31 Miss. 36.

⁹⁴ *Kraus v. Torry*, 146 Ala. 548; *Consequa v. Willings*, Pet. C. C. 229; *Anonymous*, *Martin & Hayw.* 149; *Stewart v. Ellice*, 2 Paige 604; *Hollis v. Covenant B. & L. Ass'n*,

104 Ga. 318; *Bigelow v. Burnham*, 83 Iowa 120, 32 Am. St. 291; *Thorn v. Alvord*, 32 N. Y. Misc. 456; *Stepp v. National Life, etc. Ass'n*, 37 S. C. 417; *Coghlan v. South Carolina R. Co.*, 142 U. S. 101, 35 L. ed. 951; *Clarke v. Taylor*, 69 Ark. 612, 617; *Columbus, S. & H. R. Co.'s Appeals*, 109 Fed. 177, 48 C. C. A. 275.

⁹⁵ *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *McIntyre v. Parks*, 3 Mete. (Mass.) 207; *Whiston v. Stodder*, 8 Mart. (La.) 95, 13 Am. Dec. 281.

contract; and this conclusion will not be affected though such obligation be signed by other parties as sureties or as co-obligors at other places.⁹⁶

⁹⁶ Arrington v. Gee, 5 Ired. 590, is an instructive case upon the doctrine of *lex loci contractus*. A citizen of North Carolina took a number of slaves to Alabama and there sold them to a citizen of that state, who agreed to give him a bond, with sureties, for the price; this bond was executed by the principal at Mobile, Ala., where it bore date; afterwards two sureties signed it in North Carolina, where they resided; the bond mentioned no place of payment. It was held that all the parties were bound for the payment of interest according to the laws of Alabama. The court say: "The contract of sale from which the bond sued on had its origin was made and completed in Alabama, and the money which the purchaser engaged to pay to the seller would, if not paid when due, thereafter bear interest at the rate of eight per cent.; it not being stipulated by the parties that the payment should be made in any other place. For it is an undoubted principle of law that not only the validity of the contract depends on the *lex loci contractus*, but its effects, including the right of the creditor to interest and its amount, depends on it also. The only question in this case, then, is which is the *locus contractus*, so as to apply to this transaction the above-mentioned principle. We think clearly it is Alabama. Beyond question, that is true of the original contract: namely, that of the purchase, sale and delivery of the negroes. And 'the rate of interest which the debtor should pay is a part of that contract,' so that taking a new security here expressing that the rate

of interest should be eight per cent., or including therein eight per cent. for interest accrued (unless it be a new contract for further forbearance here), would not be in violation of our law, but would be valid. McQueen v. Burns, 1 Hawks 476. Such is even the case when a loan is made in one country and a subsequent collateral security is taken on real estate in another. De Wolf v. Johnson, 10 Wheat. 367. Much more must that be true when the security taken in a foreign country is merely personal. For the original contract obliged the debtor to pay a particular rate of interest and the new security is merely the means of more readily enforcing the performance of that obligation. If, then, Charles S. Gee, the principal debtor, had executed his note for this debt in this state, that would not have altered the rate of interest, provided the note should become payable when the debt would fall due according to the original contract and did not designate some other place of payment; in other words, if the note was but a security for the pre-existing debt and in no respect changed its character.

"But in truth, this security by bond was given by him in Alabama, as well as the debt originally contracted there; and the bond is dated at Mobile, and specifies no other place of performance. Now, although it be true that the rule of the *lex loci contractus*, before stated, is subject to the modification that it must yield to the *lex loci in quo solveret*, yet that is only in those cases in which it appears from the contract that the performance is

A contract for the payment of money entered into with such circumstances as alone would bring it under the operation of

to be at some other place. For when a contract states that the parties had in view the law of another country, when they made it, then it is but right to say that the contract should be governed by the law the parties thus appear to have intended, rather than by that of the *loci contractus*. Thus notes made and dated in Dublin for £100 mean Irish and not English currency, unless they be payable on their face in England; in which latter case the money would be English. *Kearney v. King*, 2 B. & Ald. 301; *Sproule v. Legge*, 1 B. & C. 16; *Don v. Lippman*, 5 Clark & F. 1. For debts have no *situs*, and are payable everywhere, including the *locus contractus*; and therefore the law of that place shall govern, since it does not appear from the contract that the parties contemplated the law of any other place. There cannot be any other rule but that of the place of the origin of the debt, unless it be that where the creditor may be found; since the debtor must find the creditor for the purpose of making payment. But, manifestly, this last can never be adopted, because it would vary with every change of domicile or residence of the creditor. Then, as was observed by Lord Brougham in *Don v. Lippman*, a contract, payable generally, naming no place of payment, is to be taken to be payable at the place of contracting the debt, as if it was expressed to be there payable. Being payable everywhere, the rate of interest must be determined by the law of the origin, since there is nothing else to give a rule. . . . We are to suppose that as to Charles S. Gee the bond expressed that it

was payable at Mobile. When the others executed it, can it also be supposed that they insisted that, as to them, the bond should be payable in North Carolina? Certainly not; for to say nothing more, it cannot be presumed that the same debt is payable at two different places, unless it be so expressed. It is said, indeed, that, as in our law the contract is several, it is the same thing as if these parties had given distinct notes in this state for the debt. But it is to be recollected that the bond is also joint; and therefore that all three of the obligors obliged themselves jointly to do the same thing; that is to say, to pay a certain sum of money; and the only question is, whether we are to understand them as contracting to pay the sum at one and the same place. For, if we are so to understand, there can be no doubt, from what has been already said, that the place is Mobile; and then, according to the rule that the interest is to be regulated by the law of the place of performance, the bond would bear Alabama interest. There would have been nothing unlawful in taking a bond in this state for that interest, as we have before seen, as it would merely be a supplemental security for a previous lawful contract. Now, it is impossible to suppose that these defendants could have contemplated the payment being made here by them, and not at Mobile, by the principal. The very statement of the case is, that they executed the bond as the sureties of Charles S. Gee; and in the nature of things, therefore, they expected to be only secondarily liable, and they were to be liable for what he

the laws of a particular place as the place of contract will not be withdrawn from the effect of those laws merely by taking security for the performance of the contract by mortgage upon lands situated in another jurisdiction. Taking such security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract or a loan on the part of the bondsman is repayment of the money; and the security given is but the means of securing what he has contracted for, which in the eye of the law is to pay where he borrows unless another place of payment be expressly designated by the contract.⁹⁷ But when there is nothing else to indicate where the transaction took place, or where the contract to pay is to be performed, the law of the place where the real estate is situated on which the money is secured will govern as to the rate of interest. A marriage settlement, though made in another state, was held to bear interest according to the law of South Carolina because secured on lands in that state.⁹⁸ Creditors residing in Pennsylvania, where the limit of interest is six per cent., held a

had bound himself. If that were not so it would lead to endless confusion. For, suppose a principal in Alabama and three sureties, one living and executing the bond in Louisiana, one in North Carolina and one in New York, would there be four distinct contracts as to the rate of interest? It would be absurd to hold so. In reality the contract of sureties, in reference to the question under consideration, is one of guaranty for the performance of his contract by his principal; and therefore each surety, no matter where he lives, must be liable for precisely the same, which is that for which the principal is liable, neither more nor less."

In *Findlay v. Hall*, 12 Ohio St. 610, three persons owed a debt in *New Mexico* on a promissory note payable there. Two of them assumed to renew it, and accordingly

executed a new note at *Santa Fe*. Afterwards the third executed the same note in Missouri, with a knowledge of all the facts. It was held that he ratified the agreement made by his codebtors, and that the new note was to be regarded as made in and to be governed by the laws of New Mexico in respect to the stipulation for interest.

⁹⁷ *Shipman v. Bailey*, 20 W. Va. 640; *Sheldon v. Haxtum*, 91 N. Y. 124; *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. ed. 343; *Varick v. Crane*, 4 N. J. Eq. 128; *Story's Conf. L.*, § 287a; *Kavanaugh v. Day*, 10 R. I. 393, 14 Am. Rep. 691; *Hosford v. Nichols*, 1 Paige 220; *Butters v. Olds*, 11 Iowa 1; *South Missouri L. Co. v. Rhodes*, 54 Mo. App. 129; *Farmers' Sav. B. & L. Ass'n v. Ferguson*, 69 Ark. 352.

⁹⁸ *Quince v. Callender*, 1 Desaus. 160. See § 357, at end.

mortgage made in New York upon lands situate in that state. In the absence of anything indicating where the securities were payable or showing that a different rate of interest from that of New York was intended the rate of that state was adopted.⁹⁹ The general doctrine is that the law of the place where the contract is made is to determine the rate of interest when the contract specifically gives interest; and this will be the case though the loan be secured by a mortgage on lands in another state unless there are circumstances to show that the parties had in view the laws of the latter place in respect to interest. When that is the case the rate of interest of the place of payment is to govern.¹ Where a mortgage is a mere incident to the debt, as security for the performance of a personal obligation, it will, as a security, follow the condition of the contract in respect to interest.²

There is a tendency manifested in some recent cases to limit the rule that the validity of a contract is to be determined by the law of the place of its performance to contracts which are purely personal, and to favor the view that the transfer of lands and the execution of liens thereon are governed by the laws of the place where such property is situate. In a North Carolina case³ a loan was made to a citizen of that state by a Georgia corporation, application therefor being made to a branch of the corporation located in North Carolina, to whom payments were to be made, though the contract recited that it was solvable in Georgia. The loan was secured by a mortgage of land in the latter state. The opinion contains a quotation from a Georgia case,⁴ in which, speaking of a loan made

⁹⁹ *Lewis v. Ingersoll*, 3 Abb. App. Dec. 55.

¹ *Bank v. Doherty*, 42 Wash. 317, 114 Am. St. 123; *Central T. Co. v. Burton*, 74 Wis. 329; 2 Kent's Com. 460; *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. ed. 343.

² *Sands v. Smith*, 1 Neb. 108, 93 Am. Dec. 331; *Fitch v. Remer*, 1 Biss. 337; *Cope v. Wheeler*, 41 N. Y. 303; *Williams v. Fitzhugh*, 37 N. Y. 444.

³ *Meroney v. Atlanta B. & L. Ass'n*, 116 N. C. 882, 47 Am. St. 841. In *Faison v. Grandy*, 128 N. C. 438, the same rule was applied though the loan was made in another state. *Shannon v. Georgia State B. & L. Ass'n*, 78 Miss. 955, 57 L.R.A. 800, is to much the same effect.

⁴ *Jackson v. American M. Co.*, 88 Ga. 756. See *Thompson v. Edwards*, 85 Ind. 414; *Pancoast v. Travelers'*

by the defendant to the plaintiff in New York, but secured by mortgage on land in Georgia, where the borrower resided, the court said: There was not one contract for making the notes and another for securing them by a conveyance, but a part of one and the same contract was expressed in the notes and a part in the deed executed at the same time. There was no intention to make a loan without having it secured both by the notes and the deed. It was, therefore, impossible to accomplish the object without calling in the laws of Georgia as a part of the transaction. New York had no law which could make any contract conveying land situated in Georgia operative or obligatory. As the law of Georgia would thus be essential with respect to a part of the transaction that law, if possible, ought to be applied to the whole. There was no intention to make a mere personal contract, but the scheme was to make one partly personal and partly confined by its very nature to a given *situs*—the state of Georgia. In other recent cases the place of performance has been given its usual controlling effect notwithstanding the negotiations were conducted and the property securing the debt was situated in a state the laws of which forbade the rate of interest agreed to be paid.⁵

Contracts and securities executed to take the place of others previously made for the same debt will be construed in the light of the antecedent facts and by the law which governed the former contracts or securities, if executed and to be performed in the same place; but they may by new provisions be brought under other laws.

§ 362. **Where usury is involved.** On the question of usury courts have another function than that of merely interpreting the contract of the parties to effectuate their intention. If the contract is tainted with usury the intention of the parties is wholly or in part set aside and frustrated.⁶ In determining,

Ins. Co., 79 Ind. 172; *Pine v. Smith*, 11 Gray 38; *Building & L. Ass'n v. Griffin*, 90 Tex. 480.

⁵ *Ware v. Bankers' L. & I. Co.*, 95 Va. 680, 64 Am. St. 826, and other Virginia cases cited; *Maynard*

v. Hall, 92 Wis. 565; *Building & L. Ass'n v. Logan*, 14 C. C. A. 133, 66 Fed. 827; *Brower v. Life Ins. Co.*, 86 Fed. 748.

⁶ *Church v. Malloy*, 9 Hun 148.

therefore, the place of contract with a view to disposing of the defense of usury courts do not limit themselves to a consideration of where, by the terms of the agreement, the parties say it was made or to be performed. The transaction in its incipient details is looked into, and, even if fair on its face and conformable to law, it may be shown to be a transaction belonging to a different place and to include unlawful interest.⁷ When the contract specifying the amount reserved is express its form will not hinder the inquiry whether the parties resorted to it as a means of disguising usury in violation of the law of the state where it was made and to be executed; and in arriving at this intention all the facts are to be taken into consideration.⁸ Two citizens of Massachusetts cannot make a contract in that state payable there or in New York, and agree to be governed by the law of Iowa or California, and thereby avoid the consequence of the agreement for the payment of usurious interest. Nor can a citizen of one state make his note in another to a resident there, payable in a third, with interest

⁷ Davis v. Tandy, 107 Mo. App. 437; Pratt v. Adams, 7 Paige 615; McAllister v. Smith, 16 Ill. 328; Claves v. Hooker, 6 Thomp. & C. 448, 4 Hun 231; Agricultural Nat. Bank v. Sheffield, 4 Hun 421; Richardson v. Brown, 9 Baxter 242; Meroney v. Atlanta Nat. B. & L. Ass'n, 112 N. C. 842.

"It appears that the rule as to the law of contracts made in one state to be performed in another is modified or softened, when applied to contracts for interest, so that the intentions of the parties are effectuated, as a concession to trade and commerce." Bigelow v. Burnham, 83 Iowa 120, 32 Am. St. 294.

⁸ Royal L. Ass'n v. Forter, 68 Kan. 468; Arnold v. Potter, 22 Iowa 194; Building & L. Ass'n v. Griffin, 90 Tex. 480; Meroney v. Atlanta B. & L. Ass'n, 116 N. C. 882, 47 Am. St. 841; Falls v. United States Sav.,

L. & B. Co., 97 Ala. 417, 38 Am. St. 194, 24 L.R.A. 174; Hayes v. Southern Home B. & L. Ass'n, 124 Ala. 663; Jackson v. American M. Co., 88 Ga. 756; Odom v. New England M. S. Co., 91 Ga. 305.

Notes in favor of the defendant were, by their terms, payable in the state of its domicile. They were made in another state and secured by a mortgage of land situated there; the maker was a resident of such state, and through a series of years had made all payments of dues and interest in the state of his residence to an officer of the local board established there and operated by the defendant under its charter. The usury laws of such state were applicable to the notes. Shannon v. Georgia State B. & L. Ass'n, 78 Miss. 955, 57 L.R.A. 800; Building & L. Ass'n v. Griffin, 90 Tex. 480, 488.

as allowed in a fourth.⁹ Parties by a mere mental operation cannot import the law of one state into another for the purpose of altering the character of a loan made in the latter and to be there retained, without any undertaking or duty to use the money anywhere else, or any understanding that in respect to the use or repayment of it the loan shall differ from any other.¹⁰ But where there is no intention to evade the laws against usury parties whose transactions for legitimate purposes extend into several states may conform their interest contracts to the law of the state where the debt is contracted or to the law of that where it is to be paid; in other words, they may adopt the highest rate allowed by the law of either. There are many cases in this country which illustrate both parts of this proposition.¹¹ A leading case arose and was decided in Louisiana upon a note given in that state, payable in New York, for a large sum, bearing interest at ten per cent., the legal rate of Louisiana, that of New York being only seven. The defense of usury was set up; but it was held that the note was not usurious; that, although it was payable in New York, the interest might be stipulated for either according to the law of Louisiana or that of New York.¹² In a Wisconsin case the loan was made in that state by parties residing there and for use there; but the note given was payable in New York, with interest at a higher than the legal rate of that state, and was transferred to a New York bank, and afterwards renewed by a note, made and signed by a part of the makers in Wisconsin and by one in New York; this note was given for the same amount, provided for the same rate of interest as the other and was also payable in New York. It, however, was made to the payee in the first note, which was thus paid by that party. The facts are discussed in the opinion and emphasis is put upon the conclusion that it was a Wisconsin transaction.

⁹ Arnold v. Potter, 22 Iowa 194.

¹⁰ Cope v. Wheeler, 41 N. Y. 303;
Jackson v. American M. Co., 88 Ga.
756; Stansell v. Georgia L. & T. Co.,
96 Ga. 227.

¹¹ Miller v. Tiffany, 1 Wall. 298,
17 L. ed. 540; Thomas v. Clarkson,

125 Ga. 72, 6 L.R.A.(N.S.) 658;
Steinman v. Midland S. & L. Co.,
78 Kan. 479; Midland S. & L. Co.
v. Solomon, 71 Kan. 185.

¹² Depeau v. Humphreys, 8 Mart.
(N. S.) 1.

Upon the point that merely making the note payable in New York did not make it a New York contract, Cole J., said: "The authorities . . . are too clear and emphatic and leave no room for doubt. They certainly establish the proposition that if the rate of interest be specified in the contract, and it be according to the law of the place where the contract was made, though the rate be higher than is lawful by the law of the place where payment is to be made, still the contract will be valid and binding."¹³

Where the evidence showed that a note which purported on its face to have been made in Iowa was in fact made and delivered in New York, where the payee resided, and it did not appear where the indebtedness for which it was given was incurred or where the consideration for it was delivered, or that there was any agreement as to the place of payment the presumption was indulged that it was payable in Iowa and it was sustained as valid under the laws thereof though it would have been void if it were a New York contract.¹⁴ On a second appeal it appeared that the money loaned was paid to the borrower in New York. This was immaterial, in view of the rule that a citizen of one state may loan money to a citizen of an-

¹³ Richards v. Globe Bank, 12 Wis. 692; Kilgore v. Dempsey, 25 Ohio St. 413, 18 Am. Rep. 306; Bank v. Lewin, 45 Barb. 340; Balne v. Wombough, 38 id. 352; Houston v. Potts, 64 N. C. 33; Duncan v. Helm, 22 La. Ann. 418; Andrews v. Pond, 13 Pet. 77, 10 L. ed. 67; Pratt v. Adams, 7 Paige 615; Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205; Chapman v. Robertson, 6 Paige 633; Fitch v. Remer, 1 Biss. 337; Atwater v. Rodofson, 4 Am. L. Reg. 549, 2 Handy 19; Merchants' Bank v. Griswold, 9 Hun 561; Berrien v. Wright, 26 Barb. 208; Carnegie v. Morrison, 2 Mete. (Mass.) 381; Kellogg v. Miller, 2 McCrary 395; Wayne County Bank v. Law, 81 N.

Y. 566, 37 Am. Rep. 533; Pancoast v. Traveler's Ins. Co., 79 Ind. 172; Thornton v. Dean, 19 S. C. 583, 45 Am. Rep. 796; New England M. S. Co. v. Vader, 28 Fed. 265; Brown v. American F. Co., 31 id. 516; United States v. North Carolina, 136 U. S. 211, 222, 34 L. ed. 336, 341; Coad v. Home C. Co., 32 Neb. 761, 29 Am. St. 465; Mott v. Rowland, 85 Mich. 561; Smith v. Parsons, 55 Minn. 520; Sturdivant v. Memphis Nat. Bank, 9 C. C. A. 256, 60 Fed. 730; United S. & L. Co. v. Beekley, 137 Ala. 119, 97 Am. St. 19, 62 L.R.A. 33. But see Ringer v. Virgin Timber Co., 213 Fed. 1001.

¹⁴ Bigelow v. Burnham, 83 Iowa 120, 32 Am. St. 294.

other state and contract for the rate of interest legal in the latter.¹⁵

§ 363. **Same subject.** The same liberal rule is applied to contracts for a greater rate than that allowed by the law of the place where they are made, such rate not exceeding that allowed at the place of payment.¹⁶ An instructive case upon this point was decided in Iowa in 1867. A resident of that state negotiated a loan in Massachusetts. The notes were dated at Keokuk, Iowa, but were delivered in Massachusetts and the money there received; they were payable in New York, and included interest at a higher rate than was allowed by the law of Massachusetts or New York, but legal in Iowa. The payment of the notes was secured by a trust deed of Iowa land, acknowledged by the borrower in Massachusetts and by his wife in Iowa, to an Iowa trustee.¹⁷ The notes, though dated in Iowa, were delivered and therefore had their legal inception in Massachusetts; the deed of trust, though conveying Iowa lands, being a mere security, would not change the *situs* of the loan; the securities were delivered and the money loaned received in Massachusetts. These facts could not influence the interpretation of the contract, but they were material on the question of its validity in respect to the defense

¹⁵ Bigelow v. Burnham, 90 Iowa 300, 48 Am. St. 442.

¹⁶ Middle States L. B. & C. Co. v. Miller, 104 Va. 464; Hayes v. Southern Home B. & L. Ass'n, 124 Ala. 663; Ames v. Benjamin, 74 Minn. 335; Long v. Long, 141 Mo. 352; Central Nat. Bank v. Cooper, 85 Mo. App. 383; Bennett v. Eastern B. & L. Ass'n, 177 Pa. 233, 55 Am. St. 723, 34 L.R.A. 595 (compare the last case with Southern B. & L. Ass'n v. Riggle, 4 Pa. Dist. 617); Commission Co. v. Carroll, 104 Tenn. 489, 500; Neal v. New Orleans, etc., Ass'n, 100 Tenn. 607; National Mut. B. & L. Ass'n v. Ashworth, 91 Va. 706; Nickels v. People's B. L. & S. Ass'n, 93 Va. 380;

Ware v. Bankers' L. & I. Co., 95 Va. 680, 64 Am. St. 826; Buchanan v. Drovers' Nat. Bank, 5 C. C. A. 83, 55 Fed. 223; Building & L. Ass'n v. Logan, 14 C. C. A. 133, 66 Fed. 827; Hieronymus v. New York Nat. B. & L. Ass'n, 101 Fed. 12; Coghlan v. South Carolina R. Co., 142 U. S. 101, 35 L. ed. 951; Vermont L. & T. Co. v. Dygert, 89 Fed. 123; Brower v. Life Ins. Co., 86 Fed. 748; Lines v. Mack, 19 Ind. 223; Newman v. Kershaw, 10 Wis. 333; Bolton v. Street, 3 Cold. 31; Butters v. Olds, 11 Iowa 1; Cockle v. Flack, 93 U. S. 344, 23 L. ed. 949.

¹⁷ Arnold v. Potter, 22 Iowa 194.

of usury. Stating the case according to its legal effect, independently of the question of usury, it was briefly this: A loan was obtained in Massachusetts, and a contract was there made for its repayment in New York. Had the notes contained a promise generally to pay interest, without specifying the rate, there can be no doubt that the law of New York would have interpreted that promise and the rate of that state would have been adopted. The courts of any state or country where suit on the note might be brought would have adopted that rate because it would be deemed of the substance of the contract. If the notes, instead of being founded on a loan, had been given for lottery tickets sold and delivered in a state where such sales were unlawful and were written payable in a state where such sales were not unlawful, there can be no doubt that the illegality of the consideration by the law of the state where the sale took place would vitiate and render the note invalid everywhere. The circumstance that the maker of the note was a resident of Iowa would give no recourse to the laws of that state to determine the force and effect of the interest contract and supply the rate, in the one case supposed; nor would his residence in a state permitting traffic in lottery tickets affect the question of illegality in the other. Chancellor Kent says:¹⁸ "According to the case of *Thompson v. Powles*,¹⁹ it is now the received doctrine at Westminster Hall that the rate of interest on loans is to be governed by the law of the place where the money was to be *used* or paid, or to which the loan has reference."²⁰ And since the letter of a contract does not preclude inquiry into the facts and situation of the parties to establish usury it is doubtless equally competent to show where the loaned money was intended to be used and other facts to repel such a charge. In delivering the opinion of the court in the Iowa case just mentioned Wright, J., said: "The plaintiff claims that the parties in good faith contracted with reference to the laws of this state, intending to make this an Iowa contract, and upon this subject the court instructed as follows:

¹⁸ 2 Kent's Com. 461.

344, 23 L. ed. 949; *Cope v. Wheeler*,

¹⁹ 2 Sim. 211.

²⁰ See *Cockle v. Flack*, 93 U. S. 41 N. Y. 303.

'If defendant went to Boston and urged the loan and promised ten per cent under the laws of Iowa and all the arrangements and contracts were made as to the laws of Iowa in good faith, and no more than ten per cent. was contracted for, then the defense fails and the plaintiff can recover.' Our opinion is that if the parties acted in good faith, that is, if there was no intention to evade the law, it was competent for them thus to contract, and that the defense could not avail; . . . the parties may, in good faith, contract with reference to the law of the place where the payer resides, and where the property upon which the security is taken is located."²¹

§ 364. Same subject. As a promissory note or bill of exchange has no validity until it has been delivered such paper may be dated, signed, indorsed and written payable in any place for a greater rate of interest than is there allowed and not be subject to the defense of usury by the law of that place, if it is afterwards delivered and has its inception where the rate of interest therein specified is lawful, if such delivery is upon an actual transaction at the place where it occurs, as by the instrument being there discounted. Such a note or bill will be regarded as though made where it is delivered.²² It is

²¹ *Scott v. Perlee*, 39 Ohio St. 63, 48 Am. Rep. 421; *Jones v. Rider*, 60 N. H. 452. See § 361.

²² *Kuhn v. Morrison*, 75 Fed. 81; *Pratt v. Adams*, 7 Paige 636; *City Sav. Bank v. Bidwell*, 29 Barb. 325; *Bowen v. Bradley*, 9 Abb. Pr. (N. S.) 395; *First Nat. Bank v. Morris*, 1 Hun 680; *Connor v. Donnell*, 55 Tex. 167.

But the delivery of the security for the payment of money and the handing of the latter to the borrower are not conclusive as to the place where the contract was made. *Coad v. Home C. Co.*, 32 Neb. 761, 29 Am. St. 465.

A note secured by mortgage on land in Tennessee was given for a loan negotiated in Connecticut, but was executed in North Carolina and

delivered and made payable in New Jersey. In the absence of any different understanding between the parties the laws of New Jersey controlled on the question of usury. *Hubble v. Morristown L. Co.*, 95 Tenn. 585.

A bond dated in North Carolina and delivered in Virginia specified no place of payment, and was held to be subject to the usury laws of the former; but if it had appeared that it was given pursuant to a contract made in Virginia it is suggested that it would have been otherwise. *Morris v. Hockaday*, 94 N. C. 286.

In *Tilden v. Blair*, 21 Wall. 241, 22 L. ed. 632, a draft dated in one state and drawn by a resident thereof on a resident of another state,

the first delivery of the executed instrument which determines the law by which its validity is to be tried. If the original

and accepted by the latter purely for the accommodation of the drawer, and returned to him for negotiation in the state of his residence, the proceeds to be used there and payment of it to be made by him, was negotiated to an innocent holder for value. Held, that it was to be governed by the law of the state in which it was dated and drawn, though by the terms of its acceptance it was payable at the acceptor's residence; and if by the law thereof the holder is entitled to the sum to be paid for it, though he bought it usuriously, he may recover such sum, notwithstanding the law of the state where the acceptance was made declared the contract void for usury.

In the first edition of this work the author expressed his dissent from the doctrine laid down in *Jewell v. Wright*, 30 N. Y. 259, 86 Am. Dec. 372. Subsequent decisions in New York have more clearly explained the ruling there made and settled the law more nearly in harmony with the text than it was understood to be before they were made. In *Wayne County Sav. Bank v. Low*, 81 N. Y. 566, 570, 37 Am. Rep. 533, *Rapallo, J.*, says; "In *Dickinson v. Edwards*, 77 N. Y. 573, 33 Am. Rep. 671, the decision in *Jewell v. Wright* was adhered to, and it was held that where a promissory note was made in this state by a resident thereof, bearing date and by its terms payable in this state, with no rate of interest specified, and was delivered to the payees without consideration, to be used by them for their accommodation, without restriction, and was first negotiated by them in another state at

a rate lawful there but greater than that allowed by law in this state, it was usurious and void, there being no evidence in the case of any intention on the part of the maker that the note should be discounted or used out of this state. That case, as well as *Jewell v. Wright*, was distinguished from *Tilden v. Blair*, 21 Wall. 241, 22 L. ed. 632, expressly upon the ground that in *Tilden v. Blair*, although the acceptance was made payable in New York by the acceptors who were residents of New York, yet, after having accepted in New York, they returned the acceptance to the drawer in Illinois for the purpose and with the intention that it should be negotiated by him in that state. And this court says in its opinion in *Dickinson v. Edwards* that that was the controlling fact in *Tilden v. Blair*, and that the ruling consideration was the intention of the acceptors that the draft should be used in Illinois, while in *Jewell v. Wright* and in the case then before the court there was nothing to show an intention on the part of the maker of the note to give authority to deal with it otherwise than as the law of this state would allow. The case of *Bank v. Lewin*, 45 Barb. 340, and other cases are distinguished from *Jewell v. Wright* on the same ground, and it may safely be said that the case of *Dickinson v. Edwards* rests upon the ground that there was no evidence of knowledge or intention on the part of the maker of the note that it was to be used out of this state, and that, in the absence of such proof, it must be governed by the law of the place of payment.

"In the present case the fact

delivery is made where the execution took place and where the instrument is payable any subsequent use of it then contemplated by the parties cannot affect its validity.²³ If prelimi-

which was wanting in *Jewell v. Wright and Dickinson v. Edwards* clearly appears, and the case is brought within the principle of *Tilden v. Blair*, and the cases which have followed it. The note now in suit was dated and made payable in New York, but it was made for the express purpose of being used in renewal of another note for the same amount then held by the plaintiffs, a bank in Pennsylvania. The note in suit was actually written in Pennsylvania in the form in use in that state, by the cashier of the plaintiff, at the defendant's request, and forwarded by the cashier to the defendant for signature, and was signed by the defendant in New York, and then mailed by him to the plaintiff in Pennsylvania, together with a check for the discount at the rate of eight per cent. per annum, which was lawful in Pennsylvania. The note and interest were consequently received by the plaintiff in Pennsylvania, and all this was done in performance of a previous agreement which had been entered into in Pennsylvania between the plaintiff and the defendant. All that was done by the plaintiff in New York was simply in execution of that agreement, and as is said in *Dickinson v. Edwards* in citing *Tilden v. Blair*, the designation of the place of payment of the note was an incidental circumstance for the convenience of the maker and not an essential part of the contract or with the intent to affix a legal consequence to the instrument. It cannot be contended that a party who goes into another state and there makes an agreement with a citizen

of that state for a loan or forbearance of money, lawful by the laws of that state, can render his obligation void by making it payable in another state according to whose laws the contract would be usurious. Neither can it be claimed that because the obligation, instead of being signed in the state where the contract was made, is signed in another state and sent by mail to the place of the contract, it must be governed by the usury laws of the place where it was signed." See *Sheldon v. Haxtun*, 91 N. Y. 124; *Western T. & C. Co. v. Kilderhouse*, 87 id. 430; *Merchants' Nat. Bank v. Southwick*, 67 How. Pr. 324; *Bowen v. Bradley*, 9 Abb. Pr. (N. S.) 395; *Simpson v. Hefter*, 42 N. Y. Misc. 482.

In *Hanrick v. Andrews*, 9 Port. 9. a loan was made in New York, and the interest was paid there on it, and the bill there drawn payable in Alabama, without interest—and it was held to be governed by the law of New York, and usurious. The interest contract was made and performed in that state at the time of the loan. The court held that an instrument, as to its form, and the formalities attending its execution, the mode of construing it, the meaning to be attached to the expressions by which the parties have contracted and the nature and validity of the contract is subject to the law of the place where it is made, and that the law of the place where it is to be executed must regulate its performance.

²³ *Merchants' Nat. Bank v. Southwick*, 67 How. Pr. 324.

nary negotiations for a loan are made in one state, and it is agreed that the security shall be executed and recorded in the state of the borrower's residence, the contract is complete and the papers are delivered to the lender when they are put in possession of the proper officer to be recorded though they are subsequently mailed to the creditor.²⁴

How is a contract to be considered which is usurious where it was made and also by the law of the place where, by its terms, it is to be performed by payment? If the interest allowed by the law of the place of performance is higher than that permitted by law where the contract was made the parties may, as has been stated, stipulate for the higher interest without incurring the penalties of usury. But if the contract is made payable in another state for the mere purpose of evading the usury law of the place where it was made the form of the transaction will not sustain it. The contract will be disposed of by the law of the state in which it is made. The court will decide according to the real object of the parties.²⁵ An action was brought on a bill of exchange drawn in New York, payable in Alabama, for an antecedent debt, which included a sum, in addition, greater than the interest in either state for the time of forbearance. The court say: "The defendants allege that the contract was not made with reference to the law of either state and was not intended to conform to either; that a rate of interest forbidden by the law of New York, where the contract was made, was reserved on a debt actually due and that it was concealed under the name of exchange in order to evade the law." If this defense be true, and shall be so found by the jury, the question is not which law shall govern in executing the contract, but which is to decide the fate of a security taken upon a usurious contract which neither will execute. Unquestionably it must be the law of the place where the agreement was made and the instrument taken to secure its performance. It was remarked that a contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last men-

²⁴ Kellogg v. Miller, 2 McCrary 395.

Suth. Dam. Vol. I.—74.

²⁵ Story's Conf. L., § 293a; Davis v. Tandy, 107 Mo. App. 437.

tioned case the agreement was permitted by the *lex loci contractus*, and will even be enforced there if the parties be found within that jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made.²⁶ What would be the fate of a contract made with express reference to the law of the place of payment, though stipulating interest above the rate allowed there, as well as where it was made, is not decided by that case. The contract, if intended to evade the usury law of New York, and usurious, if governed by that law, is void. But if made with reference to the law of Alabama, and usurious by it, it is not wholly void. A contract of the latter kind is in part enforced by that law. May parties in New York, where the limit of interest is seven per cent make a contract in a transaction which legitimately extends into Alabama for the payment of money there at a rate exceeding both the rate of New York and that of Alabama, and have the benefit of the law of the latter state to determine their rights if the defense of usury be made?

In an Indiana case a resident of that state borrowed money there of a domestic corporation upon a draft drawn there on New York, specifying six per cent interest for the time it had to run; it was discounted at the rate of twelve per cent, and the question was by what law the fate of the contract was to be determined. It was held to be an Indiana contract because the transaction was a loan made there and because the bill specified the Indiana rate of interest.²⁷

A resident of Massachusetts applied to a citizen of New York for a loan, and the latter agreed to lend him a sum at eight per cent on security of real estate situate in Massachusetts; the lender wrote the borrower to send him the note and mortgage which were accordingly sent, and the lender caused the loan to be paid over to the borrower in Massachusetts. Hence, the contract had its legal inception in New York; and the consideration therefor, the loan, passed to the maker of the

²⁶ *Andrews v. Pond*, 13 Pet. 65,
10 L. ed. 61.

²⁷ *Mix v. Madison Ins. Co.*, 11 Ind.
117; *Davis v. Tandy*, *supra*.

note in Massachusetts; the contract was held to be governed by the law of that state though the agreed rate of interest was usurious by the law of both states. It was deemed a Massachusetts contract because the important facts of the transaction took place in that state.²⁸ An important case in New York seems to answer the question just stated.²⁹ A New York corporation negotiated a loan of two bank corporations of Philadelphia; the bargain was made in New York, and the contract for repayment, in the form of certificates of deposit, was made there, stating the deposit of the money loaned with the borrowing corporation in New York; these certificates were payable on time at Philadelphia with interest at six per cent, the legal rate in Pennsylvania. The loan was to be in depreciated paper, but was paid in an equivalent of cash funds; and the difference between the amount received and that stated in the certificates of deposit, it was claimed, rendered it usurious by the laws of both states. Without deciding absolutely whether the contract was usurious, a majority of the court concurred in the conclusion that if it was usurious by the laws of both states it should be governed by the law of Pennsylvania where the loan was to be repaid.

In an Illinois case³⁰ a suit in chancery was commenced for the purpose of settling the rights of different creditors in the proceeds of a mortgage given for their common benefit. The demand of one creditor, a bank, was upon acceptances of bills of exchange drawn and accepted in Indiana and payable in New York. These bills were based upon actual transactions, namely, the shipment of hogs and cattle. Where the transactions took place does not very distinctly appear, but from some indications in the report it is inferred that they occurred in Indiana. Two of the bills were purchased by the bank with a reservation of seven and a half per cent interest, which was greater than the amount allowed by law in either Indiana or New York; and the question discussed was by the law of which state the fate of the security should be determined. It was

²⁸ *Pine v. Smith*, 11 Gray 38.

³⁰ *Adams v. Robertson*, 37 Ill. 45.

²⁹ *Curtis v. Leavitt*, 15 N. Y. 9.

held that the law of Indiana was to govern because the contract was made there.³¹

³¹ On a rehearing of this case the court adopted an opinion prepared by one of the judges who sat at the first hearing but not at the second. In this the writer said: "Great conflict of opinion has prevailed in respect to the laws affecting the validity of contracts made in one country but to be performed in another. The laws of the country where a contract is made are obligatory upon the parties, and, upon principle, no contract declared void by these laws ought to be enforced in any other country. As an exception to the rule, it has been held that no nation is bound to take notice of or to protect the revenue laws of another country; but this exception has no foundation in principle, although it is so firmly established that courts cannot now overturn it. No man ought to be heard in a court of justice to enforce a contract founded in or arising out of moral or political turpitude, or in fraud of the just rights of the country in which the contract was made. Story's Conf. L., p. 435. The laws of every country allow parties to enter into obligations with reference to the laws of the country where such obligations are to be performed; and although such obligations may not be in accordance with the laws of the country where they are made, as regards obligations to be performed in that country, they may be strictly in accordance with such laws as to obligations to be performed in other countries. The right to enter into contracts with reference to the laws of another country is one allowed by nations for the convenience of those transacting business within

their respective territorial limits, to enable them to obtain such rights as they could have secured in the country where the contract is to be performed, by a just observance of its laws. No nation can justly be required to allow persons subject to its laws to enter into contracts without reference to and not in accordance either with its own laws or with the laws of the country where the contract is to be performed. A limitation in the laws of all nations of the right to enter into contracts to be performed in other countries requires that they shall be in accordance with the laws of the country where they are made, or else in accordance with the laws of the country where they are to be performed. The laws of a country have no extraterritorial force, and do not prohibit persons from doing any act or making any contract in another country. The courts of any country may refuse to enforce contracts made in another country where they are immoral or unjust, or where the enforcing of them would injure the rights, interests or convenience of that country or its citizens; but the laws of a country, as such, have no operation or effect upon acts done or contracts made beyond its territorial limits. The rights enforced by courts, where contracts are made in one country to be performed in another, are those given by the law of the country where the contract was made, and such rights are to be enforced in the country where the contract is to be performed, not as a matter of right, but as a matter of comity extended towards the country where the contract was made. Persons making contracts with ref-

§ 365. **Same subject.** By the interest laws of many states usurious contracts are not wholly void. In states where there is any interest limit there are various provisions under which the debtor may defend on the ground of usury, either against the excess of interest above the legal rate, against the entire interest, or against the whole interest and some portion of the principal. Some question has arisen how far the courts of one state, in which the remedy is sought on such contracts made in

reference to the laws of the country where such contracts are to be performed may expressly or impliedly stipulate for the rights and benefits given by the laws of that country as part of the contract; and the laws of the country where the contract is made secure to the parties the rights and benefits thus agreed upon, in the same manner as if the laws in reference to which they contracted were incorporated into the contract.

"In determining the consequences attendant upon making a contract in one country, to be performed in another, which is not in accordance with the laws of either country, we should inquire which country's laws have been violated. As, for example, the laws of Illinois allow parties to contract for interest at the rate of ten per cent., while the laws of New York allow only seven per cent. Persons who make contracts in Illinois for interest at the rate allowed by its laws violate no law of the state of New York, and are not subject to the penalties imposed by the laws of that state upon persons who enter into contracts within its territorial limits in violation of such laws. A creditor who has made no contract in New York does not violate its laws by receiving money from his debtor in that state, or undertaking in another state to receive it there. The laws of Indiana allow persons to contract for inter-

est at the rate of six per cent. in case the contract is to be performed in that state, and at the rate of seven per cent. if the contract is to be performed in New York, but prohibit contracting for a greater rate in either case. Persons entering into contracts in Indiana, reserving a greater rate of interest than is allowed by its laws in such cases, thereby violate the laws of that state and incur the penalties imposed for such violation. The courts of neither state will enforce the contract, because the rights asserted under it are in violation of the laws of the state where it was made. The fate of such a contract depends upon the laws of the place where it was made, being subject to the legal consequences attendant upon the violation of those laws. *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61. In *McAlister v. Smith*, 17 Ill. 328, 65 Am. Dec. 651, this court held that pleas setting forth that bills of exchange upon which the suit was brought were made in Illinois and payable in the state of New York, under a contract not in accordance with the laws of either state, ought not to have been stricken from the files for immateriality. While the reversal of the judgment in the court below upon that ground was undoubtedly correct, upon a careful review of the subject we are not satisfied with all the reasons given on that occasion."

another state, will enforce such statutes as laws governing the contract. It is a general rule that penal laws are strictly local; confined in their operation to the territory of the power enacting them, and affect nothing more than they can reach.³² The statute of New York limits the rate of interest to seven per per cent, and declares void all usurious contracts and securities. Any contract governed by this law and which would be held void there would be held void everywhere.³³ The effect of this statute is penal, and for this reason the courts hold that statutes taking away the forfeiture or diminishing it may be made to apply to existing contracts.³⁴ The contract in such cases has no legal inception; the illegality in its origin prevents its coming into being, the law being more potent than the will of the parties. When money is parted with on the face of such an agreement it is irrecoverable, forfeited; not by judicial sentence, not because the law prescribes a fine graduated to the sum lent at usury, but because the law is passive and will not aid a party who has voluntarily risked his money in an unlawful venture. The recognition by the courts of other states of this innate infirmity of the contract, involving a forfeiture of everything of value invested in it, though that be a penalty for making a forbidden contract, is not deemed the enforcement of the penal laws by the effect of which such contracts are void *ab initio*. The same principle applied to a contract which by the *lex loci* is avoided in part would require the same abatement of the debt when sued for in another state.

By the statute of Iowa the creditor is entitled, in an action for a usurious debt, to recover only the principal, without interest or costs; but the courts of that state are directed in such action to give judgment for ten per cent interest to the school fund of the county. The creditor loses the interest, but

³²Folliott v. Ogden, 1 H. Bl. 135; Ogden v. Folliott, 3 T. R. 733; Wolff v. Oxholm, 6 M. & S. 99; The Antelope, 10 Wheat. 123, 6 L. ed. 282; Scoville v. Canfield, 14 Johns. 338, 7 Am. Dec. 467; Commonwealth v. Green, 17 Mass. 515; Sutherland on Stat. Const., §§ 12-14; Exchange

Bank v. McMillan, 76 S. C. 561.

³³See § 357.

³⁴Curtis v. Leavitt, 15 N. Y. 9, 229; Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 236; Parmelee v. Lawrence, 44 Ill. 405; Wood v. Kennedy, 19 Ind. 68; Pollock v. Glazier, 20 id. 262.

the debtor is relieved only from paying the excess over ten per cent. In an action in Illinois upon a contract made in the former state the plaintiff was permitted to recover only according to the same rule; that is, the principal without interest.³⁵ There, of course, the penalty to the school fund was not adjudged; nor could the provision in regard to costs be executed. The court say: "Here unlawful interest was contracted for and the interest was incorporated with the principal, and the law in effect says that the interest shall be expunged from the note and it shall be read and adjudged the same as if the principal sum alone had been expressed in dollars and cents. And this law, entering into and forming part of the contract, goes with it wherever it goes. It is admitted that such would be the effect of this law if it had declared that the plaintiff should have judgment for nothing. How much more so in common sense when it allowed him to take judgment for the principal sum borrowed. The distinction in the two cases is not only without reason, but is against all reason and all sound law and the philosophy of the law."

The statute of Massachusetts fixes the rate of interest at six per cent. If more is reserved the contract is not void, but the defendant recovers full costs and the plaintiff forfeits threefold the amount of the whole interest reserved, and is entitled to judgment for the balance only which shall remain due after deducting the threefold amount. In an action in Iowa upon a contract claimed to be usurious under the laws of Massachusetts the trial court instructed the jury that "this court will not enforce the penal statute of another state relating to usury when that statute does not make the contract wholly void, and, therefore, the statute of Massachusetts is not to be considered by the jury." This was held, on appeal, to be erroneous, and that the legal effect of the contract could not vary in different states, and it is according to such effect that all courts are bound to enforce contracts.³⁶

³⁵ Barnes v. Whitaker, 22 Ill. 606.

³⁶ Arnold v. Potter, 22 Iowa 191. In this case Wright, J., said: "If

the law affixed a penalty, and the defendant was in this case seeking to collect it; or if, as under our statute, the defendant forfeited a

certain amount to the school or other fund, and we were asked to declare the same, we would have cases to which the instruction in question would apply. Is forfeiture the same as penalty in this connection? This is easily answered. If the law attaches a penalty as the consequence of an act, it may be sued for and recovered; but it will be enforced alone in the state declaring the same. If, on the other hand, a person's property may be forfeited or lost by some fault or offense, the forfeiture is not enforced, except in the prosecution of the fault or offense; and if the party guilty of the fault seeks to enforce the contract which he has obtained as the fruit of such offense, he can take no part of the forfeiture. And when he declares and seeks to recover upon such a contract in another state, if the courts of that state hold that his contract shall be carried out as interpreted by the laws of the state where made, they inflict upon him no penalty; they are not enforcing the penal laws of another state, but enforcing the statute of a sister state so far as it effects a discharge of the claim. Gambling is punished by our statute, and a gambling contract is void. Suppose our laws declared that a party holding such a contract might recover one-half and no more. Now, the penalty, the penal statute, would not be enforced in another state, but, in an action upon the contract there, the holder would be limited in his recovery to the one-half. The Massachusetts statute not only uses the word 'forfeit,' but says the plaintiff shall only have judgment for

so much; thus unmistakably keeping up the distinction between a law of this kind and one penal in its nature. But take other illustrations. A stockholder fails to comply with the terms of the articles in the payment of his stock, and these articles declare that for such noncompliance his share shall become forfeited. Will any one pretend that this is a penalty within the meaning of the law? Then, again, equity recognizes the distinction when it is said that a party will *always* be relieved from a penalty, if compensation can be made, because it is deemed as a mere security; and yet, though compensation can be made, relief will not always be given against a *forfeiture*. So, again, we speak of a forfeiture in case of a breach of a covenant, but never of it as a *penalty*. So of a penalty as contradistinguished from liquidated damages, but never of *forfeiture* in the same connection. Then, again, of *forfeiture* as a recompense to an injured party for the wrongful or illegal act of another, by which the latter loses his interest in the thing. But penalty carries a very different idea. It is the punishment inflicted for not executing a prior obligation, the object being to insure the primary engagement of covenant. Bouvier's Inst., vol. 1, 292; 2, 146; 4, 217." The learned judge, referring to *Sherman v. Gasset* 9 Ill. 521, maintaining a different doctrine, said: "It was decided by a divided court, Lockwood, J., delivering the opinion of six of the judges, and Koerner, J., the dissenting opinion of the other three. We do not propose to examine it at length.

In a recent case³⁷ the loan was negotiated in Connecticut, the note and mortgage securing its payment were executed in North Carolina, the land mortgaged was situated in Tennessee and the note and mortgage were delivered and made payable in New Jersey. The rate of interest stipulated for was usurious under the laws of New Jersey and under those of Tennessee. In a suit to foreclose the mortgage it was ruled that the contract was governed by the laws of New Jersey, and that it might be enforced in Tennessee, less the excessive interest. It was said: We cannot presume that this contract is usurious and void by the laws of New Jersey. That fact must be made to appear by proof, and has been established. But, it requiring proof to establish the usurious contract under those laws, it follows, under our own decisions in such cases, that the note is not avoided, but only the usury. If this were a Tennessee contract the usury appearing on the face of the note would avoid the whole contract; but, it being a New Jersey contract, and thereby necessitating proof *aliunde* the contract to show the usury, the contract is only avoided to the extent of the usury.

It is obvious that where the *lex loci* provides that the interest contract shall not be void, but declares certain consequences of the usury and, among them, that a deduction shall be made in any action brought upon the contract from the amount to which it purports to entitle the creditor, such consequences are penal in their nature in the same sense, and no other, as the

The argument of the majority of the court strikes us as being based upon improper assumptions, and as equally inconclusive in its reasoning; and most pertinently does the dissenting opinion dispose of the whole argument by saying: "To maintain that we are bound to declare a usurious contract wholly void, when the laws of the place of contract make it so, whereby the creditor is deprived of the whole of his claim, but that we are not bound to regard the law where it

provides for a forfeiture only, by which the creditor loses but a part of his claim, seems to involve a singular inconsistency. It, in other words, involves the following remarkable syllogism: The law everywhere avoids usurious contracts when they are declared wholly void by the law of the place. This contract was void in part, and consequently it is good in whole."

³⁷ *Hubble v. Morristown L. Co.*, 95 Tenn. 585. See *Kuhn v. Morrison*, 75 Fed. 81.

law which declares the whole contract void. Neither law means, in an absolute sense, what it says by "void," and "not void." If a usurious contract were absolutely *void* anybody could allege its invalidity. But the law confines the privilege of making that objection to the debtor party to the contract and those standing in certain relations of privity to him. The law which declares the contract void itself qualifies the declaration by specifying certain effects of the usury which substantially obliterate a part of the contract from its inception.³⁸

The statute which makes usury a total or partial defense may hamper it by making it depend on some special method of local practice, and thereby confine its allowance to the courts of the state by whose law the contract and the remedy are governed.

³⁸ *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682.

If a usurious contract is wholly abandoned and the securities given to insure its performance are canceled a subsequent promise by the borrower to pay the money he borrowed is binding. *Sheldon v. Haxtun*, 91 N. Y. 124; *Hammond v. Hopping*, 13 Wend. 505; *Kilbourn v. Bradley*, 3 Day, 356, 3 Am. Dec. 273; *House v. Planters' Bank*, 57 Ga. 95.

Willis v. Cameron, 11 Abb. Pr. 245, proceeds wholly upon the ground that the statute of usury of Massachusetts, which applied to the contract in question, is penal, and therefore that the deduction of threefold the amount of the whole interest reserved can only be allowed in the courts of that state. *Hilton, J.*: "The second defense, though very ingeniously pleaded, must, I think, be regarded as sham. It assumes to be a defense in bar of the plaintiff's right to recover anything upon the note in suit; whereas, by the statutes of Massachusetts, as interpreted by the courts of that state (*Kendall v. Robertson*, 12 Cush. 156), although

the rate of interest there is declared to be six per cent. per annum on all contracts for the payment of money, yet the taking of a greater sum does not avoid the entire contract, but merely imposes upon the person taking it, by way of penalty, a forfeiture of threefold the amount of interest unlawfully reserved, *and no more*; and which is to be allowed to the defendant in the action upon the contract when he establishes the fact of taking such unlawful rate, together with his full costs in the suit; or when the illegal interest has been paid, the party paying it may recover it back threefold. (See *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. ed. 343 as to the effect of such a statute.) It will not, I suppose, be contended that the defendant, if he had paid the illegal interest, could maintain an action in this state to recover the penalty thus imposed by the statute of Massachusetts upon the party receiving it; and this being the case I think it must follow, as a necessary consequence, that he cannot in this state avail himself of the statute by way of defense." See *Sherman v. Gassett*, 9 Ill. 521.

This is illustrated by a case in Massachusetts, upon a note usurious by the law of New Hampshire, by which law the benefit of the defense depended on the defendant offering a particular mode of trial; that is, by the oath of the parties. If the usury was thus proved a certain amount was required to be deducted from the principal and interest due on the contract in assessing damages. These provisions were held to apply to the remedy, and, of course, to extend only to suits brought in New Hampshire; they could have no effect when a remedy was sought in the courts of another state.³⁹

§ 366. The law of what place governs the rate as damages. Interest before a debt is due is the creature of agreement; afterwards it is given by law as damages for detention of the money; but it may be governed as to rate by contract. In the absence of contract the amount is regulated by law. And there is much authority for saying that the law which governs the rate is that of the place where the debt is payable.⁴⁰ That law is supposed

³⁹ *Gale v. Eastman*, 7 Mete. (Mass.) 14. The distinction between the law of the contract and the remedy is very distinctly stated by Shaw, C. J., who delivered the opinion: "The general rule is that those provisions of law which determine the construction, operation and effect of a contract are part of the contract and follow it, and give effect to it wherever it goes; but that in regard to remedies, the *lex fori*, the law of the place where the remedy is sought, must govern. We therefore cannot be governed by the law of New Hampshire, which professes only to regulate the remedy on a usurious contract. The law of Massachusetts, though somewhat analogous, cannot apply because, although the *mode* of enforcing the law against usury is by applying it to the remedy, yet the law to be enforced is the law of Massachusetts. The law of this common-

wealth, declaring what shall be the rate of interest and what contracts shall be deemed usurious, also directs, when suits are brought, what deductions shall be made; but it is suits brought on *such* contracts, that is, contracts made in violation of its own provisions."

⁴⁰ *Healy v. Gorman*, 15 N. J. L. 328; *Evans v. Clark*, 1 Port. 388; *Evans v. Irvin*, id. 390; *Hall v. Kimball*, 58 Ill. 58; *Hoppins v. Miller*, 17 N. J. L. 185; *Burton v. Anderson*, 1 Tex. 93; *Gibbs v. Fremont*, 9 Ex. 25; *Bushby v. Camac*, 4 Wash. C. C. 296; *Winthrop v. Carleton*, 12 Mass. 4; *Jaffray v. Dennis*, 2 Wash. C. C. 253; *Lanuse v. Barker*, 3 Wheat. 101, 4 L. ed. 343; *Winthrop v. Pepon*, 1 Bay 468; *Gaillard v. Ball*, 1 Nott & McC. 67; *Robinson v. Bland*, 2 Barr. 1077; *Thompson v. Ketcham*, 4 Johns. 285; *Coeke v. Conigmaker*, 1 A. K. Marsh. 254; *Porter v. Munger*, 22 Vt. 191; *Crawford v. Simon-*

to have been in the minds of the parties when the debt was contracted; at all events, the money is deemed to be worth the legal rate of interest at the place where it was the debtor's duty to pay it. The creditor may bring suit wherever a court can obtain jurisdiction, but the damages for detention of the debt have generally been assessed according to the law of the place where payment was due, if that law is shown.⁴¹ This rule does not appear to be recognized in Massachusetts except in respect to contracts containing an express or implied agreement to pay interest. It is now declared settled that in an action there upon a note made payable on a day certain in another state, without any agreement express or implied to pay interest, the plaintiff can only recover at the legal rate in Massachusetts although less than such rate in the state where the note was made and payable.⁴² In Indiana if a note sued upon was made in another state and does not provide for interest nor specify the place of

ton, 7 Port. 110; *Evans v. White*, Hemp. 296; *Peck v. Mayo*, 14 Vt. 33, 39 Am. Dec. 205.

⁴¹ 2 Par. on Con. 585; 2 Par. on Notes and Bills 370; *Fanning v. Consequa*, 17 Johns. 511, 8 Am. Dec. 442; *Chambliss v. Robertson*, 23 Miss. 302; *Gage v. McSweeney*, 74 Vt. 370.

⁴² *Ayer v. Tilden*, 15 Gray 178 77 Am. Dec. 355; *Ives v. Farmers' Bank*, 2 Allen 236.

In *Ayer v. Tilden* the action was upon a New York note in which there was no agreement for the payment of interest. Hoar, J.: "That rate is six per cent. from the maturity of the note. The interest is not a sum due by the contract, for by the contract no interest was payable, and is not, therefore, affected by the law of the place of the contract; it is given as damages for the breach of the contract, and must follow the rule in force within the jurisdiction where the judgment is recovered. *Grimshaw v. Bender*, 6 Mass. 157; *Eaton v. Mellus*, 7 Gray

566; *Barringer v. King*, 5 Gray 9. The contrary rule has been held to be applicable when there was an express or implied agreement to pay interest. *Winthrop v. Carleton*, 12 Mass. 4; *Von Hemert v. Porter*, 11 Mete. (Mass.) 210; *Lanusse v. Barker*, 3 Wheat. 101, 4 L. ed. 343. Perhaps it would be difficult to support the decision in *Winthrop v. Carleton* upon any sound principle; because the court in that case held that interest could only be computed from the date of the writ; thus clearly showing that it was not considered as due by the contract, and yet adopted the rate of interest allowed at the place of the contract. But the error would seem to be in not treating money paid at the implied request of another as entitled to draw interest from the time of payment. An objection to adopting the rule of the rate of interest in the jurisdiction where the action is brought as the measure of damages may be worthy of notice; that this rule would allow the creditor

payment the court will award interest according to the local law.⁴³ In Illinois the rule is that if a foreign contract is silent as to the rate of interest the *lex fori* will determine the rate to be allowed, if any, in absence of proof of the law of the place of the contract. Where the rate of interest sought to be recovered is greater than that allowed by the *lex fori* and the law of the place of payment is pleaded and proved, and it allows a greater rate of interest than is recoverable where the remedy is sought, the *lex loci* may be invoked to show the legality of the contract and the intention of the parties to it.⁴⁴ In Kentucky interest may be recovered on a note executed in another state at the stipulated rate until its maturity, but thereafter interest will be computed at the rate prescribed by the law of Kentucky.⁴⁵ Interest as damages, in the absence of a contract, is governed by the law of the forum.⁴⁶

A cause of action arising under a foreign statute is vindicated in the tribunal of another country upon principles of comity. The *lex fori* is referred to and compared with and measured by the *lex loci* for two reasons: one that the party defendant may not be subjected to different and varying responsibilities, and the other that the tribunal trying the action may know that it is not lending itself to enforce a right which it does not recognize and which is against the public policy of the forum; reference is not made to the law thereof as creating the cause of action enforced.⁴⁷ Hence, where a foreign statute restricts the right to recover to a sum named in it interest will

to wait until he could find his debtor or his property within a jurisdiction where a much higher rate of interest was allowed than at the place of contract. But the debtor could always avoid this danger by performing his contract; and the same difficulty exists in relation to the action of trover and replevin. If such a case should arise it might with more reason be argued that the damages should not be allowed to exceed those which would have been recovered in the state where the contract was made and to

be performed." See *Chase v. Dow*, 47 N. H. 405.

⁴³ *Kopelke v. Kopelke*, 112 Ind. 435; *Shaw v. Rigby*, 84 Ind. 375, 43 Am. Rep. 96.

⁴⁴ *Morris v. Wibaux*, 159 Ill. 627, 651; *Robinson v. Holmes*, 75 Ill. App. 203.

⁴⁵ *Joseph v. Lyon*, 9 Ky. L. Rep. 324 (Ky. Super. Ct.).

⁴⁶ *Carson v. Smith*, 133 Mo. 606; *Goddard v. Foster*, 17 Wall. 123, 21 L. ed. 589; *Bischoffsheim v. Baltzer*, 21 Fed. 531.

⁴⁷ Per *Finch, J.*, in *Wooden v.*

not be added though it is provided for in a statute of the forum. The right to interest is inseparable from the right to damages and as truly and of the essence of the defendant's liability as is the sum named in the statute.⁴⁸

§ 367. **Pleading and proof of foreign law.** Courts of one state do not take judicial notice of the laws of other states or countries. Hence, where a contract is sued out of the jurisdiction within which it is to be performed and the plaintiff seeks to recover interest according to the law of the place of contract he must set forth that law in his pleading and prove it on the trial.⁴⁹ Interest, though generally regulated by statute, is not

Western New York & P. R. Co., 126 N. Y. 10, 16 Am. Neg. Cas. 806, 22 Am. St. 803, 13 L.R.A. 458.

⁴⁸ *Kiefer v. Grand Trunk R. Co.*, 12 App. Div. (N. Y.) 28, affirmed without opinion, 153 N. Y. 688.

⁴⁹ *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. ed. 788; *Eastfield S. S. Co. v. McKeon*, 208 Fed. 580; *Kraus v. Torry*, 146 Ala. 548; *Hubble v. Morristown L. Co.*, 95 Tenn. 585; *Commission Co. v. Carroll*, 104 Tenn. 489; *Robinson v. Holmes*, 75 Ill. App. 203; *Morris v. Wibaux*, 159 Ill. 651; *Balfour v. Davis*, 14 Ore. 47; *Ramsey v. McCauley*, 2 Tex. 189; *Swett v. Dodge*, 4 Sm. & M. 667; *Davidson v. Gohagin*, 2 Bibb 634; *Richardson v. Williams*, 2 Port. 239; *Jaffray v. Dennis*, 2 Wash. C. C. 253; *Peacock v. Banks*, Minor 387; *Hunt v. Mayfield*, 2 Stew. 124; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Nalle v. Ventress*, 19 La. Ann. 373; *Ingraham v. Arnold*, 1 J. J. Marsh. 406; *Johnson v. Williams*, id. 489; *Russell v. Shepherd*, Hardin 44; *Pawling v. Sartain*, 4 J. J. Marsh. 238; *Cavender v. Guild*, 4 Cal. 250; *Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318.

In *Foden v. Sharp*, 4 Johns. 183,

action was brought against the acceptors of a bill of exchange drawn and payable in England. On the inquest of damages the only evidence was the bill and a protest for non-payment. The jury allowed seven per cent. interest, the rate where the action was brought. The court ordered a reduction of the interest to five per cent., the rate in England, of which it seemed to take judicial notice.

In *Schell v. Stetson*, 12 Phila. 187, a suit upon a New York judgment rendered for costs, the court took judicial notice of the fact that the laws of that state allowed interest on such judgments and assumed that it was bound to do so by virtue of the federal constitution. But this is not a tenable position. *Clark v. Child*, 136 Mass. 344.

In an action on a note payable in New York a plea of usury setting forth the statute of that state, the plea not being demurred to, but allowed to stand for trial, is sufficient to admit the statute in evidence whether the sum on which usury was to be paid, the time when the contract was made, when payable, and the amount of usury agreed upon be pleaded or not.

necessarily so; it may, in the absence of statute, be payable, and its rate governed by custom.⁵⁰ Where the rate of another state is alleged to be established by statute the party so alleging it should prove the statute, as foreign statutes are required by the law of the forum to be proved. But if the allegation does not specify that the foreign rate is so established the court would not assume that the foreign rate was governed by a written law. It would seem to be as competent to take judicial notice of the statutory rate of another state as that the rate of another state is fixed by statute. The rate of another state and the law, written or unwritten, which is the foundation of it, is matter of fact to be alleged, proved, and found by the jury.⁵¹

Odom v. New England M. S. Co., 91 Ga. 505.

⁵⁰ *Young v. Godbe*, 15 Wall. 562, 21 L. ed. 250.

⁵¹ See cases cited in n. 40, § 366. In *Kermott v. Ayer*, 11 Mich. 181, suit was brought on a Canada note. The court held that it could not take judicial notice of the rate of Canadian interest, and that it was not a presumption of law that the rate of interest in a foreign country is the same as that established in Michigan by statute. *Campbell, J.*, said: "The evidence of the attorney from Canada concerning the Canadian law of interest could not properly be received to show the terms of a Canadian statute. Foreign statutes cannot be proved by parol, without some showing why secondary evidence becomes necessary. This doctrine has been recognized in this court in *People v. Lambert*, 5 Mich. 349, 75 Am. Dec. 49, and is the settled American doctrine. 1 Greenlf., §§ 587-8.

"The rate of interest is a matter of such common notoriety that there might be reason for excepting it from this general rule, and there is no doubt that, in many cases, it has been proved by parol, without ob-

jection. But there would be danger in allowing such an exception as an arbitrary one; and the mistakes made in works current among business men on the rates of interest in different states show that business knowledge of statutory provisions is not always reliable. We have been in some doubt whether, for this reason, there was not error in admitting the evidence objected to. But it does not appear that Canadian interest is regulated by statute; and we are not justified in making any inference not required by facts set out, in order to establish error; the presumption must always be in favor of the judgment. It is, therefore, affirmed." But, in *Talbot v. Peebles*, 6 J. J. Marsh. 200, on a similar record, the court thus treated the subject. The only witness who was sworn to prove the rate of interest in Illinois stated that the legal rate was six per cent. Consequently, if he proved anything, he proved that the rate of interest in Illinois was fixed by law. The law must necessarily be a public and written law; for if it be not a positive statute, enacted by the legislature of Illinois, it must be some pre-existing statute of Eng-

Where there is an allegation of a foreign rate of interest of the place of contract differing from the rate at the place where the action is brought unsupported by proof, or, in the absence of any allegation of the rate where the contract is payable, whether interest should be denied altogether or should be allowed according to the rate fixed or permitted by the law of the forum does not appear to be entirely settled. In Texas it is held that no interest at all can be recovered upon a contract payable in another jurisdiction, unless the rate there prevailing is alleged and proved.⁵² So in Alabama.⁵³ The more general rule, and, as we think, the more reasonable one, is to allow interest according to the *lex fori*.⁵⁴ The law of the forum is adopted in some states, in the absence of proof of the rate at the place of contract, on the principle that it should be presumed, until the contrary is shown, that the law of the state where the contract was to be performed is the same as of that where the action is brought.⁵⁵

land or Virginia, recognized by the constitution of Illinois, or must be an express provision of her constitution.

Where the plaintiff seeks to recover interest by virtue of a contract made in a foreign state the defendant is bound to show any infirmity in the contract under the laws thereof. If he admits the validity of the contract such proof need not be made. *Dearlove v. Edwards*, 166 Ill. 619.

⁵² *Wheeler v. Pope*, 5 Tex. 262; *Able v. McMurray*, 10 id. 350; *Prigdon v. McLean*, 12 id. 420; *Ingram v. Drinkard*, 14 id. 351. See *Cooke v. Crawford*, 1 id. 9, 46 Am. Dec. 93; *Burton v. Anderson*, 1 Tex. 93.

⁵³ *Evans v. Clark*, 1 Port. 388; *Peacock v. Banks*, Minor 387; *Spain v. Grove*, id. 177.

⁵⁴ *Surloft v. Pratt*, 3 A. K. Marsh. 174; *Chumasero v. Gilbert*,

26 Ill. 39, 24 id. 651; *Deem v. Crume*, 46 Ill. 69; *Goddard v. Foster*, 17 Wall. 123, 21 L. ed. 589; *Prince v. Lamb*, 1 Ill. 378; *Lougee v. Washburn*, 16 N. H. 134; *Hall v. Woodson*, 13 Mo. 462; *Hall v. Kimball*, 58 Ill. 58; *Booty v. Cooper*, 18 La. Ann. 565; *Leavenworth v. Brockway*, 2 Hill 201; *Kopelke v. Kopelke*, 112 Ind. 435; *Shaw v. Rigby*, 84 Ind. 375, 43 Am. Rep. 96; *Thomas v. Beckman*, 1 B. Mon. 34. See *Gordon v. Phelps*, 7 J. J. Marsh. 619; *Whidden v. Seelye*, 40 Me. 247, 63 Am. Dec. 661.

⁵⁵ *Hallam v. Telleren*, 55 Neb. 255; *Fitzgerald v. Fitzgerald & M. C. Co.*, 41 Neb. 374, 472; *Law v. Crawford*, 67 Mo. App. 150; *Desnoyer v. McDonald*, 4 Minn. 515; *Fouke v. Fleming*, 13 Md. 393; *Martin v. Martin*, 1 Sm. & M. 176. See *De La Chaunette v. Bank of England*, 9 B. & C. 208; *Kermott v. Ayer*, 11 Mich. 181.

§ 368. **Effect of change in law of place of contract.** One branch of the present inquiry remains to be considered; that is, what is the effect of changes in the law in regard to the rate of interest while the contract on which the question of interest arises is pending or after the principal becomes due. At first blush the principle which fixes the rate by the law of the place of contract might seem to require the rate to be the same throughout the period of forbearance or default as at the making of the contract, or when the contract duty or liability to pay interest attaches. It is so when interest is expressly or tacitly agreed to be paid. But where it is recoverable for mere default in not paying money due either *ex contractu* or *ex delicto* it is governed by the law in force when the interest accrues; the rate will change to conform to the law if any change takes place.⁵⁶

⁵⁶ *Saling v. Bolander*, 125 Fed. 701, 60 C. C. A. 469; *Watkins v. Junker*, 90 Tex. 584; *Gulf, etc. R. Co. v. Humphries*, 4 Tex. Civ. App. 333; *State v. Guenther*, 87 Wis. 673; *Wilson v. Cobb*, 31 N. J. Eq. 91; *Jersey City v. O'Callaghan*, 41 N. J. L. 349; *White v. Lyons*, 42 Cal. 279; *Stark v. Olney*, 3 Ore. 88; *Firemen's Fund Ins. Co. v. Western Ref. Co.*, 162 Ill. 322; *Stickler v. Giles*, 9 Wash. 147; *Sanders v. Lake Shore, etc. R. Co.*, 94 N. Y. 641; *First Nat. Bank v. Fourth Nat. Bank*, 84 id. 412; *O'Brien v. Young*, 95 id. 428.

A statute changing the rate of interest cannot operate retrospectively so as to diminish the amount due under the rate established by a prior statute. *Reese v. Rutherford*, 90 N. Y. 644.

Under a statute requiring a county treasurer if he has not funds to pay an order when presented to indorse it "not paid for want of funds," and expressing that from the date of such indorsement the order shall bear legal interest, it

Suth. Dam. Vol. I.—75.

has been held that the legal rate in effect at the time the indorsement is made enters into the contract as a part of it, and is not affected by a subsequent statute reducing the rate. The opinion lays some stress upon the rule of construction which forbids giving statutes a retroactive operation; but more weight is given to the question of legislative power. *Union Sav. B. & T. Co. v. Gelbach*, 8 Wash. 497, 24 L.R.A. 359 (two judges dissenting); *Williams v. Shoudy*, 12 Wash. 362; *Seton v. Hoyt*, 34 Ore. 266, 43 L.R.A. 634, 75 Am. St. 641, is to the same effect, as is *Shipley v. Hacheney*, 24 Ore. 303.

In a subsequent Washington case it was ruled that a statute reducing the legal rate of interest had no effect upon state warrants issued and presented for indorsement prior to the time it took effect. In this case there was no such statute as is referred to in the preceding paragraph, and the ruling is rested on the custom to pay interest on such warrants. It is said, referring to

In a California case, suit was brought against an administrator for the balance of an account due from his intestate. It did not appear when the account was made. It had been presented to the defendant, who rejected it. The case was tried without a jury. The account was found to be correct by the trial court and interest allowed on the balance for a certain time at the Mexican rate, which prevailed until an interest statute was adopted increasing the rate, and from the time that statute took effect at the rate fixed thereby. This was held to be erroneous. Baldwin, J., announced this general principle: that interest is governed by the law in force at the time and place of contracting.⁵⁷ Later cases in that state recognize the distinction above stated.

In the absence of a contract to pay interest it is only allowed as damages for failure to pay money due; and it is competent for the legislature to fix the amount which shall be recovered.⁵⁸ Interest for money lent may be recovered though the loan was made when the law was otherwise.⁵⁹ This point was decided in New York, in 1839, in a case which presented the question in this form. After the debt sued upon became due and while interest as damages was accruing the legislature passed a general interest law which provided that "for the purpose of calculating interest a month shall be considered the twelfth part of a year, and as consisting of thirty days; and interest for any number of days less than a month shall be estimated by

the county order case: "If such was the force of an agreement to pay interest provided by the statute the same force should be given to an agreement to pay interest authorized by a custom so long recognized and acquiesced in as to have the force of a statute." *State v. Bowen*, 11 Wash. 432.

⁵⁷ *Aguirre v. Packard*, 14 Cal. 171, 73 Am. Dec. 645; *Prairie State L. & B. Ass'n v. Nubling*, 64 Ill. App. 329; *Abner v. York*, 19 Ky. L. Rep. 643.

It is said in *State v. Guenther*, 87 Wis. 673, though the issue did

not demand the statement, that "on a contract which stipulates for interest, interest at the agreed rate, or, in the absence of an agreed rate, at the rate prescribed by law at the date of the contract, will be the rate recoverable until the repayment of the principal sum. *Spencer v. Maxfield*, 16 Wis. 178. A change of the legal rate would not affect the rate of interest recoverable upon such a contract."

⁵⁸ *White v. Lyons*, 42 Cal. 279; *Randolph v. Bayne*, 44 Cal. 366.

⁵⁹ *Dilworth v. Sinderling*, 1 Bin. 488, 2 Am. Dec. 469.

the proportion which such number of days shall bear to thirty." The assistant vice-chancellor said: "I am of opinion that when an account is stated after this provision went into effect, including items arising before, the interest must be computed in the manner therein directed upon the prior as well as the subsequent items from the passage of the act. The terms of the section are sufficiently comprehensive for this. They are for the purpose of calculating interest, etc. The only objection is whether an unlawful retrospective effect is given to the statute. To put the point more clearly: If a promissory note was dated before the 1st of January, 1830, (when that act was passed) and was sued for afterwards, the interest should be computed at three hundred and sixty-five days to a year for the time down to that date and three hundred and sixty days subsequently. The statute in question does in effect raise the rate of interest. Suppose it did so in terms, changing it to eight per cent., and then a prior demand is sued upon. Now, where interest is not specified in a contract as a part of it it is allowed as damages for the refusal to pay the debt. The rate of interest is undoubtedly subject to the existing law during the continuance of that law. But is there any implied contract between the parties restricting the interest to such rate? A fresh demand of the debt, and a refusal, is a new assertion of a right, and imposes a new liability upon the party; so does a neglect without a new demand. The damages are imposed for this renewed violation of a contract. I do not perceive that in this the great principle of treating statutes as prospective only in their operation is infringed. The new law takes effect upon a new violation of an obligation. It has no retrospective effect upon previous rights. The previous right was to discharge the debt with interest at a given rate. That right has not been asserted. By the general rule of law, if there was no statute regulating interest, damages of an uncertain amount would be recoverable for the detention of money, as for that of any other property. The statute then prescribes that for the continued refusal or neglect to discharge the debt those damages shall be at another rate of interest."⁶⁰

⁶⁰ *Bullock v. Boyd*, 1 Hoff. Ch. continued the discussion upon authority. He said: "There are some
294. The assistant vice-chancellor

§ 369. Same subject. There is a distinction made in respect to the nature of the obligation to pay interest subsequent to

English cases which bear upon this question. By the terms of the act (2 Charles 2), no person from and after the 29th of September, 1660, upon any contract, shall, from and after the said 29th of September, take, etc., more than at the rate of six per cent. The interest under the previous act was eight per cent. In the case of *Walker v. Penry* the point was whether, where interest upon a mortgage, made before the statute, had been paid at the rate of eight per cent., so much of the extra two per cent. as accrued after the act of 1660 should be applied in reducing the principal. The mortgagee had entered in 1675. Lord Chancellor Jeffries decided that the statute had reference only to subsequent contracts, and would give no relief; but he gave interest at six per cent. only from the entry in 1675. On a rehearing he adhered to his opinion. See 2 Vernon, 42 and 78. Mr. Ord cites this case as settling that the statute had no effect upon prior contracts (on Usury, p. 40); and Mr. Comyn treats the question as undecided. The latter writer notices, however, the subsequent reversal of the decree upon a bill of review. See 2 Vernon, 145. Both writers have omitted to state that the case was first determined by Lord Nottingham upon a bill of foreclosure, who held that the extra two per cent. should go towards reducing the principal. Then, upon a bill to redeem, Lord Jeffries determined as before stated. Upon the bill of review Lord Commissioner Trevor said: 'Being there was a decree already made he would not reverse;' but Lord Rawlinson and Hutchins

held that the act had a retrospect, and makes it unlawful to take more than six per cent. upon any contract, whether made before or after the act of parliament. The note of the decree in Mr. Raithby's edition plainly shows that they meant six per cent. after the new statute of 1660. Thus, so far as this case goes, we have the authority of Lord Nottingham and Commissioners Rawlinson and Hutchins against the opinion of Lord Jeffries. But there is also the express authority of Sir Matthew Hale to the same effect. *Hedworth v. Primate*, Hardress, 318. By Hale, chief baron: 'Since the new act which reduces interest to six per cent., more shall not be allowed upon any contract, though made before the statute, by reason of the words of the statute, which are,' etc. He then notices the difference in the language of the act and that of the 21 Jac. 1, cap. 27.

'His observations reconcile also the position in 1 Eq. Cas. Ab. 288, pl. 1, and in Hawkins' Pleas of the Crown, 82, § 10, that under the statute of usury (12 Anne, ch. 16) there was no retrospect to any debt contracted before its passage. The language is express, limiting its operations to contracts made after the 29th of September, 1714.

'There is another case (*Procter v. Cooper*, Prec. in Ch. 116), in which the master of the rolls held, upon a bill to redeem a mortgage made before 1660, that interest should be allowed at eight per cent. to the time of the passage of the act. See *Bodley v. Bellamy*, 1 W. Black. 267.

'The case of *Towler v. Chatterton*

maturity between cases where there is an express or tacit agreement to pay it before maturity of the principal debt and cases in

(6 Bing. 258) is also of weight upon this question. By an act of 9 George IV., c. 14, called Lord Tenterden's act, passed May 9, 1828, it was provided that in actions of debt, or in cases grounded on any simple contract, no acknowledgment or promise by words only should be sufficient evidence of a new or continuing contract, whereby to take any case out of the enactment of the statute of limitations; but such acknowledgment or promise must be made or contained by or in some writing signed by the party chargeable thereby. The act also contained a provision that it should not go into effect until the 1st of January, 1829. The action was *assumpsit*, and commenced in Hilary term, 1829. The debt was then of more than six years' standing. In February, 1828, a declaration was made by parol to pay, under instruction from the judge to find upon that point. The judge then nonsuited the plaintiff on the ground that the promise should have been in writing under the statute. The court of common pleas refused to set aside the nonsuit. Two other cases were cited in the judgment upon the same statute to the same effect. One of them was before Lord Tenterden, where the action had been brought before the statute went into effect, though not tried until afterwards.

"I have carefully read the leading cases in the courts of our own country upon the subject of retrospective statutes, especially *Dash v. Van Kleeck*, 7 Johns. 477, in which the strength of the old supreme court of our state was fully put forth. I see nothing in the principles there

advocated or the decision there made to change the result I have arrived at. *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Bedford v. Shilling*, 4 S. & R. 401, 8 Am. Dec. 718; *Woart v. Winnick*, 3 N. H. 473, 14 Am. Dec. 384; *Hackley v. Sprague*, 10 Wend. 113; *Sayre v. Wisner*, 8 Wend. 66." *Stark v. Olney*, 3 Ore. 88; *Perrin v. Lyman*, 32 Ind. 16; *Woodruff v. Scruggs*, 27 Ark. 26, 11 Am. Rep. 777.

But see *Cox v. Marlatt*, 36 N. J. L. 389, 13 Am. Rep. 454. In this case the court decided that the rate of interest which a judgment will bear immediately after its rendition cannot be changed by subsequent legislation. *Seudder, J.*, said: "The effect of a judgment is to fix the rights of the parties thereto by the solemn adjudication of a court having jurisdiction. How these rights can be affected by subsequent legislation is not apparent. This contract of the highest authority cannot be disturbed so long as it remains unreversed and unsatisfied. Changing the rate of interest does not affect existing contracts or debts due prior to such enactment, whether they be evidenced by statute, judgment or agreement of the parties. Such has been the uniform course of decision in our courts. . . . If it be said that the interest is given as damages for the detention of the debt, and that the damages are greater when seven per cent. interest can be had than when only six per cent. can be obtained, and for such detention after the rate is increased there should be additional damages allowed, the answer is that there can be no such second assessment where the amount of the debt

which there is no interest contract whatever. It is true that some courts hold that if the agreement is to pay the debt, with interest at a specified rate on a day certain and does not expressly stipulate the interest afterwards, the interest obligation expires at the day fixed for payment, and the interest which the debtor is obliged to pay while he detains the money after it is due is only computed at the legal rate as damages.⁶¹ In these courts, on the doctrine that the interest agreement has no effect after maturity, doubtless the interest after that time would be computed at whatever might be the legal rate, changing the rate in the computation as the legal rate may change. The rule, however, as we have stated, is more generally to continue the rate agreed on before maturity until the debt is paid or put in judgment.⁶² But there is yet another distinction:—courts which concur in continuing the interest rate, if agreed on for the period of credit, to payment or judgment differ in the reasoning by which they reach that result; and this difference will naturally produce a divergence on the point we are now discussing. When the agreement in respect to the rate of interest before maturity is construed as tacitly continuing so long as the debt remains in contract unpaid the interest after maturity rests on a basis of contract and is not subject to be reduced or altered by any law subsequently enacted.⁶³ But when the continuance of the rate agreed on before maturity is not put upon the ground that the agreement continues it, but upon the theory that the rate which was agreed to before maturity as a just compensation for the use must be deemed a just and proper compensation afterwards for the detention of the money, then the rate rests not upon the contract and is not so fixed as to be beyond the effect of subsequent legislation which is plainly intended to modify it.

or liability has been once adjudged, and the cause of action remains the same. The interest is the measure of damages for the detention, and that must relate to the time when the amount is fixed by the entry of the judgment." See *North River*

Meadow Co. v. Shrewsbury Church, 22 N. J. L. 424, 53 Am. Dec. 258.

⁶¹ See § 309.

⁶² *Id.*: *Farmer v. Mitchell*, 128 Ill. App. 297 (verbal agreement).

⁶³ *Lee v. Davis*, 1 A. K. Marsh. 397, 10 Am. Dec. 746; *Association v. Eagleson*, 60 How. Pr. 9.

This distinction is illustrated by two cases in Connecticut. In one of them⁶⁴ the action was brought upon a promissory note, payable in that state, for a specified sum, "with taxes, and interest at the rate of fifteen per cent. after maturity." Here the contract in respect to interest after maturity was not tacit, but express. The difference is immaterial so far as the effect is concerned. A tacit agreement is as inviolable as an express contract. Notes which provide for interest generally and are construed to mean interest until paid, are equivalent to the contract made in the case just mentioned. When that note was made the law of Connecticut permitted parties to contract for any rate of interest. But before it matured an act was passed which provided that no greater rate of interest than seven per cent. should be recovered for money loaned "for the time after the money loaned becomes due." It was held that the fifteen per cent. was to be regarded as interest recoverable under the contract, and not as damages; that the act was not intended to apply to contracts in which there was an agreement as to the rate of interest after maturity, and if it was intended to apply to such contracts then existing it was so far unconstitutional and void as impairing their obligation. The other case⁶⁵ was an action upon a note made in 1869, and payable in Connecticut in three years, with interest at seven and three-tenths per cent. per annum. The statute in force when this note was made provided that when interest was reserved at a higher rate than six per cent. the contract should be void so far as related to interest. In 1872 an act was passed "validating and confirming" usurious contracts, and providing that they might be enforced. It will be observed that this note contained a promise of interest which was general as to time and in Connecticut meant from date to maturity. If not affected by usury, nor changed by subsequent legislation, the conventional rate would be continued, not as an agreed rate, but as a just one, being considered just after maturity because the parties had adopted

⁶⁴ Hubbard v. Callahan, 42 Conn. 524, 19 Am. Rep. 564. See Hagood v. Aikin, 57 Tex. 511.

⁶⁵ First Ecclesiastical Soc. v. Loomis, 42 Conn. 570, approved in Hinman v. Goodyear, 56 id. 210.

it during the period of credit.⁶⁶ In 1873 the validating act of 1872 was repealed. It was held that the contract in this note was validated by the act of 1872, and the repeal of it could not annul the validating effect. The note, with the agreed interest to maturity, was recoverable; but the interest afterwards at the conventional rate, not being secured by the contract, was unaffected by these acts, and the conventional, being in excess of the legal rate when the note was made, could not be deemed a just rate.⁶⁷

It results from this brief review of the adjudications that whenever interest after maturity of the debt is not fixed by an agreement of the parties, binding for that purpose by the law of the place of contract, it is competent for the legislature of that jurisdiction to change the rate to be computed as damages; and by parity of reason it is fair to conclude also that a statute enacted in another jurisdiction where the remedy is sought, applying the law of the forum to the computation of such interest as damages, would be valid. On the other hand, if the interest after maturity is fixed by contract, valid for that purpose by the law of the place of contract, whether it be by a promise in express terms of interest after maturity at a specified rate or by a promise of interest at a specified rate generally, it is as sacred and secure against the impairing effect of subsequent legislation as the agreement before maturity or for payment of the principal itself.⁶⁸

§ 370. **Same subject.** The question has been considerably discussed and differently decided by the courts whether a contract for the payment of money which is subject to be avoided either wholly or in part for usury can afterwards be validated by legislation so as to deprive the debtor entirely of that defense.⁶⁹ A usurious contract, although declared wholly or in

⁶⁶ *Beckwith v. Trustees of Hartford, etc. R.*, 29 Conn. 268, 76 Am. Dec. 599.

⁶⁷ See *Simpson v. Hall*, 47 Conn. 417.

⁶⁸ *Lee v. Davis*, 1 A. K. Marsh. 397, 10 Am. Dec. 746; *Association v. Eagleson*, 60 How. Pr. 9.

⁶⁹ See *Mitchell v. Doggett*, 1 Fla. 371; *Springfield Bank v. Merrick*, 14 Mass. 322; *Wood v. Kennedy*, 19 Ind. 68; *Perrin v. Lyman*, 32 Ind. 16; *Morton v. Rutherford*, 18 Wis. 313.

part void, is not void in an absolute sense; it is only voidable at the election of the debtor. When he elects to avail himself of the defense the effect of the law in discharging any part of the obligation to pay the principal of the debt and lawful interest is a penalty, and is imposed not so much to benefit or relieve the debtor as to maintain by this sanction the general policy of the law of restricting interest transactions within what are deemed reasonable limits, regard being had⁷⁰ for the general welfare. It is even regarded as unconscientious and inequitable for him to claim and accept such a discharge.⁷⁰ It is, at all events, purely statutory, and is not distinguishable in principle from penal damages given in certain actions in which simple or actual damages are allowed to be doubled or trebled. Although the usurious contract may be so far void, if the debtor chooses to set up the defense of usury, that the creditor may not be able to sustain an action for the whole or even a part of the debt for reasons of policy, yet a moral obligation remaining to perform the contract, it would be going very far to say that the legislature may not, in furtherance of the original intention of the parties, add a legal sanction to that obligation when those reasons have ceased or such policy is abandoned;⁷¹ especially as the repeal of a penalty provided by law would have this effect and thereby establish matters in the condition in which it was the intention of all concerned to place them.⁷²

The privilege of a debtor to repudiate his contract by pleading usury or the privilege, by making an unconscionable de-

⁷⁰ *Curtis v. Leavitt*, 15 N. Y. 9. An action for the original consideration of a usurious contract, with legal interest thereon, is maintainable without the aid of a curative statute. *Wallace v. Goodlett*, 104 Tenn. 670.

⁷¹ See *Lewis v. McElvain*, 16 Ohio, 347; *Trustees v. McCaughey*, 2 Ohio St. 155; *Johnson v. Bentley*, 16 Ohio 97; *Boyce v. Sinclair*, 3 Bush 204; *Hess v. Werts*, 3 S. & R. 361; *Syracuse Bank v. Davis*, 16 Barb. 188; *Bleakney v. Farmers,*

etc. Bank, 17 S. & R. 64, 17 Am. Dec. 635; *Satterlee v. Matthewson*, 16 S. & R. 191; *Menges v. Wertman*, 1 Pa. 218; *Woodruff v. Scruggs*, 27 Ark. 26, 11 Am. Rep. 777; *Perrin v. Lyman*, 32 Ind. 16; *Gibson v. Hibbard*, 13 Mich. 214; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 236; *Woolley v. Alexander*, 99 Ill. 188.

⁷² *Hinman v. Goodyear*, 56 Conn. 210; *First Ecclesiastical Soc. v. Loomis*, 42 Conn. 570; *Johnson v. Utley*, 79 Ky. 72.

fense; to have the benefit of a penalty given by statute for a violation of law is not a vested right.⁷³ Statutes which take away the defense of usury in respect to existing contracts, or produce the same effect by expressly validating and confirming them, are generally, and by a decided weight of authority, sustained.⁷⁴ When they go no farther than to bind a party by

⁷³ *Jenness v. Cutler*, 12 Kan. 500; *Ayers v. Probasco*, 14 id. 175.

"But the legislature has no power to substitute one penalty for another except where that which is substituted is, as in the present case, in effect a mere reduction or modification of the original penalty, and where a penalty is once released or abrogated it ceases to be subject to legislative control." *Woolley v. Alexander*, 99 Ill. 188. See *Hardin v. Trimmer*, 27 S. C. 110; *Maynard v. Marshall*, 91 Ga. 840.

⁷⁴ *Id.*; *Hardway v. Lilly* (Tenn. Ct. of Ch. App., affirmed orally by the supreme court; see *Wallace v. Goodlett*, 104 Tenn. 670, 676, which is to the same effect); *Pattison v. Jenkins*, 33 Ind. 87; *Andrews v. Russell*, 7 Blackf. 474; *Grimes v. Doe*, 8 id. 371; *Thompson v. Morgan*, 6 Minn. 292; *Parmelee v. Lawrence*, 48 Ill. 331; *Curtis v. Leavitt*, 17 Barb. 309, 15 N. Y. 9; *Wood v. Kennedy*, 19 Ind. 68; *Rathbun v. Wheeler*, 29 Ind. 601; *Washburn v. Franklin*, 36 Barb. 599; *Wilson v. Hardesty*, 1 Md. Ch. 66; *Pollock v. Glazier*, 20 Ind. 262; *Burns v. Anderson*, 68 id. 181; *Sager v. Schneewind*, 83 id. 204; *Danville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 663; *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682.

Mr. Justice Matthews, writing the opinion in the case last cited, said in reference to some of the other cases referred to in this note: "These decisions rest upon solid ground. Independent of the

nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is that the right of a defendant to avoid his contract is given to him by statute for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he (the borrower) has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. *Read v. Plattsmouth*, 107 U. S. 568, 27 L. ed. 414, and see *Lewis v. McElvain*, 16 Ohio 347; *Johnson v. Bentley*, id. 87; *Trustees v. McCanghy*, 2 Ohio St. 152; *Satterlee v. Matthewson*, 16 S. & R. 169, 2 Pet. 380, 7 L. ed. 458; *Watson v. Mercer*, 8 Pet. 88, 8 L. ed. 876."

The Virginia code of 1873, ch. 15, § 13, provides that if by a new law, repealing a former law, any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, with

a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy, and not of constitutional power.⁷⁵ The legislature has power to impose on all debtors interest from the date of the enactment for delay in the payment of money already due.⁷⁶

The repeal of a statute giving a judicial remedy upon contracts usurious on their face does not defeat a suit brought, under the repealed act, on such a contract and which was undecided in the appellate court when the repealing statute was enacted, there being in effect a general statute declaring that "the repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any pro-

the consent of the parties affected, be applied to any judgment pronounced after the new law takes effect. Under this it has been ruled that though the statute of usury in force when a contract was made declares it to be null and void, if at the time a judgment is rendered on the contract the statute has been amended so as to avoid a usurious contract only so far as the interest is concerned, such statute should govern. *Mosby v. St. Louis Mut. Ins. Co.*, 31 Gratt. 629; *Bain v. Savage*, 76 Va. 905.

⁷⁵ Cooley's Const. Lim., p. 374. See *Head v. Ward*, 1 J. J. Marsh. 280; *Outen v. Graves*, 7 id. 629; *Cox v. Marlatt*, 36 N. J. L. 389, 13 Am. Rep. 454; *Pond v. Horne*, 65 N. C. 84; *Williams v. Smith*, id. 87.

It was held in *Mucklar v. Cross*, 32 N. J. L. 423, that a bond made in 1865, when the legal rate of interest was six per cent., conditioned for the payment of the principal sum in five years after date, with lawful interest for the same, pay-

able annually, at such rate as then was or thereafter might be fixed upon as the legal rate of interest in that state by the legislature, did, after the passage of the act of March 15, 1866, increasing the legal rate of interest to seven per cent., carry interest at such increased rate though that act in terms only applied to contracts made after its passage; the increased rate of interest being payable, not by virtue of the statute, but by force of the agreement of the parties.

In *Drake v. Latham*, 50 Ill. 270, suit was brought on a ten per cent. note. This note was made while the law of 1849 was in force, which only allowed six per cent. to be contracted for, and forfeited the excess. The act of 1857 repealed all the penalties; but it was held that the creditor could not, as a mere effect of that repeal, recover a larger rate than he might lawfully have contracted for. *Simpson v. Hall*, 47 Conn. 417.

⁷⁶ *Daune v. Mastick*, 50 Cal. 244.

ceeding commenced under and by virtue of the statute repealed." ⁷⁷ Such statute inures to the benefit of a citizen of another state who acquired the usurious obligation in the state in which it was enacted and who sued in the state of his domicile to enforce the lien given to secure the payment of the sum loaned although his suit was brought before the law was enacted, and the right thereby given was not affected because of the repeal of the statute by reason of the provision saving rights of action after its repeal. ⁷⁸ A decree rendered prior to the enactment of a statute authorizing the recovery of principal and legal interest on a note or other contract, notwithstanding a stipulation on its face for an usurious rate of interest, refusing foreclosure of a mortgage because of the disclosure of such a stipulation is not an adjudication upon the merits that will defeat a suit to enforce the same mortgage, to the extent of the principal and legal interest due, brought after such enactment. ⁷⁹

SECTION 7.

INTEREST AS AN INCIDENT TO THE PRINCIPAL.

§ 371. **Interest due by agreement a debt.** With a certain propriety interest may be said always to be an incident to the principal; ⁸⁰ not only when it is a part of the contract, but also when it is allowed as damages. In the former case it is, however, not strictly an incident; or rather, it is more than that. There must be a principal sum; but after interest has accrued it is no longer dependent on the principal, it does not necessarily follow it. Conventional interest is of itself a debt and payment of the principal alone will not affect the right to recover the interest; ⁸¹ and yet it is so allied to the principal that

⁷⁷ Wallace v. Goodlett, 104 Tenn. 670.

⁷⁸ Kendrick v. Kyle, 78 Miss. 278.

⁷⁹ Wallace v. Goodlett, *supra*.

⁸⁰ Leggatt v. Palmer, 39 Mont. 302.

⁸¹ Alabama City, G. & A. R. Co. v. City of Gadsden, 185 Ala. 263; Curry v. La Fon, 155 Mo. App. 678; Froment v. Oltarsh, 60 N. Y. Misc. 89; Bennett v. Federal C. & C. Co., 70 W. Va. 456, 40 L.R.A. (N.S.) 588; Central Bank & T. Co. v. State,

if it recovered without recovery of the interest, when the latter is not secured by a separate instrument, it is barred; not because it cannot exist as a valid demand distinct from the principal, but because demands arising upon one agreement for principal and interest due to the same party at the same time cannot be divided and each made the subject of a separate action. In that respect there is no difference between principal and interest;⁸² an action brought for one would bar both,

139 Ga. 54; *Watts v. Garcia*, 40 Barb. 656; *Howe v. Bradley*, 19 Me. 31; *Canfield v. Eleventh School Dist.*, 19 Conn. 529; *Still v. Hall*, 20 Wend. 51; *Stone v. Bennett*, 8 Mo. 51. See *Foster v. Harris*, 10 Pa. 45.

Where the debt only was seized and condemned by the enemy in war, it was held that the interest due might not be recovered by the original creditor. *Bordley v. Eden*, 3 Har. & McH. 167.

⁸² *Central Bank & T. Co. v. State*, 139 Ga. 54. In *Doe v. Warren*, 1 Me. 48, 10 Am. Dec. 25, suit was brought on a note payable with interest annually. The chief justice says: "What is interest? It is an accessory or incident to the principal; the accessory is a constantly accruing one. The former is the basis, or the substance, from which the latter arises and on which it rests." *Merchants' Nat. Bank v. Whitmer*, 171 Mo. App. 352.

In *Howe v. Bradley*, 19 Me. 31, *Shepley, J.*, says: "The holder in such cases may maintain a suit to recover the interest payable before the principal, but cannot have a separate action for it after the principal becomes due and while it remains unpaid, because he may recover it in an action for the principal." The question in this case was whether an indorser of a note on which interest became due before

the principal was payable was entitled to the same notice in respect to the interest as in regard to the principal, in order to be held liable for it. It was held he was not; that if on the note becoming due it was dishonored, and the indorser then duly notified, he was fixed not only for the principal and interest then maturing, but also for interest which was payable before and not paid.

In *Chinn v. Hamilton*, Hemp. C. C. 438, the court said: "The promise to pay the debt and the promise to pay the interest from the date of the contract are two separate and distinct promises or undertakings; one may be performed without performing the other. In declaring upon a covenant or a parol contract in writing containing various undertakings the plaintiff has his election to complain of the breach of one or of all of the covenants or promises. If he complains of the breach or non-performance of one only of the covenants or promises he thereby admits that the others have been performed. The intentment is to be made most strongly against the pleader, and as he complains of the breach of only one of the covenants or obligations the presumption arises that the others have been performed. It at all events waives any right of action upon them; for having sued upon

whether included in the claim or recovery or not. If a claim against an estate has been allowed by the administrator as presented, no interest being demanded, the claimant cannot thereafter collect interest on the sum allowed.⁸³ In England the principle is said to be that though a mortgagee cannot be compelled to take payment of interest for less than the stipulated time yet, if he puts an end to the security by realization, or if by the intervention of a third party under the interpleader rule, the mortgagor's property is realized, from the moment the principal money gets into the pocket of the lender, interest ought to stop.⁸⁴ This rule was applied where principal and interest, secured by a bill of sale, was payable in equal monthly instalments, and the borrower authorized the lender to sell and out of the proceeds deduct the sum for which he was liable. Interest ceased to run on the making of the sale.⁸⁵ But interest made payable before the principal is due may be sued for alone before

the contract once he is forever barred from suing again [in respect to any cause that existed at the time of that suit and which might have been included in it]. It will not be allowed to split up the various covenants and promises contained in one contract and sue upon each of them; he can have but one recovery upon one contract, which then becomes merged in the judgment of the court."

This language must be understood as referring to the facts then before the court—to a contract for principal and for interest, both due. It is broad, but is obviously not used in so general a sense as to be applicable to a contract requiring a series of acts to be performed at different times. A suit for a breach in respect to the first would not necessarily involve the whole contract, and the judgment would not merge it so far as it contained other executory provisions. For instance, a note or other instrument may provide for instalments of principal

or interest. Undoubtedly successive actions could be brought for their recovery. Yet it is quite as clear that all instalments of either interest or principal or both, due at the time of bringing action, must be declared for in one action; at all events the judgment will be a bar in respect to all.

A judgment determining the title to and ownership of securities is conclusive between the parties in a subsequent action to recover the interest upon such securities collected by the defeated party prior to such judgment; but a claim for interest on securities collected by the defendant is not necessarily a part of an action to determine the title to such securities. *Govin v. De Miranda*, 9 N. Y. Misc. 684, 79 Hun 329.

⁸³ *Matter of Warren*, 56 App. Div. (N. Y.) 414.

⁸⁴ *Forster v. Clowser*, [1897] 2 Q. B. 362; *Curry v. La Fon*, 155 Mo. App. 678.

⁸⁵ *West v. Diprose*, [1900] 1 Ch. 337.

the latter becomes due,⁸⁶ or after voluntary payment of the principal.⁸⁷

§ 372. Interest as damages accessory to principal. Interest which is allowed as damages and which is not liquidated, nor covered by any contract to pay it, is strictly incidental to the debt.⁸⁸ It cannot exist after the debt ceases by payment or otherwise,⁸⁹ though payment is made after suit brought,⁹⁰ in

⁸⁶ *Greenleaf v. Kellogg*, 2 Mass. 568; *Cooley v. Rose*, 3 id. 221; *Catlin v. Lyman*, 16 Vt. 44; *Hastings v. Wiswall*, 8 Mass. 455; *Estabrook v. Moulton*, 9 id. 258, 6 Am. Dec. 64; *Bannister v. Roberts*, 35 Me. 75; *Scott v. Liddell*, 98 Ga. 24.

⁸⁷ *Kimball v. Williams*, 36 App. D. C. 43.

⁸⁸ A statutory penalty, amounting to five times the legal rate, imposed on an attorney wrongfully withholding money from a client is incident to the debt, and the right to recover it, being governed by the rules of contract rather than those of tort, survives the death of the debtor. *Griffiths v. Powers*, 216 Mass. 169.

⁸⁹ *Louisville & N. R. Co. v. Elmore & Brame*, 10 Ala. App. 627; *Bassick G. M. Co. v. Beardsley*, 49 Colo. 275, 33 L.R.A.(N.S.) 852; *Forschirm v. Mechanics' & Traders' Bank*, 137 App. Div. (N. Y.) 149; *O'Rourke v. New York*, 130 App. Div. (N. Y.) 673; *In re Seybei*, 120 App. Div. (N. Y.) 291; *Grote v. New York*, 117 App. Div. (N. Y.) 768 (notwithstanding the reservation of the claim for interest); *Bennett v. Federal C. & C. Co.*, 70 W. Va. 456, 40 L.R.A.(N.S.) 588; *Bronx G. E. Co. v. New York*, 29 N. Y. Misc. 402; *Graves v. Saline County*, 43 C. C. A. 414, 104 Fed. 61, citing the text; *Walton v. United States*, 61

Fed. 486; *Los Angeles v. City Bank*, 100 Cal. 18; *Bronner B. Co. v. M. M. Canda Co.*, 18 N. Y. Misc. 681; *Pacific R. v. United States*, 158 U. S. 118, 39 L. ed. 918; *Stewart v. Barnes*, 153 U. S. 456, 38 L. ed. 781; *Moore v. Fuller*, 2 Jones, 205; *Tillotson v. Preston*, 3 Johns. 229; *Burr v. Burch*, 5 Cranch C. C. 506; *Jacot v. Emmett*, 11 Paige 142; *Consequa v. Fanning*, 3 Johns. Ch. 587; *Gillespie v. Mayor*, 3 Edw. 512; *Southern Cent. R. Co. v. Moravia*, 61 Barb. 180; *Potomac Co. v. Union Bank*, 3 Cranch C. C. 101; *Dixon v. Parkes*, 1 Esp. 110; *Fake v. Eddy*, 15 Wend. 76; *Johnston v. Brannan*, 5 Johns. 268; *Williams v. Houghtaling*, 5 Cow. 36; *People v. New York County*, 5 Cow. 331; *Stevens v. Barringer*, 13 Wend. 639; *American B. Soc. v. Wells*, 68 Me. 572, 28 Am. Rep. 82; *Cutter v. Mayor*, 92 N. Y. 166.

The rule applies with equal force where the principal is extinguished by a statute. *Johnson v. District of Columbia*, 31 Ct. of Cls. 395.

The payment of an account, no demand being made for interest, bars a subsequent action to recover it. *Crane v. Brooks*, 189 Mass. 228.

⁹⁰ *In re Osborn's Sons & Co.*, 177 Fed. 184, 29 L.R.A.(N.S.) 887, 100 C. C. A. 392; *Davis v. Harrington*, 160 Mass. 278.

the absence of an agreement reserving the right to it.⁹¹ Being accessory and incidental to the principal, it adheres to and follows it; ownership of the fund on which the interest accrues includes the interest. Where attached property becomes by process of law changed into money in the officer's hands and is invested by him so as to produce interest the accretion does not belong to the officer, but to the party entitled to the money;⁹² and where a debt is attached before it is due the garnishee is liable for interest thereon from the time it is payable.⁹³ A specific legacy carries interest from the death of the testator; it becomes then the property of the legatee.⁹⁴ The interest which accrues on a claim against an estate, both before and after its allowance, is a part of the claim and entitled to preferential payment to the same extent as the principal.⁹⁵ The law will not frustrate the intention of parties to reserve the right to interest. Thus, where a drawee made a payment "on account"

⁹¹ *Grote v. New York*, 190 N. Y. 235.

⁹² *Richmond v. Collamer*, 38 Vt. 68; *Jackson v. Smith*, 52 N. H. 9; *Farley v. Moore*, 21 id. 146; *Chase v. Monroe*, 30 id. 427.

⁹³ *Cross v. Brown*, 19 R. I. 220.

⁹⁴ See *Ingraham v. Postell*, 1 McCord Ch. 94; *Hilyard's Est.*, 5 W. & S. 30; *Angerstein v. Martin*, 1 Turn. & Russ. 232; *Hewett v. Morris*, id. 241; *Jones v. Ward*, 10 Verg. 160; *Huston's App.*, 9 Watts 472; *Beal v. Crafton*, 5 Ga. 301; *Stephenson v. Axson*, *Bailey's Eq* 274; *Graybill v. Warren*, 4 Ga. 528; *Yandt's App.*, 13 Pa. 575, 53 Am. Dec. 496; *Darden v. Orgain*, 5 Cold. 211; § 344.

A. received \$6,000 from B. and in consideration thereof executed a bond by which he bound himself to pay the interest on that sum or so much thereof as might be necessary for B.'s support to B. for life, and at her death to pay the principal and what might remain unexpended

of the interest to C. A. was liable for interest at the legal rate according to the legal effect of the bond, and not the interest received by him from his investment of the money. *Granger v. Pierce*, 112 Mass. 244. See *Cory v. Leonard*, 56 N. Y. 494.

It is observed in the course of discussion in a recent case that where a demand of damages constitutes the very ground of the action it would seem that the rule would be different. If, for instance, in covenant on the part of the lessee to repair a building, the lessee should prove performance the plaintiff might still be entitled to have the jury pass upon the question of his damages, however small they might be, because in such a case the right to damages constitutes the right of action. But this doctrine has no application to an action of *assumpsit*. *Stewart v. Barnes*, 153 U. S. 456, 38 L. ed. 781.

⁹⁵ *Eddy v. People*, 187 Ill. 304

upon a draft, payable without interest and only upon the completion of a contract, and the draft was not then surrendered, but was retained as an evidence of debt, it was inferred that it was the intention of the parties that interest should be payable and the holder of the draft was entitled to recover it from the date of the drawee's being notified that the contract was completed.⁹⁶

SECTION 8.

INTEREST UPON INTEREST.

§ 373. **Compound interest.** Strictly, all interest which is computed upon interest is compound interest. But that which is commonly denominated such is interest annually or at other successive periods added to the principal to bear interest for the next interest period; in other words, interest computed with annual rests, or rests at the end of the longer or shorter interest periods, regularly adding the interest for the preceding period to the principal, thenceforth to bear interest. Compound interest in this latter sense is never computed by way of damages except against persons acting in a fiduciary capacity⁹⁷ who grossly abuse their trust in respect to money.⁹⁸ Nor will a contract in advance to pay such interest be enforced in several states; in others it will be.⁹⁹ But after simple interest has

⁹⁶ *Peck v. Granite State P. Ass'n*, 21 N. Y. Misc. 84.

⁹⁷ *Ute Indians v. United States*, 45 Ct. of Cls. 440; *Shelley v. Cody*, 187 N. Y. 166; *Rosenbaum v. Pendleton*, 9 Ohio Dec. 642, 646; *Stokely v. Thompson*, 34 Pa. 210; *Stevens I. Co. v. South Ogden W. Co.*, 20 Utah 267; *Stinson v. Rountree*, 51 Ind. App. 207; *Taylor v. Scott*, 178 Ill. App. 487.

The assignee of a mortgage in possession has no right to cast interest to the time he took possession and make that a new principal upon which to calculate interest. *Lewis v. Small*, 75 Me. 323.

Suth. Dam. Vol. I.—76.

⁹⁸ See § 353.

A statute providing for interest means simple interest only. *Fishbury v. Vineyard H. W. Co.*, 193 Mass. 196.

⁹⁹ Such contracts are valid in Oregon, *New England M. Co. v. Vader*, 28 Fed. 265 (compare *Levens v. Briggs*, *infra*); in Dakota, *Hovey v. Edmison*, 3 Dak. 449; South Carolina, *Bowen v. Barksdale*, 33 S. C. 142; and Georgia, *Merck v. American Freehold L. & M. Co.*, 79 Ga. 213, 233; *Ellard v. Scottish-Am. M. Co.*, 97 Ga. 329. In Maine a promise to pay compound interest is valid, but the court will not de-

accrued an agreement that it shall thereafter bear interest is valid.¹ Such interest, when contracted for at the time the debt accrues or the loan is made, is refused on grounds of policy as tending to usury and oppression.² But after interest is due,

declare an implied promise. *Bradley v. Merrill*, 91 Me. 340. In Nebraska parties may contract that overdue instalments of interest shall bear interest if the whole interest does not exceed the legal rate. *Hallam v. Telleren*, 55 Neb. 255. Such contracts have been sustained in other states: *Hale v. Hale*, 1 Cold. 233, 78 Am. Dec. 490; *Vaughan v. Kennan*, 38 Ark. 114; *Mueller v. McGregor*, 28 Ohio St. 265; *McNairy v. McNairy*, 1 Tenn. Cas. 329; *Bowman v. Duling*, 39 W. Va. 619; *Lee v. Melby*, 93 Minn. 4; *Palm v. Faucher*, 93 Miss. 785, 33 L.R.A. (N.S.) 296. They have been declared void in these cases: *Levens v. Briggs*, 21 Ore. 333, 14 L.R.A. 188; *Van Benschooten v. Lawson*, 6 Johns. Ch. 313; *Breckinridge v. Brooks*, 2 A. K. Marsh. 335, 12 Am. Dec. 401; *Bowman v. Neely*, 151 Ill. 37; *Fleet v. Lockwood*, 17 Conn. 243; *Drury v. Wolfe*, 134 Ill. 294; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Catlin v. Lyman*, 16 Vt. 44; *Perkins v. Coleman*, 51 Miss. 298; *Bogges v. Goff*, 47 W. Va. 139; *Sanford v. Lundquist*, 80 Neb. 408, 414; *Reusens v. Arkenburgh*, 135 App. Div. (N. Y.) 75.

An agreement to pay compound interest does not avoid the entire contract; the court will simply refuse to enforce the payment of interest upon interest. *Hochmark v. Richler*, 16 Colo. 263; *Bowman v. Neely*, 137 Ill. 443.

¹ *Wigton v. Elliott*, 49 Colo. 115; *Hochmark v. Richler*, 16 Colo. 263; *McConnell v. Barber*, 86 Hun 360; *Stewart v. Petree*, 53 N. Y. 621, 14

Am. Rep. 352; *Perkins v. Coleman*, 51 Miss. 298; *Townsend v. Riley*, 46 N. H. 300; *Porter v. Price*, 26 C. C. A. 70, 80 Fed. 655; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Fitzhugh v. McPherson*, 3 Gill 408; *Gunn v. Head*, 21 Mo. 432; *Grimes v. Blake*, 16 Ind. 160; *Niles v. Board of Com'rs*, 8 Blackf. 158; *Forman v. Forman*, 17 How. Pr. 255; *Van Benschooten v. Lawson*, 6 Johns. Ch. 313, 10 Am. Dec. 333; *State v. Jackson*, 1 Johns. Ch. 13, 7 Am. Dec. 471; *Toll v. Hiller*, 11 Paige 228; *Barrow v. Rhineland*, 1 Johns. Ch. 550; *Leonard v. Villars*, 23 Ill. 377; *Henderson v. Hamilton*, 1 Hall 314; *Baker v. Scott*, 62 Ill. 86; *Doe v. Warren*, 7 Me. 48; *Cox v. Smith*, 1 Nev. 161, 90 Am. Dec. 476; *Lewis v. Bacon*, 3 Hen. & Munf. 89; *Stone v. Locke*, 46 Me. 445; *Thayer v. Star M. Co.*, 105 Ill. 540; *Denver B. & M. Co. v. McAllister*, 6 Colo. 261; *Case v. Fish*, 58 Wis. 56; *Leonard v. Patton*, 106 Ill. 99.

² *Lee v. Melby*, 93 Minn. 4; *Tetley v. McElmurry*, 201 Mo. 382.

There are but two exceptions to the rule that the law will not allow the recovery of compound interest: First, in respect to interest-bearing coupons; these, when payable to bearer, have, by commercial usage, the legal effect of promissory notes. They are contracts for the payment of a definite sum of money on a day named, and pass as negotiable paper. The interest on the bonds to which such coupons were attached is not compounded indefinitely, but once only. The second exception is

no matter at how short intervals it is payable, the creditor may sue for it; or the parties, by a new agreement, may put it upon interest. It has, however, been decided that there is a moral obligation to pay interest on interest for the time it has been in arrears, and that a subsequent promise to pay it for the time already elapsed is binding.³ Accounts may be judicially stated by computing interest according to the practice of the parties, both as to charging it on the items on each side from their dates and also as to periodical rests.⁴ Where the parties to a transaction amongst themselves treat accrued interest as an addition to the original principal sum and charge up interest thereon they are bound by their course of dealing, if subsequent lienors without notice are not affected.⁵

§ 374. **Instances of interest on interest.** When a demand consisting of principal and interest passes into a judgment or decree as a general rule it bears interest because the original claim is merged therein. It is thenceforth a demand of a different nature. The principal and interest are blended together and adjudged to the creditor for immediate payment or to be at once collected.⁶ Where strict foreclosure was stipulated for

in cases where, the interest having become due and unpaid, the debtor then agrees to have the accrued interest added to the principal and become interest-bearing. *Bowman v. Neely*, 151 Ill. 37.

³ *Sanford v. Lundquist*, 80 Neb. 408, 414, 18 L.R.A.(N.S.) 633 (it is immaterial that the original contract provided for interest at the maximum rate and the latter agreement also provided therefor); *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Tillotson v. Nye*, 88 Hun 101; *Hathaway v. Meads*, 1. Ore. 66, 50 Am. Rep. 456; *Bogges v. Goff*, 47 W. Va. 139; *Rose v. Bridgeport*, 17 Conn. 247; *Camp v. Bates*, 11 Conn. 497.

⁴ *Goodhart v. Rastert*, 10 Ohio Dec. 40; *Emerson v. Atwater*, 12 Mich. 314; *Carpenter v. Welch*, 40

Vt. 251; *Schieffelin v. Stewart*, 1 Johns. Ch. 620, 7 Am. Dec. 507; *Backus v. Minor*, 3 Cal. 231.

If payments are to be made within a stipulated time after quarterly statements are rendered, though such are not rendered, rests may be allowed at every quarter and interest computed on the amounts then due. *Miller v. Billington*, 194 Pa. 452.

⁵ *Hooper v. Hooper*, 81 Md. 155, 177, 48 Am. St. 496.

Interest upon the interest in an account stated may be recovered without an agreement in writing therefor as is required in contracts generally. *Atkinson v. Golden Gate T. Co.*, 21 Cal. App. 168.

⁶ See *Stevens v. Coffeen*, 39 Ill. 148; *State v. Jackson*, 1 Johns. Ch. 13, 7 Am. Dec. 471.

in the mortgage and six months given to pay the debt with interest at the rate of ten per cent., the legal rate being six, it was held that inasmuch as the complainant was entitled to strict foreclosure it was not error to require a higher rate than is provided for by the statute upon the extension of the time of payment.⁷

In a suit for specific performance by the vendee after he has made default in the payment of purchase-money, on which interest was payable annually, the purchase-money to be paid on a decree in his favor should include interest on the instalments of interest from the time they became due.⁸ In such a case the court said: "We express no opinion whether interest upon such instalments of interest could have been recovered by the vendor in a suit for damages, or on a bill for specific performance brought by him. But the complainant comes into court acknowledging his default in making the payments when due, and asks specific performance on making the payments now. As he asks equity he must do equity, and put the vendor in the same condition as if the payments had been made when agreed. Had this money been paid when due it would have earned interest from that time." It was held that interest should be computed on the several instalments of interest from the time they respectively became due.⁹

§ 375. **Interest on instalments of interest.** The question on which the court in the preceding case refrained from expressing an opinion is one upon which the American courts are divided. Where the principal is payable on long time and interest is payable annually or at shorter periods, and the latter is not paid when due, according to the older cases, and as the law seems to be settled in a majority of the states, no interest can be collected upon such arrears of interest,¹⁰ though demand has been made

⁷ *Bissell v. Marine Co.*, 55 Ill. 165.

⁸ *Morris v. Hoyt*, 11 Mich. 1.

⁹ *Id.*; *Pujol v. McKinlay*, 42 Cal. 559. See 3 *Pomeroy on Equity*, § 1407.

¹⁰ *Leonard v. Villars*, 23 Ill. 377; *Smith v. Luse*, 30 Ill. App. 37;

Broughton v. Mitchell, 64 Ala. 210; *Young v. Hill*, 67 N. Y. 162 (except in mercantile transactions upon a contract implied from the course of dealing or from custom); *Dyar v. Slingerland*, 24 Minn. 267; *Mason v. Callender*, 2 id. 302; *Stokely v. Thompson*, 34 Pa. 210; *Ferry v.*

for it.¹¹ In several states, however, the rule is otherwise; interest on such arrears is allowed from the time the same became due without rest to the time of computation for payment or judgment. Thus in North Carolina and Arkansas it is held that where a note is given with a stipulation that the interest is to be paid annually or semi-annually the maker is chargeable with interest at the like rate upon such deferred payments of

Ferry, 2 Cush. 92; Doe v. Vallejo, 29 Cal. 285; Ackerman v. Emmott, 4 Barb. 626; Waldron v. Coal Co., 61 W. Va. 280. See note to § 373.

"Interest upon interest which has accrued upon contracts upon which interest is by their terms payable at stated periods before the principal becomes due is never allowed in making up judgments in suits thereon. This has often been determined, and must now be considered as the settled law in this commonwealth." Shaw v. Norfolk County R. Co., 16 Gray 407, 416, citing Hastings v. Wiswall, 8 Mass. 455; Wilcox v. Howland, 23 Pick. 167; Henry v. Flagg, 13 Metc. (Mass.) 64. To the same effect is Hodgkins v. Price, 141 Mass. 162.

In Pindall v. Bank of Marietta, 10 Leigh 481, a debtor owing a debt consisting of principal and interest, it was agreed between him and his creditor that he should, in the first place, pay off the principal, and that the interest might for a time remain unpaid. The creditor received money from the debtor and applied it in satisfaction of the principal. Many years elapsed without payment of the interest. It was held that the creditor was only entitled to the interest due at the time the principal was paid, and not to the interest on the interest, there having been no agreement to pay it. Tooke v. Bonds, 29 Tex. 419, is to the same effect.

Interest cannot be compounded without statutory authority. Hoyle v. Page, 41 Mich. 533. It is provided by statute in Michigan (1 Howell's Stats., § 1599) "that when any instalment of interest upon any note, bond, mortgage or other written contract shall have become due, and the same shall remain unpaid, interest may be computed and collected on any such instalment so due and unpaid from the time at which it became due, at the same rate as specified in any such note, bond, mortgage or other written contract, not exceeding ten per cent.; and if no rate of interest be specified in such instrument, then at the rate of seven per cent." This does not apply to new interest accruing by lapse of time after the maturity of the debt. Voigt v. Bel-ler, 56 Mich. 140; McVicar v. Deni-son, 81 Mich. 348; Wallace v. Glaser, 82 Mich. 190, 21 Am. St. 556.

Where the contract makes interest payable by instalments at fixed periods and separately from the principal, simple interest will be allowed on each instalment at the contract rate; but where the payment of interest is not stipulated for until the principal becomes due interest is allowable only on the latter. Rix v. Strauts, 59 Mich. 364.

¹¹ Whitecomb v. Harris, 90 Me. 206.

interest as if he had given a note for the amount thereof.¹² By this mode of computation the court say compound interest is not given, but a middle course is taken between simple and compound interest.¹³ So in Tennessee¹⁴ and Kentucky.¹⁵ Ewing, J., said in the first Kentucky case cited: "The fact that the amount so promised to be paid is described as interest accruing upon a larger sum which is payable at a future day cannot the less entitle the plaintiff to demand interest upon the amount, in default of payment, as a just remuneration for the detention or non-payment." In Vermont¹⁶ it is allowed by way of damages for delay of payment; but parties cannot stipulate for interest before it becomes due. In South Carolina interest overdue bears interest.¹⁷ So in Rhode Island, New Hampshire, Iowa, Wisconsin, Ohio, Texas, Georgia, Alabama, and Washington substantially the same doctrine prevails,¹⁸ in-

¹² Bledsoe v. Nixon, 69 N. C. 89, 12 Am. Rep. 642; Vaughan v. Kennan, 38 Ark. 114. See note to § 373.

¹³ Kennon v. Dickins, Cam. & Norw. Conf. R. (by Battle) 357, 2 Am. Dec. 642; Bledsoe v. Nixon, *supra*.

¹⁴ House v. Tennessee F. College, 7 Heisk. 128.

¹⁵ Talliaferro v. King, 9 Dana 331, 35 Am. Dec. 140; Hall v. Scott, 90 Ky. 340.

¹⁶ Catlin v. Lyman, 16 Vt. 44.

¹⁷ O'Neill v. Bookman, 9 Rich. 80; Gibbs v. Chisolm, 2 N. & McC. 38, 10 Am. Dec. 560; Singleton v. Lewis, 2 Hill 408; O'Neill v. Sims, 1 Strob. 115; De Bruhl v. Neuffer, *id.* 426; Doig v. Barclay, 3 Rich. 125; Watkins v. Lang, 17 S. C. 13; Wright v. Eaves, 10 Rich. Eq. 582; Miller v. Hall, 18 S. C. 141.

¹⁸ Alabama City, G. & A. R. Co. v. City of Gadsden, 185 Ala. 263; Stone v. Pettus, 47 Tex. Civ. App. 14; Hillshoro O. Co. v. Citizens' Nat. Bank, 32 Tex. Civ. App. 610; Warnock v. Itawis, 38 Wash. 144;

Cramer v. Lepper, 26 Ohio St. 59; Lewis v. Paschal, 37 Tex. 315; Mills v. Jefferson, 20 Wis. 50; Pearce v. Hennessy, 10 R. I. 223; Lanahan v. Ward, *id.* 299; Mississippi Valley T. Co. Hofius, 20 Wash. 272.

In Wheaton v. Pike, 9 R. I. 132, 11 Am. Rep. 227, Durfee, J., said: "The reasons assigned for not allowing interest are, first, that interest on interest savors of usury and is liable to bear with oppressive hardship on the debtor; and second, that the creditor from his forbearing to call for the instalments of interest when they become due may be presumed to have waived his claim to interest on the same. These reasons are not entirely consistent; for if the interest is not to be allowed for the first reason, there can be no waiver of interest to be presumed. It is also urged that interest, if so allowable upon annual or semi-annual dues of interest, should, for the same reason, when the debt is payable with interest at a particular time, be allowed from that time up-

terest being allowed on unpaid overdue instalments of interest.

on the interest then due as well as on the principal. *Doe v. Warren*, 7 Me. 48. See *Union Bank v. Williams*, 3 Cold. 579. But, on the other hand, it is urged that interest upon such interest, whatever savor of usury it may have, is not usurious; for after such interest is due the debtor may lawfully agree to pay interest thereon; and if he has paid interest thereon he cannot recover it back; that no rule should be adopted which favors the debtor at the expense of the creditor; and that there is no good reason why money due at a particular time for the use of money should not carry interest from that time in the same manner as money due for anything else. In South Carolina, where the rule accords with this view, it has been held that where a party contracts to pay a sum of money with interest thereon on a given day when the day arrives the interest becomes principal and bears interest for the future. *Doig v. Barclay*, 3 Rich. 125. There is a reason for not allowing interest upon interest applicable to negotiable securities which we do not find referred to, namely, that it may not be known to the debtor to whom the interest is to be paid; but it may be replied that the same reason would hold in regard to the principal of a negotiable security payable at a particular day, without interest, upon which, nevertheless, interest accrues after its maturity."

Pierce v. Rowe, 1 N. H. 179. *Woodbury, J.*: "If any interest can be allowed on the annual interest, it must be allowed by virtue of some general principles, and not of

any express contract for it contained in the note. But those principles on the subject of interest must be gathered from the reasons on which interest is originally founded, and on which it is in any case permitted without an express contract for its payment. Wherever money is due to an individual, without any stipulation as to interest, some compensation for the use of the money while wrongfully detained seems justly to be due; because the use of the money must be presumed to be beneficial to the one party, and the detention of it injurious to the other. Indeed, the increases of net profit of property are an appurtenant to the property itself, and the same broad principle which, without a special contract, would enable the owner to recover the property, would also entitle him to recover its increase. Hence a fair reward for the use of money while negligently or wrongfully withheld from the creditor ought always to be allowed him in the nature of damages for its detention; and the principles of our civil actions justify such an allowance by permitting the damages recovered to be commensurate with the injury sustained. On this theory interest will not commence, when no express contract exists for it, till a wrong is done by the debtor's failure to pay what has become due. Because till that event no breach of duty has happened on his part for which legal damages can accrue. But after money becomes due, every day's neglect to make payment of it, whether principal or interest, is an injury to the creditor; and our civil remedies would prove defective, and would

Nebraska interest may be computed upon overdue interest if

not, as justice requires, approximate those specific ones provided by equity unless the money detained, and a compensation for its use while so detained, could be recovered by the creditor. Were this not the law a strong temptation, also, would be presented to debtors to violate their duties. They would, in the language of Lord Mansfield, be encouraged 'to make use of all the unjust dilatories of chieane;' 'and the more the plaintiff is injured the less he will be relieved.' Approved in *Little v. Riley*, 43 N. H. 113; *Townsend v. Riley*, 46 N. H. 300, 313.

But where partial payments have been made during a year, the note bearing annual interest, there should not be rests made for such intermediate payments. If such payments were made on account of accruing interest not due, they should be deducted at the end of the year, but without interest upon them. *Mann v. Cross*, 9 Iowa 327; *Calhoun v. Marshall*, 61 Ga. 275.

In *Preston v. Walker*, 26 Iowa 205, 96 Am. Dec. 140, and *Burrows v. Stryker*, 47 Iowa 477, interest was allowed upon delinquent interest upon notes made in New York and payable there.

If the contract rate of interest is higher than the minimum legal rate interest will not be allowed on unpaid interest unless the contract explicitly provides for it. *Wofford v. Wyly*, 72 Ga. 863.

In *The Ship Packet*, 3 Mason 255, the mode of computing interest on a bottomry bond was discussed by Judge Story. "The rule laid down by Mr. Marshall, in his treatise on Insurance and Bottomry (b. 2, ch.

4, p. 752), is, that 'if when the risk is ended the borrower delay payment the common interest begins to run, *ipso jure*, without any demand. *Discussio periculo, majus legitima usura non debetur*. But this interest runs only on the principal, not on the marine interest, for this would be interest upon interest. *Accessio accessio non est*.' For this doctrine he cites no English authority, but relies altogether upon the civil law and Pothier and Emerigon. The doctrine of the civil law, denying compound interest, is not of universal application under the common law. The opinions of Pothier and Emerigon seem certainly opposed to allowance of interest upon the maritime premium (commonly, but somewhat improperly; called interest); but Emerigon admits in explicit terms that the law and practice in France are in favor of it. Upon examining his reasoning on the subject it is by no means satisfactory, being obviously founded upon mere motives of compassion. My opinion is that by the successful termination of the voyage the maritime premium, as well as the sum lent, becomes due; the whole forms one aggregate debt, and that any delay in discharging it ought to be allowed by the allowance of common interest, exactly as in other cases of debt. In making up the decree the sum lent and the bottomry interest are to be considered as the principal, and common interest upon this amount is to be added from the time the bond becomes due to the time of the decree."

The statute of Oregon allows parties to stipulate that delinquent in-

by so doing the total interest is not made to exceed the maximum legal rate.¹⁹

§ 376. **Separate agreements for interest.** Contracts for payment of interest, when secured by a separate instrument, will be enforced like all other agreements for the payment of money at a time certain. After maturity interest as damages will be allowed, and proof that the consideration is interest on a debt secured by another instrument will be of no avail to prevent such recovery.²⁰ Coupons are a familiar example. When so framed that they cannot be separated from the principal obligation they are only equivalent to a provision therein for the payment of interest, and the question of interest on the amount so agreed to be paid is simply one of interest on arrears of interest.²¹ According to the courts of New York the same rule

terest may bear interest, but not to compound it oftener than once a year. In *Murray v. Oliver*, 3 Ore. 539, the action was on a note payable in one year, "with interest at the rate of thirty per cent. per annum until paid, and interest to be paid semi-annually, and if not paid when due to be compounded at the same rate." *Boise, J.*: "We think this contract divisible. There is an agreement to pay the principal and interest at the end of one year from date; then it is stipulated that the interest shall be paid semi-annually," etc. After referring to the statutes he continues: "It would, therefore, result in rendering void the contract to pay interest semi-annually, and would not vitiate the contract to pay the principal sum with interest at thirty per cent."

¹⁹ *Murtagh v. Thompson*, 28 Neb. 358.

²⁰ *Wigton v. Elliott*, 49 Colo. 115; *Lee v. Melby*, 93 Minn. 4; ("This has always been treated as an illogical exception to the rule prohibiting the making of an agreement

in a single instrument obligating the promisor to pay interest after due upon interest then unmatured"); *Rice v. Shealy*, 71 S. C. 161; *Humphreys v. Morton*, 100 Ill. 592; *Graeme v. Cullen*, 23 Gratt. 266; *Koshkonong v. Burton*, 104 U. S. 668, 26 L. ed. 886; *Genoa v. Woodruff*, 92 id. 502; *Walnut v. Wade*, 103 id. 183; *Mills v. Jefferson*, 20 Wis. 50; *Pruyn v. Milwaukee*, 18 id. 367; *Forstall v. Consolidated Ass'n of Planters*, 34 La. Ann. 770; *Welsh v. First Division St. Paul & P. R. Co.*, 25 Minn. 314; *North Pennsylvania R. Co. v. Adams*, 54 Pa. 94, 93 Am. Dec. 677; *Gilbert v. Washington, etc. R. Co.*, 33 Gratt. 586. *Contra*, *Force v. Elizabeth*, 28 N. J. Eq. 403.

²¹ *Cripple Creek v. Adams*, 36 Colo. 320; *Parsons v. Utica C. Mfg. Co.*, 80 Conn. 58; *Graham v. Fitts*, 53 Fla. 1046; *Rose v. Bridgeport*, 17 Conn. 243. See *Camp v. Bates*, 11 id. 487; *Crosby v. New London, etc. R. Co.*, 26 id. 121; *Clarke v. Janesville*, 1 Biss. 98.

governs so long as the coupons remain in the hands of the original holder; until negotiated or used in some way they serve no independent purpose, but continue to be incidents of the bonds and have no greater force or effect than the stipulation for the payment of interest contained in the bonds. So long as they so remain it can make no difference whether the coupons are attached or detached.²² But generally, if the coupon has in itself all the parts of a complete contract it may be detached, and if negotiable possesses all the qualities of commercial paper. An action may be maintained on it without production of the bond, though the bond may belong to another party, has never been issued or has been canceled. And interest after maturity will be given as on notes and bills.²³ Where it is provided by statute that, in the computation of interest upon any note, interest shall not be compounded, nor shall the interest therein be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith, interest will not be allowed on coupons maturing after the option given the holder of a note to

²² *Bailey v. Buchanan County*, 115 N. Y. 297, 6 L.R.A. 562; *Williamsburgh Sav. Bank v. Solon*, 136 N. Y. 465, 481; *Buffalo Loan, T. & S. D. Co. v. Medina G. & E. L. Co.*, 12 App. Div. 199.

²³ *Long Island L. & T. Co. v. Long Island City & N. R. Co.*, 85 App. Div. (N. Y.) 36; *Trustees Internal Imp. Fund v. Lewis*, 34 Fla. 424, 26 L.R.A. 743, 43 Am. St. 209; *Cook v. Illinois T. & S. Bank*, 68 Ill. App. 478; *Lexington v. Union Nat. Bank*, 75 Miss. 1; *Love v. Philadelphia & R. R. Co.*, 19 Phila. 304; *Nash v. Meggett*, 89 Wis. 493; *Drury v. Wolfe*, 134 Ill. 294; *Cairo v. Zane*, 149 Ill. 122, 143; *Rich v. Seneca Falls*, 19 Blatch. 558; *Philadelphia & R. R. Co. v. Smith*, 105 Pa. 195; *Same v. Knight*, 124 id. 58; *Whitaker v. Hartford, etc. R. Co.*, 8 R. I. 47, 86 Am. Dec. 614; *Thomson*

v. Lee County, 3 Wall. 327, 18 L. ed. 177; *Aurora v. West*, 7 id. 82; *Humphreys v. Morton*, 100 Ill. 592; *Genoa v. Woodruff*, 92 U. S. 502, 23 L. ed. 586; *Connecticut Mut. Ins. Co. v. Cleveland, etc. R. Co.*, 41 Barb. 9, 26 How. Pr. 225; *City v. Lamson*, 9 Wall. 477, 19 L. ed. 725; *Clark v. Iowa City*, 20 id. 583; *Durant v. Iowa County, Wool. C. C.* 69; *Mercer County v. Hackett*, 1 Wall. 83; *Gelpeke v. Dubuque*, id. 175; *Murray v. Lardner*, 2 id. 110; *North Pennsylvania R. Co. v. Adams*, 54 Pa. 44; *Pollard v. Pleasant Hill*, 3 Dill. 195; *Rogers v. Lee County*, 1 id. 529; *Mathias v. Superior I. Co.*, 70 Pa. 160; *Norris v. Philadelphia*, id. 332; *Hollingsworth v. Detroit*, 3 McLean, 472; *Jefferson County v. Hawkins*, 23 Fla. 223 (if no rate of interest is specified in the coupon it bears that fixed by

declare the whole sum therein promised to be due and payable has been exercised, in the absence of such agreement.²⁴

§ 377. **Periodical interest after maturity of debt.** In Rhode Island, where interest is allowed on instalments of interest payable at stated times after they become due, the question arose whether, after the whole principal matures and remains unpaid, interest will become due thereon periodically in instalments as was stipulated before the principal fell due. It was decided in the negative for the reason that after maturity of the principal sum both the accruing interest and the principal are not due on any particular day, but every day until they are paid. In that case the interest by the contract was payable semi-annually. The court gave judgment for the principal with simple interest to the time of rendering judgment, together with interest on the semi-annual dues of interest, including that which accrued when the note became due.²⁵ In South Carolina interest after maturity may be regulated by agreement; and it

statute, though the bonds bear a higher rate); *Scotland County v. Hill*, 132 U. S. 107, 33 L. ed. 261.

If there is a discrepancy as to the rate of interest between a coupon and the bond to which it was originally attached the latter will control when the former is held by one who acquired it after maturity. *Goodwin v. Bath*, 77 Me. 462.

If bonds and coupons are issued pursuant to a special statute which does not make provision for the payment of interest upon either after maturity they do not bear interest. *Bates v. Gerber*, 82 Cal. 550; *Soher v. Calveras County*, 39 Cal. 134; *Hewel v. Hugin*, 3 Cal. App. 249, citing local cases. See *Davis v. Yuba County*, 75 id. 452.

Coupons given by a guardian for instalments of interest on a mortgage on the ward's lands, if not so worded as to bind either of them personally, do not draw interest after maturity as commercial paper

nor as "written instruments" within the statute of Illinois. *United States M. Co. v. Sperry*, 26 Fed. 727.

If coupons which do not bear interest by their terms are not presented for payment at the place designated, the money being there to pay them, interest will not be allowed on them if the residue of the fund subsequently passes to the purchaser of the property at a foreclosure sale. *Grand Trunk R. Co. v. Central Vermont R. Co.*, 105 Fed. 411.

Interest may be recovered from maturity without presentation as stipulated unless it is shown the debtor was prepared to pay on presentation. *Abraham v. New Orleans B. Ass'n*, 110 La. 1012.

²⁴ *Stubbings v. O'Connor*, 102 Wis. 352, 363.

²⁵ *Wheaton v. Pike*, 9 R. I. 132, 11 Am. Rep. 227.

has been held that, if agreed to be paid periodically, the instalments of interest accruing after maturity will bear interest. The bond was given in February, payable on the first of the following January, and provided for interest annually.²⁶ But

²⁶ *O'Neill v. Bookman*, 9 Rich. 80. Withers, J.: "Within the period of the stipulated credit, when the interest is to be paid annually, no one questions that interest should be computed on the interest from the respective periods fixed for the payment. *Gibbes v. Chisolm*, 2 N. & McC. 38, 10 Am. Dec. 560; *Singleton v. Lewis*, 2 Hill (S. C.) 408; *O'Neill v. Sims*, 1 Strob. 115; *De Bruhl v. Neuffer*, id. 426. Thus much we must regard as settled upon an immovable foundation of authority in the books of reports, reinforced by innumerable instances of conformity in circuit decisions and transactions of daily occurrence. The cases cited, especially *Gibbes v. Chisolm*, will show that the doctrine stated has been fully discussed upon considerations, moral and legal, with a consideration of cases English and American in law and equity, and with dissent in the court at first (see *Gibbes v. Chisolm*) reconciled subsequently. See *Singleton v. Lewis*. But the question now before us presents a variation from some of our cases, but not from all of them. It is a case where the special credit has expired; and shall the terms, 'with interest payable annually,' be applied to the interest annually accruing at the period of each year following the time set for the payment of the principal? Why should they not so apply when they were so intended by the parties? Undoubtedly they must if the law do not forbid. There can be no law to forbid unless it can be found in the legisla-

tion upon usury. That forbids one 'to take, directly or indirectly, for loan of any moneys, etc., above value of seven pounds for the forbearance of one hundred pounds for one year, and so after that rate for a greater or lesser sum, or for a longer or shorter time.' We have already seen that it is not unlawful—that it is not usurious—to compute interest upon the interest promised to be paid at the expiration of each year within the period of credit expressly stipulated. But this decides the whole question; for it only remains in each case to ascertain what the debtor has promised; whether he intended to promise to pay interest annually beyond the time fixed for the payment of the principal, if forbearance should extend beyond that time; for if he did, there is no more usury in applying the same rule of computation to the year next following than to the next preceding that time. The matter is thus solved: A party promises to pay at a given time \$100, with interest from a given time. At the day of payment, what is due? The principal and interest. From that time, what is forborne? Not the principal only, but all as to which default is made, to wit: the principal and interest; both are equally payable at the time. So it is not the forbearance of \$100 merely, but of more; and where the contract—whether expressly or by legal implication—extends to another succeeding period of time, when the interest is again payable, there is another sum, at

if the promise is to pay at a time fixed beyond twelve months from date, with interest annually, the interest is not payable

such time, in addition to the principal, again forborne. It is at least but seven per cent. per annum, or at that rate, for the forbearance of \$100, or for a greater or less sum. *Singleton v. Lewis* presents a direct authority for the application of this rule of computing interest upon the interest accrued for years succeeding the time fixed for payment of the principal. In that case the credit of the latter expired one year from date, according to the terms used. Yet the promise was: 'with lawful interest, payable annually.' The necessary implication was that the debtor promised to pay interest annually for a period beyond the first year, else the words to that purport would avail nothing whatever, inasmuch as the interest due a year after date would have drawn interest without them. It was said in *O'Neill v. Sims* 'that in all cases in which the compounding of interest, whilst the collection of principal during the whole time is at the discretion of the creditor, seems to savor of usury or may, by abuse, be perverted to the purposes of the usurer.'

"That which touches the question of mutuality in a contract need not affect the question of usury. There can be no illegality for any reason in a promise to pay \$100 with interest at the end of a year, and if not then paid and so long as the same may remain unpaid the interest thereon shall be paid annually; and if this can be gathered from the contract to be the agreement, it is not obvious how the mere fact that the creditor is at liberty to sue for his money in any case will make that usury which is not so

for some other reason. In the case of *Eaton v. Bell*, 7 Eng. C. L. 13, 5 B. & Ald. 34, bankers who advanced money made half-yearly rests and carried the interest to the principal, and computed interest on the aggregate, indulging for a considerable space of time, and this mode of computation being acquiesced in was ratified by the king's bench and held free from the taint of usury. That court referred to and recognized the doctrine of Lord Eldon, in *Ex parte Bevan*, 9 Ves. 223, that a prior contract for a loan for twelve months, to settle the balance at the end of six months, and convert the interest then accrued into principal, would be bad for usury; yet that the same thing actually done at the end of six months, and a stipulation to forbear such aggregate, would be legal. *Kelly on Usury*, p. 48, supposes such *dicta* must be understood as applying to mortgages of real property only. It is finally to be remarked that if at the end of each year a party may give an interest-bearing note for the interest, which notes would be unquestionably valid, there can be no reason why at the inception of the contract he may not provide terms that shall produce the self-same result. Of course an inference that the parties agreed for compound interest may be drawn from their dealings in a like manner as the inference may be drawn from the same source as to simple interest. We adjudge that the plaintiff in the present case was entitled to compute interest upon the interest falling due each year as was allowed in *Singleton v. Lewis*, the terms importing and the agreement

annually after maturity.²⁷ In New Brunswick an obligation to pay the specified rate of interest until the whole sum for which it was given is paid, and specifying that overdue interest is to bear interest at the same rate, carries interest at the stipulated rate on overdue interest, whether it accrued before or after the maturity of the principal.²⁸

§ 378. **Computation, application and effect of partial payments.** The established mode in the court of chancery of computing interest is that whenever a sum in excess of the interest at that time due is to be credited a balance is to be struck.²⁹ And the same rule applies at law. Where partial payments are made on a money demand after maturity the payment is applied in the first place to discharge the interest then due; if the payment exceeds the interest the surplus goes towards discharging the principal; and the subsequent interest is to be computed on the balance of the principal unpaid. If the payment be less than the interest the surplus interest must not be taken to augment the principal, but interest continues on the principal until sufficient payments are made to extinguish the interest to that date. If there be a surplus of such payment it is applied to the principal. A like application is made of all payments.³⁰ This rule applies to payments upon judg-

being at least as clear in the present case as in that."

²⁷ *Westfield v. Westfield*, 19 S. C. 85. See *Wilson v. Kelly*, *id.* 160.

²⁸ *King v. Keith*, 1 New Bruns. Eq. 538, 555.

²⁹ *Chapline v. Scott*, 4 Har. & Millen. 91.

³⁰ *Holecombe v. Holecombe*, 74 N. J. L. 257; *Boggess v. Goff*, 47 W. Va. 139; *Russell v. Lucas*, Hemp. C. C. 91; *Anonymous*, *Martin & Hayw.* 169; *Baker v. Baker*, 28 N. J. L. 13, 75 Am. Dec. 243; *De Ende v. Wilkison*, 2 Pat. & H. 663; *Bann v. Moon*, 1 Hayw. 323; *Van Benschooten v. Lawson*, 6 Johns. Ch. 313, 10 Am. Dec. 333; *Stoughton v. Lynch*, 2 Johns. Ch. 209; *Bettes v.*

Farewell, 15 Up. Can. C. P. 450; *Scanland v. Houston*, 5 Yerg. 310; *Dean v. Williams*, 17 Mass. 417; *Story v. Livingston*, 13 Pet. 359, 10 L. ed. 200; *State v. Jackson*, 1 Johns. Ch. 13, 7 Am. Dec. 471; *Tracy v. Wikoff*, 1 Dall. 124, 1 L. ed. 65; *Penrose v. Hart*, *id.* 378; *Lewis v. Bacon's Legatee*, 3 Hen. & Munf. 89; *Edes v. Goodridge*, 4 Mass. 103; *Meredith v. Banks*, 6 N. J. L. 408; *Houston v. Crutcher*, 31 Miss. 51; *Den's Est.*, 35 Cal. 692; *Backus v. Minor*, 3 *id.* 231; *Gwinn v. Whitaker*, 1 Har. & J. 754; *Lightfoot v. Price*, 4 Hen. & Munf. 431; *Wallace v. Glaser*, 82 Mich. 190; *Betcher v. Hodgman*, 63 Minn. 30, 56 Am. St. 447; *Peyser v.*

ments.³¹ demands upon which interest is allowed only in the discretion of the jury, if it is given,³² and accounts where credits are payments.³³ Rests in an account bearing interest and con-

Myers, 135 N. Y. 599; Clift v. Moses, 75 Hun 517; Wilson's Est., 18 Phila. 56.

In Kentucky if interest at a higher rate than six per cent. is contracted for and one of the obligors dies before the maturity of the note, and payments are made by the surviving obligors, the application thereof to the interest due by the survivors and the remainder to the principal is correct as to them, but erroneous as to the estate of the decedent, which is liable for only six per cent. after the maturity of the obligation. As to his estate the payments should be credited without reference to the amount of interest the living obligors were bound to pay. *Snelling v. Atchison*, 7 Ky. L. Rep. 752.

Where moneys are advanced by one party in the conduct of a business, no time for payment being fixed, and credits are given thereon from time to time, interest is to be allowed on each item in the debit and credit column from the time it was received or paid until the date of final settlement. *Boreing v. McHargue*, 152 Ky. 360.

³¹ *Hodgdon v. Hodgdon*, 2 N. H. 169.

³² *Peebles v. Gee*, 1 Dev. 341.

³³ *Ross v. Russell*, 31 N. H. 376, was an action on an account stated. During seven years after statement of the account nine payments were made upon it, aggregating more than the principal. *Woods, C. J.*, said: "The mode of computing interest upon promissory notes seems to have been perfectly settled by the usages of business and by judicial decisions in many jurisdictions, and

we are not aware of any defections from the rule by any extended usage or any respectable authorities. The authorities in the plaintiff's argument are uniform in support of it, and the unvarying practice of this court is likewise believed to have been in harmony with it. We do not understand the argument of the defendants as drawing the rule into question; but as insisting upon a distinction between the present contract and a promissory note, as well as upon the nature of the contract itself; as, for the reason that the frequency with which the payments were made renders the application of such a rule unreasonably onerous to the party, and therefore not within the general maxim of allowing such interest as shall be just and reasonable. In other words, they claim to have paid the money due on the contract; that the several payments from time to time made in discharge of it should be treated like items of a mutual account, in which the relation of debtor and creditor is not recognized between the parties, except upon final settlement or upon the recurrence of such periodical rests as are allowed by courts sometimes when the justice of the case seems to require it. If this were a correct view of the case the question for the court would be as to what interest ought to be allowed, and what rests established for computing it. * * * It was from the beginning a debt for goods sold to the defendants, and by the admission of the party drawing interest; and the sums of money from time to time received by the plaintiff of the defendants were not of

sisting of numerous items are a proper substitute for computation of interest on each item.³⁴

Where payment is made on a debt before it is due and begins to bear interest the party who so pays is not, without some stipulation to that effect, entitled to interest up to the time the debt begins to bear it.³⁵ If, however, the debt bears interest and a payment is made and accepted before the money is due, it should be immediately applied to the principal and accrued interest which would next become due.³⁶

the nature of items of mutual account, but as the auditor finds, and as clearly appears, payments made toward the extinguishment of the debt, and applicable as payments ordinarily are, or should by law be, towards interest or principal, according to the direction that the law gives to such payments in the silence of the parties in respect to them. We find no ground upon which we can exempt this contract to pay money with interest from the general rule shown to govern promissory notes in the particulars in controversy. The principal was payable on demand, and the interest, of course, also. The plaintiffs had a right to insist upon the payment of interest as often as interest accrued, and could have encountered any attempt of the defendants to apply a payment towards the principal by demand of fresh payment on account of interest. The legal presumption, then, was that the payment was made first in reduction of the claim which did not carry interest; that is, the interest itself." *McGregor v. Gannlin*, 4 Up. Can. Q. B. 378.

The court held in *Gwinn v. Whitaker*, 1 Har. & J. 754, that a payment by a debtor *must* be first applied to extinguish the interest of his debt, and then to the principal; and that a different application is

not in the discretion of the debtor. But in *Pindall v. Bank*, 10 Leigh 484, it was held that a debtor owing a debt consisting of principal and interest, and making a partial payment, has a right to direct its application to so much of the principal in exclusion of the interest, and the creditor, if he receives it, is bound to apply it accordingly. And this was approved in *Miller v. Trevilian*, 2 Rob. (Va.) 1, which decided also that a case is not taken out of the influence of that principle by the circumstance that the party receiving the payment is a fiduciary.

³⁴ *Harding v. Handy*, 11 Wheat. 103, 6 L. ed. 429; *Schieffelin v. Stewart*, 1 Johns. Ch. 620, 7 Am. Dec. 507.

³⁵ *Killilan v. Herndon*, 4 Rich. 609.

³⁶ *French v. Kennedy*, 7 Barb. 452; *Miami Exp. Co. v. Bank of United States*, 5 Ohio 260; *Williams v. Houghtaling*, 3 Cow. 86; *Tracy v. Wikoff*, 1 Dall. 133.

In *Miami Co. v. Bank*, *supra*, eight notes were made October 21, 1820. They were severally payable *on or before* the first day of December, 1823, and succeeding years to 1830, and all were on interest from December 1, 1818. Large payments were made on these notes in 1821 and 1822. *Hitchcock, J.*, said: "On

§ 379. *Same subject.* In the computation, for the purpose of applying a partial payment made after the principal sum is due no notice is taken of the time when such sum fell due. The rests are to be made when the payments are actually made unless the latter fall short of the interest, in which case, as stated, the rest is deferred until the amount paid equals or exceeds the interest due; then the money paid is applied first to discharge the interest, and if there is a surplus it is applied to reduce the

the part of the defendants it is insisted that inasmuch as these notes are payable on or before a particular day, and payments were made before that day, they have a right to compute interest upon the principal sum up to the time of payment and so on from time to time as payments were made. Had the interest been due when the payments were made this rule would not have been so objectionable, although we are not prepared to say it would be correct. In support of the principle contended for the defendants' counsel cite 8 S. & R. 378; 4 Wash. C. C. 92; 17 Mass. 417; 1 Johns. Ch. 13, 7 Am. Dec. 471; 2 Johns. Ch. 209, and a number of other cases. In all these cases, I apprehend, it will be found that none of the payments were made until after the debt was due; at least the contrary does not appear to have been the fact. The cases in Seargent & Rawle, and the one in Washington are upon judgments. In the case before the court no interest was demandable until the notes themselves became due. To adopt this rule, then, would be doing injustice to the plaintiffs. It would be charging them interest before they could be called upon for either principal or interest. To adopt what is called the commercial rule would be equally unjust to the defendants. There would not be the

same injustice in this case, it is true, that there would be where the payments had been long delayed and the debt had been even due for a great length of time. In such case it might so happen that the payment of interest alone would discharge both principal and interest. The case cited from 1 Dallas seems to recognize this principle. But it must be remembered that the notes here were payable on or before a certain day. Although the defendants could not compel payment before the day, yet the plaintiffs might pay before that time and the defendants might be compelled to receive it. They could only be compelled to receive it upon the hypothesis that full payment was made; not only principal, but interest. If, then, partial payment only is made it would seem to be but just that this partial payment should apply as well to interest as principal. We have found but one case reported similar to the one now before the court. This case is reported in 3 Cow. 86. The court say: 'Payment made on an instalment not due and payable should be applied to the extinguishment of principal and such proportion of interest as has accrued on the principal thus extinguished. For instance, a note or bond is given for the payment of \$100 on or before the termination of one year. At

principal.³⁷ But in Rhode Island, where, as remarked, instalments of interest bear interest while in arrear, a rest is to be made at the time the principal should have been paid though no payment is then made. In a recent case a rule was laid down for computing the amount due at any given time on a bond to pay \$7,500 on or before May 7, 1859, with interest from date at the rate of seven per cent. per annum, payable on the 7th of May, 1859, and, after that time, semi-annually until the principal sum be paid. It was held that the seven per cent. instalments should be reckoned with interest on them up to the time when the principal was due and seven per cent. simple interest on the amount then found due and thence until the time to which the amount is to be computed; inasmuch as by force of the words "until the principal sum be paid" the contract rate must be held to govern to the time of actual payment although after maturity.³⁸

The rule which has been stated as applicable where partial payments have been made is intended to, and does, prevent interest being computed upon interest; and of course must be modified where interest payable at particular times and remaining unpaid is allowed to bear interest. In North Carolina the rule for computing interest on a bond on which it is payable annually is to calculate the interest on the bond for the first year, setting the interest aside, and then for the second, third, and so on until the time for the first payment; then calculate the interest on each year's interest to the same time, and apply the payment first to the extinguishment of this interest and the surplus, if any, to the reduction of the principal. If the payment is not sufficient to pay this interest it is applied first to extinguish the interest calculated on each year's interest, and the surplus to the principal interest as far as it will go. If the payment is not enough to satisfy the interest on the interest

the end of six months a payment of \$51.50 is made. This is not applied to sink the principal to \$48.50; but the \$1.50 is applied to the interest of \$50 for six months, and \$50 to sink so much of the principal. At the end of the year there will be

due \$50 of principal and the interest on that \$50 for one year."

³⁷ French v. Kennedy, 7 Barb. 452.

³⁸ Lanahan v. Ward, 10 R. I. 299.

it is set aside, and neither stops nor bears interest.³⁹ Where only the interest on the principal and the deferred interest is a separate demand payments are applied to the delayed annual interest and the secondary interest accrued thereon, and the balance, if any, to the interest accrued on the principal since the last annual period, and then to the principal itself.⁴⁰ If an erroneous rule of computing interest is adopted with the knowledge and consent of the parties, although ignorantly, it is a mistake of law; but if there is a mistake in the calculation it is one of fact.⁴¹

SECTION 9.

SUSPENSION OF INTEREST.

§ 380. **Miscellaneous cases.** Interest given as damages results from the debtor's default. When he owes money and knows the amount he is chargeable with interest from the time when he ought to pay it; but if he is prevented from paying by the act or neglect of the creditor⁴² or by law he is not in default, and no interest is allowable during the period he is so prevented. The fact that when an instalment of interest became due the mortgagor was unable to find the mortgagee until after the period for the payment of interest, in order to prevent the principal from coming due, is not, in the absence of any

³⁹ *Bratton v. Allison*, 70 N. C. 498.

⁴⁰ *Vaughan v. Kennan*, 38 Ark. 114.

⁴¹ *Baker v. Baker*, 28 N. J. L. 13, 75 Am. Dec. 243.

⁴² *Cheney v. Bilby*, 20 C. C. A. 291, 74 Fed. 52; *Hart v. Brand*, 1 A. K. Marsh. 159, 10 Am. Dec. 715; *Thompson v. Fullenwider*, 5 Ill. App. 551.

The maker of a note is bound to know the amount due upon it and cannot claim a reduction of the interest because the payee refused to inform him on that point. *Lamprey v. Mason*, 148 Mass. 231.

Interest is due under a note stipulating therefor until paid and a stipulation in a mortgage that it shall not be due or payable until the performance by the mortgagee of all the conditions in the contract, the latter contemplating that certain work is to be done on the property and that one party shall have it in usable form and the other its equivalent in money, though the performance of such work is delayed by the mortgagee. *Scandinavian Am. Bank v. Washington H. & I. Co.*, 70 Wash. 223.

fraud on the part of the mortgagee, a defense to a foreclosure of the mortgage for the non-payment of the principal.⁴³ Nor is interest suspended on a bond or note which is lost or mislaid unless a tender is made.⁴⁴ The interest on a note payable by an administrator to the estate he represents is not suspended by his appointment as such.⁴⁵ Neither is that result produced by the death of the payee of a note although no administration is granted upon his estate and no guardian appointed for the minor heirs, and it is uncertain whether there are any claims against it, if the maker of the obligation can cause letters of administration to be issued.⁴⁶ But where a person entitled to an annuity removed to parts unknown and made no demand of the administrator for many years till suit was instituted the court refused to allow interest except from the commencement of suit on the ground that its allowance in such case is not matter of positive law, but dependent on the circumstances.⁴⁷ If negotiable municipal bonds are past due the maker may pay them at any time upon reasonable notice to their holders; but a notice published three times within six days prior to the time fixed for their payment does not stop the interest at that date unless the holders had actual notice of the call though the money was on deposit at the place designated in the notice for the payment of the bonds.⁴⁸ The owner of a building holding money owing a bankrupt contractor pending adjustment of claims of subcontractors under mechanics' liens is not liable for interest.⁴⁹

§ 381. **Where payments prevented by legal process.** In case of garnishment, trustee process or restraint by other judicial proceeding, where the indebtedness is of such a character that interest can only be recovered for wrongful detention of the principal sum, the question whether the debtor who is sub-

⁴³ *Dwight v. Webster*, 10 Abb. Pr. 128. See *Cheney v. Libby*, 134 U. S. 68, 33 L. ed. 818; *Cheney v. Bilby*, *supra*.

⁴⁴ *Payne v. Clark*, 23 Mo. 259. See *Heywood v. Hartshorn*, 55 N. H. 476.

⁴⁵ *Rodenbach's App.*, 102 Pa. 572.

⁴⁶ *Gale v. Corey*, 112 Ind. 39

⁴⁷ *Laura Jane v. Hagan*, 10 Humph. 332. See *Daniels v. Benton*, 180 Mass. 559, § 344.

⁴⁸ *Williamson County v. Farson*, 199 Ill. 71, 101 Ill. App. 328; *Read v. Buffalo*, 74 N. Y. 463. See § 214, note.

⁴⁹ *Bond v. Pickett Cotton Mills*, 166 N. C. 20.

jected to such process shall pay interest during the pendency of the suit has been much discussed and variously decided. In the New England states and some others the trustee is not generally chargeable with interest during the time he is under such restraint,⁵⁰ unless the funds have been retained under such circumstances that the court can infer that they have earned interest⁵¹ or the trustee practices unreasonable delay in making his answer for the purpose of obtaining a longer use of the money.⁵²

Where a corporation whose object was not to employ its funds in trade and business was the trustee the court held that it had done its duty if it had the money ready upon the determination of the case to pay such judgment as should be rendered.⁵³ So it has been held that if money be enjoined in the hands of a party who is thereby prevented from making any use of it interest is not allowed.⁵⁴ In an action in New York upon a note it was

⁵⁰ *Newport W. & L. Co. v. Drew*, 141 Cal. 103; *Walker v. Lancashire Ins. Co.*, 188 Mass. 560; *Rennell v. Kimball*, 5 Allen 356; *Prescott v. Parker*, 4 Mass. 170; *Adams v. Cordis*, 8 Pick. 260; *Smith v. Flanders*, 129 Mass. 322; *Huntress v. Burbank*, 111 Mass. 213; *Greenish v. Standard S. Ref.*, 2 Low. 553; *Barnes v. Bamberger*, 196 Pa. 123; *Burr v. Commonwealth*, 212 Mass. 534 (no agreement for interest).

⁵¹ *Gage v. Lowe* (Tex. Civ. App.) 127 S. W. 1178; *San Antonio v. Stevens* (Tex. Civ. App.) 126 S. W. 666; *Norris v. Massachusetts Mut. L. Ins. Co.*, 131 Mass. 294; *Brown v. Silsby*, 10 N. H. 521; *Swansea Mach. Co. v. Partridge*, 25 id. 369; *Pierce v. Rowe*, 1 id. 179; *Abbott v. Stinchfield*, 71 Me. 214; *Woodruff v. Bacon*, 35 Conn. 98. See *Condee v. Skinner*, 40 id. 463.

The intervention of trustee process will not relieve the defendant from interest where judgment was entered on the debt after a defense

on the merits, during the continuance of the attachment, no application having been made to continue the action for judgment until such process was disposed of. *Albion L. Works v. Citizens' Ins. Co.*, 3 Fed. 197.

⁵² *Oriental Bank v. Fremont Ins. Co.*, 4 Met. 1; *Rushton v. Rowe*, 61 Pa. 63.

The exemption of a garnishee from liability for interest only applies where he stands in all respects *rectus in curia* as a mere stakeholder. It never applies when he assumes the attitude of a litigant. *Ray v. Lewis*, 67 Minn. 365.

Liability for interest does not antedate the return day. *Huff v. Citizens' Nat. Bank*, 99 Ark. 97.

⁵³ *Swansea Mach. Co. v. Partridge*, 25 N. H. 391. See *Norris v. Hall*, 18 Me. 332; *Chase v. Manhardt*, 1 Bland. 333.

⁵⁴ *Watson v. McManus*, 223 Pa. 583; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204;

said that a person who is prohibited by injunction from paying the principal will not be compelled to pay interest; and one who causes such injunction is not entitled to it. The debtor in that case supposed he was enjoined, but was not; and not being compelled to retain the money was held liable to pay interest.⁵⁵ But a municipality enjoined from paying money due on a contract for public works, being in possession and enjoyment thereof, will be charged interest on claims at the same rate it would have had to pay for money borrowed to meet such claims when due.⁵⁶ A party who ties up funds in the hands of a trustee may not recover a larger rate of interest than was realized on them.⁵⁷ In the absence of an attachment a garnishee who holds assigned funds must pay interest on them.⁵⁸ Where a garnishee may pay money after garnishment, if a writ is issued upon a false affidavit the defendant may recover interest on the entire sum garnished from the issuance of the writ until it was quashed, though the plaintiff obtained judgment for a part of such sum.⁵⁹ As a general rule after the property of an insolvent passes into the hands of a receiver or of an assignee in insolvency interest is not allowed on the claims against the funds. The delay of distribution is the act of the law; it is a necessary incident to the settlement of the estate.⁶⁰ The creditors, however, have

Wade v. Wade, 1 Wash. C. C. 477; Bowman v. Wilson, 2 McCrary 394; Laurel Springs L. Co. v. Fougeray, 57 N. J. Eq. 318.

⁵⁵ East Tennessee L. Co. v. Leeson, 183 Mass. 37; Stevens v. Barringer, 13 Wend. 639.

⁵⁶ John Agnew Co. v. Board of Education City of Paterson, 83 N. J. Eq. 49.

⁵⁷ Pryor v. Buffalo, 61 N. Y. Misc. 162.

⁵⁸ Cox v. Cronan, 82 Conn. 175.

⁵⁹ Battle v. White (Tex. Civ. App.) 124 S. W. 216.

⁶⁰ Tredegar v. Seaboard A. L. R., 183 Fed. 289, 105 C. C. A. 501; Blair v. Clayton E. Co. (Del.) 77 Atl. 740; Attorney Gen'l v. Supreme Council, 206 Mass. 131; Forschirm

v. Mechanics' & Traders' Bank, 137 App. Div. 149; Atlanta Nat. Bank v. Four States G. Co. (Tex. Civ. App.), 135 S. W. 1135; Thomas v. Western C. Co., 149 U. S. 95, 116, 37 L. ed. 663, 671; Williams v. American Bank, 4 Mete. (Mass.) 317, 323; Thomas v. Minot, 10 Gray 263; Grand Trunk R. Co. v. Vermont Cent. R. Co., 91 Fed. 569; New York S. & T. Co. v. Lombard I. Co., 73 Fed. 537; Guignon v. First Nat. Bank, 22 Mont. 140.

As to the right of an assignee to pay the creditors of the assignor interest on their claims, see Matter of Fay, 6 N. Y. Misc. 462; Bryant v. Russell, 23 Pick. 508, 533; Scott v. Morris, 9 S. & R. 123.

"Where the assets of a corpora-

equal rights; if dividends have been paid some of them others whose claims to dividends have been contested by the assignees are entitled to interest on dividends which should have been paid them.⁶¹ Preferred creditors are not entitled to interest unless the order for the distribution of the proceeds of the property sold under foreclosure provides therefor, the fund being insufficient to pay all the creditors.⁶² But mortgagees whose claims cannot be paid in full out of the proceeds of a receiver's sale may claim interest as against creditors without liens down to the time of the order directing the receiver to make payment.⁶³ Where all the money due when an order of interpleader is made is paid into court the plaintiff is not liable for interest which would have been earned by that money between the time of its payment and the rendition of judgment.⁶⁴ A custodian of a fund who has not paid the money into court pending the determination of a cause in which he has been interpleaded must pay

tion, including stock liability, are less than its indebtedness and it passes into the control of a court of chancery for administration of its assets and for dissolution, the general rule is that interest is not allowed on the claims against the funds. The delay in distribution is the act of the law. It is a necessary incident to the settlement of the estate. The rights of all the creditors are fixed when the court takes jurisdiction of the property. It is therefore inequitable that interest should thereafter be allowed on the claims where certain of the claims draw interest at one rate and others draw interest at a lower rate or not at all." *Gillett v. Chicago T. & T. Co.*, 230 Ill. 373, 415. On the other hand, it has been said that a creditor entitled to interest may not be responsible for the proceedings and should not lose thereby so far as his claim may be paid out of the proceeds of the securities he holds; but he may not demand it out of the debtor's general assets after the ap-

pointment of a receiver unless there should be a surplus to be returned to the stockholders. *First Nat. Bank v. Campbell*, 52 Tex. Civ. App. 445.

Under sec. 57h, Bankruptcy Act 1898, the creditor of a bankrupt holding a security which is liquidated after the adjudication of bankruptcy by being converted into money is entitled to interest up to the time of such liquidation. *In re Kessler & Co.*, 171 Fed. 751. The opinion notes English cases to the contrary.

⁶¹ *Bank v. Lampton*, 104 Miss. 427.

⁶² *St. Louis U. T. Co. v. St. Louis, etc. R. Co.* (Tex. Civ. App.), 146 S. W. 348.

⁶³ *Walter v. Pennsylvania C. S. Co.*, 9 Del. Ch. 374. See the cases cited in the opinion.

⁶⁴ *Clinton B. & I. Works v. First Nat. Bank*, 103 Wis. 117.

All the equities will be weighed in determining whether interest shall be paid on money deposited in

interest during its pendency if the facts justify the presumption that he had the beneficial use of it.⁶⁵

In New Jersey the obligee of a bond, for the purpose of having it collected, made an unconditional assignment. Afterwards, fearing that the assignee would appropriate the money to his own use, the assignor filed a bill in equity to restrain the obligor from paying the money to the assignee and the latter from receiving it. It was held that during the continuance of the injunction the obligor was not chargeable with interest.⁶⁶

In Pennsylvania where the debt is the subject of a foreign attachment interest ceases on the service of the writ if the debtor is ready and willing to pay the debt and interest; but he is not entitled to the benefit of this rule where the delay is caused by his litigiousness and unreasonable conduct. The court suggest that a sure way for the garnishee to avoid liability for interest is to pay the money into court.⁶⁷

In an Ohio case the court said the exemption, by reason of an injunction or garnishment, seems to rest entirely upon the idea of the party having the money actually in readiness to be disposed of as directed by the court, and so being in the custody of the law it is to be regarded as a *quasi*-payment, as if placed on deposit subject to the order of the court; and referring to the case in hand said: "Nothing short of such a state of facts, we think, should have exempted the defendant in this case from the payment of interest during the pendency of the attachment proceedings. The record shows no proof of such a state of facts in this case. It is not pretended that the defendant, either before or during the attachment proceedings, expressed a wish or even a willingness to pay his indebtedness. Nor does it appear that he was ready to pay. If, then, he is in law exempt from the

court in performance of the contract between the parties. *Townsend v. Swallow*, 91 Neb. 564.

⁶⁵ *Elgin, etc. R. Co. v. Northwestern Nat. Bank*, 165 Ill. App. 35.

⁶⁶ *Branthwait v. Halsey*, 9 N. J. L. 3.

⁶⁷ *Jones v. Manufacturers' Nat. Bank*, 99 Pa. 317; *Rushton v. Rowe*,

64 id. 63. See *Fitzgerald v. Caldwell*, 2 Dall. 215, 1 L. ed. 354; *Jackson v. Lloyd*, 44 Pa. 82; *Irwin v. Pittsburgh, etc. R. Co.*, 43 id. 488; *Mackey v. Hodgson*, 9 id. 468; *Updegraff v. Spring*, 11 S. & R. 188; also *Stevens v. Gwathmey*, 19 Mo. 628; *Goodwin v. McGehee*, 19 Ala. 468.

payment of interest during the time of his garnishment for the reason that he was actually holding the money, ready and willing to pay, but was prevented by the attachment proceedings, such state of facts must be presumed. But a presumption is the supposition of a truth grounded on circumstantial or *probable* evidence. It should always be a natural and reasonable deduction from pertinent circumstances and relative existing facts to constitute a legal presumption.”⁶⁸

In Alabama where a bill was filed for the purpose of subjecting a sum of money in the hands of a third person to the payment of a debt due the complainant it was held that if such person is enjoined from using it, and does not offer to bring it into court, but insists upon his right to retain it both against the complainant and his debtor, he should be charged with interest.⁶⁹ In a later case a debtor was enjoined from paying money over to his creditor, but was not restrained from using it in any other manner; it was held that he could only discharge himself from liability for interest by paying the money into court.⁷⁰

In Kentucky a debtor is not excused from paying interest because the fund is attached in his hands by a bill in chancery unless he brings the money into court or shows that he was prevented from using it.⁷¹

In Maryland in a suit upon an injunction bond given upon the granting of an injunction to restrain the payment of a sum of money interest on this sum is recoverable as a matter of right up to the time it was paid into court upon the dissolution of the injunction. This right of action and recovery proceeded on the assumption that the debtor enjoined was exempt from paying interest during the continuance of the injunction.⁷²

In Virginia it is held that, although a debtor is restrained from paying money by attachment, he ought nevertheless to pay interest during the time he was so restrained if he continued to hold the funds.⁷³

⁶⁸ Candee v. Webster, 9 Ohio St. 452. In accord: Shawnee v. Treauiff, 36 Okla. 280.

⁶⁹ Kirkman v. Vanlier, 7 Ala. 217.

⁷⁰ Bullock v. Ferguson, 30 Ala. 227.

⁷¹ Shackelford v. Helm, 1 Dana 338.

⁷² Wallis v. Dilley, 7 Md. 237.

⁷³ Templeman v. Fountleroy, 3 Rand. 434. Carr, J., said: “The last objection to the decree is that it

This is contrary to the rule in Maine. There a stockholder in a bank was denied interest either on ordinary dividends declared on his shares or on money due him by reason of the reduction of the bank's capital stock for a period during which the bank was prevented from paying him the same by attachments of his stocks in suits pending between him and other parties, notwithstanding the money was mingled with that of the bank, which was ready and willing to pay it to him but for the attachments, there being no promise on the part of the bank to pay interest.⁷⁴

A garnishee who admits his indebtedness is liable for interest thereon *pendente lite* unless he deposits the money in court.⁷⁵ There is practical good sense in this rule as applied to debtors generally in all judicial proceedings. A debtor who is in default, and therefore liable to interest when the restraining

gives interest while the money was stayed in the party's hands, and it would have been a contempt to have paid it out. I have examined the case of *Tazewell v. Barrett*, 4 Hen. & Munf. 159, and think the principle decided there directly applicable to the present question. Tazewell owed money to Bland by bond. He was served with a *subpoena* on behalf of Bland's executors, attaching this money in his hands. After this service he received notice that the bond had been assigned. An order of court was subsequently served on him to restrain him from paying the money until further order. It was five or six years before this order was discharged; and in a suit by the assignees of the bond the question was whether during this time Tazewell should pay interest. The court decided that he should. Judge Roane considered the principle as settled by *Hunter v. Spotswood*, 1 Wash. 145, where a sheriff sold attached effects under an order of court directing him to pay the money to Hunter on his giving secur-

ity, which he failed to do; the money remained; and it was said died in the sheriff's hands by depreciation. Yet he was decreed to pay interest. In all such cases I think the safe and sound doctrine is that if the party, though restrained from paying, holds and uses the money (and we must presume he uses if he continues to hold it) he ought to pay interest; and if the holder does not think so he has always the privilege of bringing the money into court; and because if the debtor could under the restraining process hold the debt for years without interest it would offer a strong temptation to him to stir up claims of this kind and to throw all possible obstacles in the way of a decision of the question raised." See *Ross v. Austin*, 4 Hen. & Munf. 502.

⁷⁴ *Mustard v. Union Nat. Bank*, 86 Me. 177.

⁷⁵ *Work v. Glaskins*, 33 Miss. 539; *Smith v. German Bank*, 60 id. 69; *Stephens v. Pennsylvania Cas. Co.*, 135 Mich. 189.

process is served, has no cause to complain that that liability continues; for the process, in restraining him for the time being, operates in harmony with his own choice. When the course of the proceedings admonishes him that the money may be required so soon that he can make no further beneficial use of it the option to pay it into court is equivalent to the option to pay to his creditor, and having this election from the first it cannot be said that the law compels him to keep the money at all; he is not prevented for any time whatever from making payment.⁷⁶

§ 382. **Where war prevents payment.** War suspends all commercial intercourse between belligerent nations, and the citizens or subjects of each are enemies of the citizens or subjects of the other. Their contracts are prevented by law from being performed while this hostile relation subsists. Interest cannot be allowed on money becoming due during a war between enemies, the payment of which could not be made by reason of such suspension of commercial intercourse, because the debtor is not in fault for the delay.⁷⁷ On a bond given in one of the American states to a British creditor before the war of the revolution, and confiscated, it was held that the creditor was not entitled to interest except from the time the debt was demanded after the treaty of peace; but that it ought to be disclosed by plea that the creditor was beyond sea and that the debtor had always been ready since the treaty to pay, and is now ready; in verification of which he should pay the money into court.⁷⁸ Courts are powerless to abate interest on a judgment for any time on the ground that the creditor was within the lines of the enemy.⁷⁹

Interest on loans made previous to, and maturing after, the

⁷⁶ See *Greenish v. Standard S. Ref.*, 2 Low. 553; *McKnight v. Chauncey*, Selden's Notes (N. Y.), 97.

A vendee who may remove all question concerning his right to a chattel by paying according to his contract is not relieved from liability for interest because of the pendency of a replevin suit brought by the vendor. *Johnson v. Crawford*, 144 Fed. 905.

⁷⁷ *Bean v. Chapman*, 62 Ala. 58; *Brewer v. Hartie*, 3 Call 21; *Duniston v. Imbrie*, 3 Wash. C. C. 396; *Birdley v. Eden*, 3 Har. & Millen. 167. See *Dulany v. Wells*, id. 20; *Court v. Vanbibber*, id. 140.

⁷⁸ Anonymous, *Martin & Hayw.* 363. See *Sheppard v. Taylor*, 5 Pet. 675, 8 L. ed. 269; *Selden v. Preston*, 11 Bush. 191.

⁷⁹ *Rowe v. Hardy*, 97 Va. 674.

commencement of a war ceases to run during the subsequent continuance of it although it was stipulated for in the contract.⁸⁰ But interest which accrued during the war of the revolution on a bond to a citizen of Maryland by a principal and surety, the former a British subject and the latter a citizen of that state, was held to be recoverable in an action against the surety.⁸¹ The rule that interest is not recoverable between alien enemies during a war between their respective countries was held to be applicable to debts between citizens of states in rebellion and citizens of states adhering to the national government in the late civil war; but it only applied when the money was to be paid to the belligerent directly.⁸² It cannot apply when there is a known agent, resident within the same jurisdiction with the debtor, appointed to receive the money; in such a case the debt will draw interest.⁸³

§ 383. **Tender stops interest.** Tender has been considered in a broader sense in another connection.⁸⁴ It is only needful here to explain when admissible, in what it consists, and its effect to stop interest. The theory of charging interest after a debt is due and ought to be paid is that the debtor is in default; that he might voluntarily pay, and should be charged with interest because he does not, but withholds the money without the creditor's consent; hence a tender, being an offer of payment, has the effect of preventing all the consequences of the default; it stops interest and protects the party against costs; for, if the tender is refused, it is not his, but the creditor's, fault that the debt remains unpaid.⁸⁵ The tender and refusal only cause a suspension of interest and exempt the debtor from costs.

⁸⁰ *Brown v. Hiatts*, 15 Wall. 177, 20 L. ed. 128; *Lush v. Lambert*, 15 Minn. 416, 2 Am. Rep. 142.

⁸¹ *Paul v. Christie*, 4 Har. & McH. 161; *Bean v. Chapman*, 62 Ala. 58.

⁸² *Pillow v. Brown*, 26 Ark. 240; *Ward v. Smith*, 7 Wall. 447, 19 L. ed. 207; *Lush v. Lambert*, *supra*; *Bigler v. Waller*, Chase's Dec. 316; *Brown v. Hiatts*, 15 Wall. 177.

⁸³ *Ward v. Smith*, 7 Wall. 447, 19 L. ed. 207; *Williams v. State*, 37

Ark. 463; *Roberts v. Cocke*, 28 Gratt. 207.

For circumstances under which trustees were relieved from paying interest during the civil war, though residing in the southern states, where their creditors or *cestui que trust* also resided, see *Lacy v. Stemper*, 27 Gratt. 42; *Brent v. Clevinger*, 78 Va. 12.

⁸⁴ §§ 260-278.

⁸⁵ *Shoop v. Fidelity & Deposit Co.*

Where the maker of a promissory note paid money into the hands of an agent to secure it and the latter tendered the money to the holder of the note on condition of having it delivered up, the note being mislaid, this condition was not complied with, and the agent afterwards became bankrupt with the money in his hands, the maker was still responsible on the note, but interest was not recoverable after the time of the tender.⁸⁶

§ 384. **Tender not allowed for unliquidated damages.** A tender can only be made of a debt which is certain in amount; it is not available at common law where the demand consists of unliquidated damages.⁸⁷ The debt must also be certain to justify interest by reason of the debtor's default. The theory of the law is that the debtor is able by his own voluntary act to prevent such interest. His act can never be more than a tender, without the concurring act of the creditor in accepting the money. A

of Maryland, 124 Md. 130; *Neff v. Heimer*, — Tex. Civ. App. —, 163 S. W. 140; *Kiefert v. Maple Valley Mut. Home Fire Ins. Co.*, 158 Wis. 340; *Neely v. Williams*, 149 Fed. 60, 79 C. C. A. 82; *Wadleigh v. Phelps*, 149 Cal. 627; *Glos v. Ambler*, 218 Ill. 269; *Hibernia Bank & T. Co. v. Smith*, 89 Miss. 298; *Tetley v. McElmurry*, 201 Mo. 382; *Farmers' & Traders' Bank v. Kelsay*, 186 Mo. 648; *German-Am. Bank v. Martin*, 129 Mo. App. 484; *Reitz v. Hayward*, 100 Mo. App. 216; *Heal v. Richmond County Sav. Bank*, 127 App. Div. (N. Y.) 428; *Supreme Lodge v. Selby*, 153 N. C. 203; *Pittsburg P. G. Ins. Co. v. Leary*, 25 S. D. 256, 31 L.R.A. (N.S.) 746; *Baldwin v. San Antonio* (Tex. Civ. App.), 125 S. W. 596; *Ward v. Thorndyke*, 65 Wash. 11; *Murray v. O'Brien*, 56 Wash. 361, 28 L.R.A. (N.S.) 998; *Puget Sound I. Co. v. Frankfort, etc. Ins. Co.*, 52 Wash. 124; *Eau Claire v. Eau Claire W. Co.*, 137 Wis. 517; *Bremyer v. School Ass'n*, 86 Kan.

644; *Sanders v. Mosbarger*, 159 Mo. App. 488; *Patterson v. Sharp*, 41 Cal. 133; *Raymond v. Bearnard*, 12 Johns. 274, 7 Am. Dec. 317; *Jackson v. Law*, 5 Cow. 248; *Woodruff v. Trapnall*, 12 Ark. 640; *Wheeler v. Woodward*, 66 Pa. 158; *Dixon v. Clark*, 5 C. B. 365; *Waistell v. Atkinson*, 3 Bing. 389; *Carley v. Vance*, 17 Mass. 389; *Cornell v. Green*, 10 S. & R. 14; *Johnson v. Triggs*, 4 G. Greene, 97; *Freeman v. Fleming*, 5 Iowa 460; *Shant v. Southern*, 10 id. 415; *Mohm v. Stoner*, 11 id. 30; *Hayward v. Munger*, 14 id. 516; *Dooley v. Smith*, 13 Wall. 604, 20 L. ed. 547; *Wilcox v. Richmond & D. R. Co.*, 3 C. C. A. 73, 52 Fed. 264, 17 L.R.A. 804.

A tender of the amount due does not suspend interest if the debtor subsequently assails the validity of the demand and seeks to have it canceled. *Tishuingo Sav. Bank v. Buehanan*, 60 Miss. 496.

⁸⁶ *Dent v. Dunn*, 3 Camp. 290.

⁸⁷ *Cilley v. Hawkins*, 48 Ill. 308; *Gregory v. Wells*, 62 id. 232; *Dearle*

tender, however, being all the debtor can do towards performance of the promise to pay has the effect of preventing damages for non-performance. On principle, a party should have a right by tender to prevent default wherever in the absence of such tender interest would be chargeable on the ground of default.⁸⁸ In New Hampshire the plaintiff in a tort action will not generally be allowed interest if he recovers less on the trial than the defendant offered him although the offer was not strictly a tender.⁸⁹ The interest is allowed in such a case as damages following the delay in obtaining redress, and if the wrong-doer is not responsible for the delay he certainly ought not to be called upon to compensate the other party for a loss he has brought upon himself.

§ 385. **When tender may be made.** A tender is the offer of performance by a party who is under a contract obligation to pay money. It should, to prevent interest altogether, be made on the day the money becomes due; the offer is then of the very thing promised, and, if accepted, there is a specific performance of the contract. In Massachusetts a tender afterwards could not be pleaded and was unavailing as a defense, until the rule was changed by statute.⁹⁰ And this is the doctrine of the English courts. There it is said a plea of tender is in truth a plea of performance of the contract as far as the party contracting can perform; and where money is to be paid the debtor cannot pay it unless the creditor will receive it. A tender, therefore, at the time it is due is sufficient because it is payment so far as the debtor can pay, but a tender afterwards is too late.⁹¹ Nothing can discharge a covenant to pay on a certain day but actual payment; acceptance afterwards may have the effect of discharge as accord and satisfaction.⁹² But neither in England

v. Barrett, 2 Ad. & E. 82; Green v. Shurtliff, 19 Vt. 592; Dunning v. Humphrey, 24 Wend. 31. See McDowell v. Keller, 4 Cold. 258; Hopson v. Fountain, 5 Humph. 140.

⁸⁸ In *Dearle v. Barrett*, 2 Ad. & E. 82, it is assumed, or referred to as true, that a tender is pleadable to a *quantum meruit*. See note *b* to this case.

⁸⁹ *Thompson v. Boston & M. R. Co.*, 58 N. H. 524.

⁹⁰ *City Bank v. Cutter*, 3 Pick. 414; *Suffolk Bank v. Worcester Bank*, 5 id. 106; *Dewey v. Humphrey*, id. 187; *Maynard v. Hunt*, id. 240; *Frazier v. Cushman*, 12 Mass. 277.

⁹¹ *Dobie v. Larkan*, 10 Ex. 776.

⁹² *Poole v. Tumbridge*, 2 M. & W.

nor Massachusetts is a tender of the debt after it is due without effect. The denial of the right to plead such a tender is technical, and the benefit of it is afforded in another way. The tender, or even an offer to pay without going far enough to constitute a tender, may so negative default as to take away the right to damages or any penalty for detention of the money. A bank was by statute subjected to additional damages at the rate of twenty-four per cent per annum for the time it should refuse or delay payment; and demand for payment of a large sum of its bills was made, which was partially complied with; but the amount required, exceeding the specie in the vaults of the bank, there was a deficiency in the payment which was tendered after suit brought, on the day after the demand, and an additional sum for interest and costs. This tender was refused; after which the money was deposited in another bank subject to the order of the creditor and notice thereof given to such creditor. Under a rule of the trial court the money was brought into court and taken by the plaintiffs. The court, by Parker, C. J., said: ⁹³ "The tender, though not technically good as a defense,

223. In this case *Johnson v. Clay*, 7 Taunt. 486, is doubted.

In *Hume v. Peploe*, 8 East 168, Lord Ellenborough, C. J., said: "In strictness, a plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract; and we cannot now suffer a new form of pleading to be introduced different from that which has always prevailed in this case. The damages, indeed, have sometimes varied, as the rate of interest has been changed. And though the courts have adopted the practice of referring it to their officers to compute principal and interest on bills of exchange, instead of sending it to a jury to make the same computation, yet it is a matter always in the discretion of the court, and not to be obtained without motion."

⁹³ *Suffolk Bank v. Worcester Bank*, 5 Pick. 106. The chief justice cites the practice in England in sup-

port of the exemption of the debtor from liability to pay interest in such cases. Referring to *Dent v. Dunn*, 3 Camp. 296, he says: "The action was brought by Dent against the executrix of Dunn on two promissory notes given by the testator in his life-time. It appeared that after his death his executrix had given her agent a sum sufficient to take up the notes. The agent offered to pay the principal and interest on having the notes delivered up to him, but they were mislaid, and so the money was not paid. The agent failed with the money in his hands. Afterwards the notes were found and the action brought. These facts were relied upon in defense of the action, but not admitted as such. A question then arose, to what time the interest should be made up. Lord Ellenborough said he thought interest ought to be stopped from the time of the offer to pay. Interest, he said, is a compensation

is a legal equitable shield against the just but severe penalty for neglecting and refusing to redeem their bills from the

agreed to be paid for the use of money forborne by the lender at the borrower's request. It is more frequently recovered in the shape of damages for money improperly retained by the debtor contrary to the request of the creditor. But in neither of these ways can interest run after an offer to pay the principal upon a reasonable condition, which the party to receive refuses, or is not in a situation to fulfill. And a verdict was taken for the principal and interest down to the tender. Here, it will be observed, was no legal tender. The offer to pay was after the notes had become due, and a condition was insisted on, which, however reasonable, would have rendered the offer nugatory as a tender; but yet it had its effect, because the money was not unlawfully detained, but it was the negligence of the plaintiff in regard to the notes which prevented the payment.

"So in the case before us there was no legal tender but an offer to pay the money on the same day that the action was commenced, together with a surplus sufficient to cover the interest or penalty which had accrued, and upon the refusal to receive, the money was deposited in a bank for their use, with a notice that they might at any time draw it out. The case is more favorable for the defendants than the one cited, and it differs also in this, that there was no contract for interest, so that it could be recovered only as damages for improper detention; whereas in the case cited the promissory notes themselves were without doubt upon interest, it being stated that the offer by the agent was to

pay the principal and interest. There, too, the money was lost so that the payment of the principal itself was disputed. Here the principal and interest due at the time of the offer and the costs which had accrued were at all times after the offer at the disposal of the plaintiffs. The court of common pleas in England have adopted the same just principle, and applied it more extensively as appears by the case of *Zeevin v. Cowell*, 2 Taunt. 203. The case was that after the action was commenced, and before the declaration was made out, the defendant offered to pay the debt and costs which the plaintiff refused to take, and proceeded to make out his declaration. The motion was that the defendant should be permitted to pay into court the debt and costs up to the time of the offer to pay; which was allowed and the plaintiff was made to pay the costs of the application and all subsequent costs. And in the case of *Roberts v. Lambert*, 2 Taunt. 283, the same order was made. This rule is exceedingly just, as it goes to repress the spirit of litigation, and punishes the party for his vexatious proceedings. These cases fully justify us in the conclusion we have come to in the present case, that the money brought in under the rule was sufficient; which having been taken out by the plaintiffs, judgment must be for the defendants for costs after that time." *Goff v. Rehoboth*, 2 Cush. 475. See *Jeter v. Littlejohn*, 3 Murph. 186; *Cornell v. Green*, 10 S. & R. 14; *Heywood v. Hartshorn*, 55 N. H. 476.

In *Donohue v. Chase*, 139 Mass. 407, the rates of interest stipulated for in mortgage notes varied from

time when they would have redeemed them but for the refusal of the other party to receive. We think, too, that the plaintiffs ought not to recover even simple interest after they might have received their money and refused, under the circumstances of this case. The bank bills or notes sued were promises to pay money on demand, without any engagement to pay interest. Interest was no part of the contract; but after demand and non-payment interest would be recovered in the form of damages for detention. This claim of damages might be answered before a jury by proving that it was the fault of the plaintiffs themselves that they had not received their debt and that the money had been placed subject to their order so that the debtor could not put it to profitable use. If there were any question about the amount due the case might be different; but where the sum is certain and the creditor refuses to receive the debt, which is not by the terms of the contract on interest, and the debtor deprives himself of the use of the money, putting it under the control of the creditor without any condition, we can see no principle of law or justice which will oblige the debtor to pay interest subsequently." It has also been held in Kentucky that a tender after the day fixed for payment is not good.⁹⁴

seven to twelve per cent. The mortgagor made an offer to pay the sum due, which was refused unless compliance was made with an illegal demand of the mortgagee. The court observe that the debtor did all that was necessary to be done before receiving the creditor's account. He was in fault, and it would be inequitable to allow him to avail himself of his own wrongful act to secure the payment of an excessive rate of interest. The offer to pay did not amount to a legal tender, but the court reduced the subsequent interest to the legal rate.

The statute of 3 and 4 Wm. 4, c. 42, § 21, enacts: "That it shall be lawful for the defendant in all personal actions (with certain exceptions) by leave of any of the said Suth. Dam. Vol. I.—78.

superior courts where such action is pending, or a judge of any of said superior courts, to pay into court a sum of money by way of compensation or amends, in such action and under such regulations as to the payment of costs and the form of pleading as the said judges or such eight or more of them as aforesaid shall, by any rule or orders by them to be from time to time made, order and direct."

⁹⁴ *Huston v. Noble*, 4 J. J. Marsh. 130. See *Gould v. Banks*, 8 Wend. 562, 24 Am. Dec. 90; *Day v. Lafferty*, 4 Ark. 450.

In *Dixon v. Clark*, 5 C. B. 365, *Wilde, C. J.*, said: "In actions of debt and *assumpsit*, the principle of the plea of tender, in our apprehension, is that the defendant has been

§ 386. *Same subject.* After a debt has become due an action accrues for the recovery of damages; the whole demand is one

always ready (*toujours prist*) to perform entirely the contract on which the action is founded; and that he did perform it as far as he was able by tendering the requisite money; the plaintiff himself precluding a complete performance by refusing to receive it. And as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prist*), but must be accompanied by a *profert in curiam* of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt (for that would be inconsistent with the *uncore prist* and *profert in curiam*), yet he will answer the action, in the sense that he will recover judgment for his costs of defense against the plaintiff.—in which respect the plea of tender is essentially different from that of payment of money into court. And, as the plea is thus to constitute an answer to the action, it must, we conceive, be deficient in none of the requisite qualities of a good plea in bar. With respect to the averment of *toujours prist*, if the plaintiff can falsify it he avoids the plea altogether. Therefore, if he can show that an entire performance of the contract was demanded and refused at any time when, by the terms of it, he had a right to make such a demand, he will avoid the plea. Hence if a demand of the whole sum originally due is made and refused a subsequent tender of part of it is bad, notwithstanding that, by part payment, or other means, the debt may have been reduced, in the *interim*, to the sum tendered. And this is the

principle of the decision of *Cotton v. Godwin*, 7 M. & W. 147. If, however, the demand were of a larger sum than that originally due under the contract, a refusal to pay it would not falsify the *toujours prist*, even though the amount demanded were made up of the sum due under the contract, and some other debt due from the defendant to the plaintiff. And this is the principle of the decisions of *Brandon v. Newington*, 3 Q. B. 915, and *Hesketh v. Fawcett*, 11 M. & W. 356, which appear to overrule *Tyler v. Bland*, 9 M. & W. 338.

“This principle, however, we think, is only applicable where the larger sum is demanded *generally*, and can hardly be enforced where it is explained to the defendant at the time how the amount demanded is made up; for, in such case, the transaction appears to be nothing less than a simultaneous demand of the several debts so as to falsify the averment of *toujours prist* as to each. But, besides the averment of *readiness* to perform, the plea must aver an actual *performance* of the entire contract on the part of the defendant as far as the plaintiff would allow. And it is plain that where, by the terms of it, the money is to be paid on a future day certain, this branch of the plea can only be satisfied by alleging a tender *on the very day*. And this is the principle of the decisions of *Hume v. Peploe*, 8 East 168, and *Poole v. Tumbridge*, 2 M. & W. 223. It is also obvious that the defect in the plea in this respect cannot be remedied by resorting to the previous averment of *toujours prist*. Consequently a plea by the acceptor of

for their recovery, the right to which is given by law for failure to perform the contract. A tender then is not an offer of strict performance, but of damages; a tender of the full amount to which the creditor is entitled, if received, is accord and satisfaction; but since the damages are certain in amount, consisting of the debt and interest, the general American doctrine is that a tender may be made after the debt is due and may be pleaded as such. To be sufficient, however, it must include the interest up to date it is made.⁹⁵ In cases of promises to pay in chattels or in paper money of fluctuating value an effectual tender in kind of the thing stipulated to be paid, can only be made on the day appointed for payment.⁹⁶ It is only upon debts due that a tender will stop interest; a tender to pay a debt bearing interest before it is due will not have that effect.⁹⁷ The creditor has a right to keep his money at interest according to the contract.⁹⁸

a bill or the maker of a note of a tender *post diem* is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding that the plea alleges that the defendant was always *ready* to pay, not only from the time of the tender (as the plea was in *Hume v. Peploe*), but also from the time when the bill or note became payable. On the same reasoning it appears to us that this branch of the plea can only be satisfied by alleging a tender of the whole sum due under the contract, for that a tender of a part of it only is no averment that the defendant performed the whole contract as far as the plaintiff would allow. If it be said that the plea of tender is, in effect, only in preclusion of damages subsequent to the tender, and that it would be unjust to give the plaintiff those damages which have been incurred merely in consequence of his refusal to receive the money tendered, the answer is that the same argument might be applied

to the instance of the tender *post diem* of the amount of a bill or note with the interest then due; but that, in each case, the defendant is unable to allege that he has performed the terms of his contract as far as the plaintiff would allow him, and is, therefore, disabled from pleading a tender."

⁹⁵ *Ordway v. Farrow*, 79 Vt. 192, 118 Am. St. 951; *Tracy v. Strong*, 2 Conn. 659; *Stadwell v. Cooke*, 38 id. 549; *Ashburn v. Poulter*, 35 id. 553; *Patterson v. Sharpe*, 41 Cal. 133; *Haman v. Dimmick*, 14 Ind. 105; *Livingston v. Harrison*, 2 E. D. Smith 197; *Rudolph v. Wagner*, 36 Ala. 698; *San Antonio v. Alamo Nat. Bank* (Tex. Civ. App.), 155 S. W. 620.

⁹⁶ *Powe v. Powe*, 42 Ala. 113; *Toulmin v. Sager*, id. 127, 94 Am. Dec. 633.

⁹⁷ *Ellis v. Craig*, 7 Johns. Ch. 7; *Mitchell v. Cook*, 29 Barb. 243. See *Wood v. Howland*, 127 Iowa 394.

⁹⁸ *Id.*; *Saunders v. Frost*, 5 Pick. 259, 266; *Kingman v. Pierce*, 17 Mass. 247.

In a Wisconsin case the question arose whether a tender can be made before an interest-bearing debt becomes due by tendering interest also to the maturity of the debt. The court remarked that the question was somewhat novel in its character, and upon which authorities are not numerous, owing doubtless to the rarity of the occurrence as matter of fact. It is seldom, at least in modern times, that the debtor offers to pay before the debt is due, including interest up to the time it is due; still more seldom, such offer being made, that the creditor refuses it. The two Massachusetts cases seem to rest the decision upon the right of the creditor to keep his money at interest according to the contract. But where the debtor tenders the whole amount of the interest which could accrue up to the time of payment fixed by the contract this reason would seem to fail. But can it not be said that the creditor may have an interest in keeping his money invested upon security rather than to have it in his own hands? Can it not be said that he may insist on it, even arbitrarily or obstinately, and without advantage to himself, so long as the contract provides for? It would seem so, unless the rule of the civil law is to prevail, which was that the day of payment was fixed for the convenience of the debtor only; that he might not be compelled to pay before that time, leaving him at liberty, however, to do so if he chose.⁹⁹ A tender should be made before suit brought though it may be made after the creditor has directed it to be brought,¹ and even taken the initiatory steps.² But under a rule of court the defendant may pay into court the amount he acknowledges to be due.³ A tender made in a bill for the specific performance of a contract to convey land and an offer to bring the money due into court whenever that should be directed is sufficient to stop interest,⁴ the entire obligation being covered.⁵

⁹⁹ Moore v. Cord, 14 Wis. 213. See McHard v. Wheteroft, 3 Har. & McH. 85; Tillon v. Britton, 9 N. J. L. 120.

¹ Hubbard v. Chenango Bank, 8 Cow. 88; Fishburne v. Sanders, 1 N. & McC. 242; Winningham v. Redding, 6 Jones 125.

² Knight v. Beach, 7 Abb. Pr. (N.

S.) 241; Retan v. Drew, 19 Wend. 304; Bennett v. Bayes, 5 H. & N. 391.

³ Murray v. Windley, 7 Ired. 201, 47 Am. Dec. 324.

⁴ Cheney v. Bilby, 20 C. C. A. 201, 74 Fed. 52.

⁵ Wood v. Howland, 127 Iowa 394.

The law of tender has been more or less regulated by statute in nearly all the states, and a tender is generally allowed after suit commenced; but when so made the costs that have accrued up to that time must also be tendered.⁶ The tender may be made generally for the debt, interest and costs, and will be sufficient if the amount is large enough; but a tender for the debt, not mentioning costs, will not be good, though the plaintiff recover no more than is paid into court; for tenders are *stricti juris*.⁷ If at the time of the tender the debtor has no knowledge of the commencement of a suit and the creditor does not inform him thereof, nor make any claim of costs, but refuses to accept the amount tendered solely on account of its insufficiency to pay the *debt*, it may be regarded as a waiver of all claims for costs.⁸ After judgment the only way to make a tender effectual is to bring the money into court and move for and obtain a rule to enter satisfaction upon the record.⁹ But where a defendant, on being taken on execution under a *ca. sa.*, tendered the debt and costs to the plaintiff's attorney and required him to sign his discharge, which such attorney refused to do until the debtor paid an independent collateral demand for costs, it was held that the plaintiff and his attorney were liable to an action on the case for such refusal.¹⁰

SECTION 10.

PLEADING.

§ 387. **How interest claimed in pleading.** It is a rule of pleading that those damages which are implied by law or necessarily result from the facts stated as the cause of action need not be specially declared for.¹¹ Under this rule interest at the legal rate, which may be claimed as damages for nonpayment of money when due, may be recovered without being specially

⁶ Freeman v. Fleming, 5 Iowa 460;
Emerson v. White, 10 Gray 351.

⁷ Shotwell v. Denman, 1 N. J. L.
174; State Bank v. Holecomb, 7 id.
193. See Gammon v. Stone, 1 Ves.
Sr. 339.

⁸ Haskell v. Brewer, 11 Me. 258;
Hull v. Peters, 7 Barb. 331.

⁹ Jackson v. Law, 5 Cow. 248.

¹⁰ Crozer v. Pilling, 6 D. & R. 129.

¹¹ Padley v. Catterlin, 64 Mo. App.
629. See ch. 10.

claimed in pleading.¹² Where, in an action for conversion, the damages asked largely exceeded the recovery, it was proper to

¹² *Haley v. Supreme Court of Honor*, 139 Ill. App. 478; *Moll v. Sanitary Dist.*, 131 id. 155 (in eminent domain); *Meyer v. Johnson*, 122 id. 87; *Manchester F. Assur. Co. v. Fitzpatrick*, 120 id. 535; *Fremont County v. Fremont County Bank*, 145 Iowa 8; *Travelers' Ins. Co. v. Henderson C. Mills*, 120 Ky. 218, 117 Am. St. 585; *Houston v. Lubbock*, 35 Tex. Civ. App. 106; *Spokane v. Costello*, 42 Wash. 182; *Larson v. Anderson*, 122 Minn. 39; *Ansley v. Jordan*, 61 Ga. 482; *Tucker v. Page*, 69 Ill. 179; *McConnell v. Thomas*, 3 Ill. 313; *Washington v. Planters' Bank*, 1 How. (Miss.) 230, 28 Am. Dec. 333; *Grand Lodge A. O. U. W. v. Bagley*, 164 Ill. 340. *Contra*. *Farrell v. Farmers' Mut. F. Ins. Co.*, 66 Mo. App. 153; *Davis v. Creamer*, 179 Mo. App. 374; *Rawls v. American Cent. Ins. Co.*, 97 S. C. 189; *Higgins v. J. I. Case Threshing Mach. Co.*, 95 Neb. 3; *Morley v. St. Joseph*, 112 Mo. App. 671; *South Omaha v. Ruthjen*, 71 Neb. 545 (if in excess of the demand of the complaint); *Peterson v. Mannix* (Neb.) 90 N. W. 210. But when interest is included in the agreement it is part of the debt agreed to be paid, and the interest promise and its breach must be alleged. In *Chinn v. Hamilton*, Hemp. C. C. 438, debt was brought on a promissory note for \$3,919.53, to be paid one day after date, with interest at ten per cent. from date until final payment. In the declaration the plaintiff demanded the sum of \$3,919.53, and assigned as a breach the non-payment of that sum, made no averment in relation to the interest, and concluded the breach in these words: "to the damage of the plaintiff, \$2,000." And the court

say: "In actions upon obligations, or promissory notes for the payment of money, containing no stipulation in regard to interest, it has not been deemed necessary to demand in the declaration the interest that may be due, nor to negative its payment in the assignment of breaches. The uniform and settled practice is to declare for the debt alone, and interest is recovered as damages for its detention. Upon the failure to pay money at the time it is due the creditor is justly and legally entitled to be remunerated by the debtor for the damages he has sustained by the fault of the debtor. The law has declared the amount of these damages, and fixed them at the rate of six per cent. per annum, and allowed the parties to the contract to vary this rate, so that in no case shall it exceed the rate of ten per cent. per annum upon the amount loaned or withheld. In lieu of the damages that the creditor would be entitled to recover for the unjust detention of the debt the law has given interest; and although the law denominates it interest, it is in fact the damages which the creditor has sustained. He is therefore always allowed to recover the interest due at the rendition of the judgment as damages for the detention of the debt. But in cases where the parties stipulate in the contract for the payment of interest before the debt falls due, the interest cannot be regarded in the light of damages, but constitutes a part of the contract itself. The interest in this case accrues by the stipulations of the contract, and not as a legal consequence of a breach. It cannot be in the nature of damages, for it arises before any

allow interest although it was not specifically demanded. "Since it was immaterial whether the interest was recovered as dam-

infracton of the contract or failure to perform it. * * * The promise to pay the debt, and the promise to pay interest from the date of the contract, are two separate, distinct promises or undertakings; one may be performed without performing the other. In declaring upon a covenant or a parol contract in writing containing various undertakings, the plaintiff has his election to complain of the breach of one or of all of the covenants or promises. If he complains of the breach or the non-performance of one only of the covenants or promises, he thereby admits that the others have been performed. The intendment is to be made most strongly against the pleader, and as he complains of the breach of only one of the covenants or obligations, the presumption arises that the others have been performed. It, at all events, waives any right of action upon them; for, having sued upon the contract once, he is forever barred from suing again. It will not be allowed to split up the various covenants or promises contained in one contract and sue upon each of them—he can have but one recovery upon one contract, which then becomes merged in the judgment of the court.

"If the foregoing remarks are well founded the declaration is not defective. Can the plaintiff in this case recover interest after the debt becomes due; and if he can, at what rate? He is entitled to recover interest as damages for the detention of the money after it became due, and where the contract is silent the law fixes the rate at six per cent. per annum; but when the contract fixes the rate of interest at ten per cent.,

the law declares that to be the rate. In this case the contract is set out in the declaration, and fixes the rate of interest at ten per cent. per annum; consequently the plaintiff is entitled to recover interest at the rate of ten per cent. per annum. The fact that the parties have agreed upon the rate of interest does not change the nature of interest after the debt becomes due; but it is still justly regarded in the nature of damages for the failure to pay at the time stipulated by the parties."

But in *De Groot v. Darby*, 7 Rich. 120, *Whitner, J.*, said: "The plaintiff claims interest in this case. The action was for goods sold and delivered. The declaration contained no count for interest, and although it did contain the usual count for money had and received, the bill of particulars, we are informed in the course of the argument, was for goods alone, and without any item for interest. It cannot be said, in the ordinary transaction of the sale of goods, that interest is an incident of the contract itself. The first inquiry is whether there was a special agreement to pay interest, *eo nomine*, or to do something towards the payment of an admitted sum. That would imply a promise; for in no just sense can it be maintained that the interest constitutes a part of the price of the goods. I do not understand this principle to be drawn into controversy. Cases in our own state are numerous in reference to such contracts as carry interest with them. *Harp.* 83; 1 *Hill* 393; 3 *McCord* 505; 2 *Bailey* 394. The mere statement of such a proposition, it would seem, discloses the necessity of its appearance in pleading in

ages or as interest it was equally immaterial whether it was demanded in the prayer of the complaint as the one or the other."¹³ If the action is brought upon an express promise to pay money and the contract set out includes a promise to pay interest at a rate which it is lawful to stipulate for until the debt is paid, a general breach with an *ad damnum* large enough to cover the principal and interest will entitle the plaintiff to

some form. The very object of all pleading is to advertise the party sought to be charged of the matter or thing claimed. Hence the necessity of a declaration; and when according to our forms and the nature of the demand it might otherwise be too general, hence the propriety of a bill of particulars. The law abhors surprise and undue advantage, and therefore requires all reasonable certainty. In this particular case the party would be wholly at sea if he may be made liable for that which is outside of the contract set forth, which in no way springs from it as an incident, which, though susceptible of allegation, is neither set out by special count nor notified in the bill of particulars. Such a rule would be obnoxious to the double implication of surprising the defendant and of giving to the plaintiff what he has not asked for. On the contrary, that is but a reasonable rule which requires such an advertisement at least as may enable the parties to prepare to meet proof by proof, that the truth may be known."

This decision is not adverse to that in the preceding case, if interest by agreement was sought to be recovered, before the account was due, or put upon interest by demand or unreasonable delay. But if it is deemed necessary to specifically claim interest on an account after it is due, and after interest would

accrue by reason of default in payment, then it would seem to be in conflict with the principle universally recognized that those damages which are implied by law need not be specially claimed.

The true distinction is pointed out in *Adams v. Palmer*, 30 Pa. 346, where it was held that where a usage of trade has fixed a period at which book-accounts bear interest this becomes a law of the contract, and it is not necessary to demand it in the copy of the claim filed. *Hummel v. Brown*, 24 Pa. 310; *Watt v. Hoch*, 25 id. 411. If a bargain, however, exists for interest at an earlier period than the usage would allow, or if a special contract be relied on as giving it, then it must be set forth in or added to the copy of the claim; otherwise the plaintiff cannot include it in his judgment.

¹³ *New Dunderberg M. Co. v. Old*, 38 C. C. A. 89, 97 Fed. 150; *Buffalo Pitts Co. v. Strinfellow-H. Co.*, (Tex. Civ. App.), 129 S. W. 1161. *Contra*, *Morris v. Smith*, 51 Tex. Civ. App. 357.

Interest is not recoverable as damages unless the allegation of damage covers those sustained and the interest thereon in the absence of a demand for it. *San Antonio, etc. R. Co. v. Addison*, 96 Tex. 71; *Erie City I. Works v. Noble* (Tex. Civ. App.), 124 S. W. 172.

recover interest to the date of the judgment at the contract rate.¹⁴ It has been held in Alabama, however, that, in general, a court of equity will not decree interest on a balance unless it is specially asked for in the bill; but this rule only applies to interest due at the filing of the bill. When interest accrues subsequently it is the practice of the court, upon further directions, to order that it be computed although there is no prayer to that effect.¹⁵ Interest should be asked for in an action for an accounting,¹⁶ in an action to enforce payment of an account,¹⁷ in condemnation proceedings,¹⁸ in an action for breach of the covenant of warranty,¹⁹ in an action of fraud to recover unliquidated damages,²⁰ and in an action to recover over charges.²¹ Only such creditors of an insolvent are entitled to interest as ask for it.²² Under a statute requiring that the relief demanded shall be stated in the complaint interest on a contract after its

¹⁴ Thrasher v. Moran, 146 Cal. 683; Camp v. First Nat. Bank, 44 Fla. 497; Chinn v. Hamilton, Hemp. C. C. 438; McConnell v. Thomas, 3 Ill. 313.

In the last case suit was upon a note payable in a year, with interest at the rate of thirty per cent. per annum from date until paid. Breach assigned: "yet the debt remains unpaid; wherefore the plaintiff prays judgment for his debt and damages for the detention of the same." A verdict was given for debt and interest, and it was held right. The "debt" in that case included the principal and interest to the time of the action.

In Nunnelle v. Morton, Cooke 21, an action of debt on a judgment in which interest was specifically asked for, it was at first a question whether the claim of interest did not render the demand uncertain. But, with some hesitation, the court held that the amount of the judgment could be claimed as a debt and the interest from its rendition as damages.

Under a statute interest may be recovered though the aggregate sum exceeds the *ad damnum*. Salem T. Co. v. McGraw, 66 W. Va. 321.

¹⁵ Godwin v. McGehee, 19 Ala. 468. See Mills v. Heeney, 35 Ill. 173; Carter v. Lewis, 29 id. 500; Prescott v. Maxwell, 48 id. 82; Heiman v. Schroeder, 74 id. 158.

Under a demand for a specified sum with interest and costs judgment cannot be recovered on the interest due on the judgment sued upon anterior to the time suit was begun. Haven v. Baldwin, 5 Iowa 403. See David v. Conard, 1 G. Greene 336.

¹⁶ Cheney v. Ricks, 187 Ill. 171.

¹⁷ Van Riper v. Morton, 61 Mo. App. 440.

¹⁸ Cunningham v. San Saba County, 11 Tex. Civ. App. 557, 563.

¹⁹ Vinton v. Lyons, 131 La. 673.

²⁰ Corder v. O'Neill, 176 Mo. 401.

²¹ Straight Creek C. & C. Co. v. Straight Creek M. Co., 135 Ky. 536.

²² Blair v. Clayton E. Co. (Del.), 77 Atl. 740.

breach must be claimed.²³ If payment has been unreasonably and vexatiously delayed a bill of particulars need not claim interest.²⁴

A claim against the estate of a decedent will support an allowance of interest though it was not specifically mentioned upon the principle that interest may be allowed on money illegally withheld or property converted without proof of special damage. It is the common practice in actions for breach of contract to allow interest without a special averment. Whether the liability was for an unlawful conversion or for breach of contract the same is true.²⁵ But as interest before the maturity of the principal is the creature of contract no case can be made for the recovery of such interest without alleging the contract and a breach of it.²⁶ A demand for principal and interest on a covenant to pay a specific sum with interest is divisible.²⁷

Under the code an office judgment in case of failure to answer is authorized to be taken for the amount specified in the summons; if an answer is filed judgment may be rendered for the principal and interest added thereto though the complaint only prays for judgment for the principal.²⁸ Interest may be allowed from the time action was begun in a default judgment although the damages were unliquidated and there was no specific prayer therefor in the complaint.²⁹ Equity will allow it where fraud has been practised in the exchange of properties from the date of the exchange though it is not demanded.³⁰ If the right to interest depends upon a demand the time of making it must be alleged or interest will be computed only from the commencement of the action.³¹ Under the code of Colorado, which requires only a statement of the cause of action in ordi-

²³ *Ferguson v. Reiger*, 43 Ore. 505.

²⁴ *Wabash P. Co. v. Bracey*, 160 Ill. App. 18.

²⁵ *Dayton v. Estate of Dakin*, 103 Mich. 65.

²⁶ *Chinn v. Hamilton*, Hemp. C. C. 438, quoted from *supra*; *McConnell v. Thomas*, 3 Ill. 313.

²⁷ *McClure v. Cole*, 6 Blackf. 290; *Verney v. Iddings*, 2 Chitty 234.

²⁸ *Cassacia v. Phoenix Ins. Co.*, 28 Cal. 628; *Corcoran v. Doll*, 32 Cal. 82.

²⁹ *Whereatt v. Ellis*, 68 Wis. 61.

³⁰ *Robbins v. Selby*, 144 Iowa 407.

³¹ *Hall v. Farmers' & Citizens' Bank*, 55 Iowa 612; *Empire State S. Co. v. Lindermeier*, 54 Colo. 497.

nary language, a count in a complaint based on an account stated which alleges facts from which the law implies a promise to pay is good though the promise is not alleged, and will sustain a judgment allowing interest.³² The statutory conditions upon which interest is demandable must be alleged.³³ If there are two defendants, only one of whom answers, it is error to allow judgment against both for interest, the relief asked for not including interest.³⁴ No greater rate of interest can be recovered than is asked for,³⁵ nor will it be allowed anterior to the time for which it is asked.³⁶ If it is sought to recover interest in excess of the statutory rate as damages by reason of the special contract between the parties, the declaration should appraise the defendant of the claim therefor.³⁷

SECTION 11.

INTEREST DURING PROCEEDINGS TO COLLECT A DEBT.

§ 388. **Interest on verdict before judgment.** When the cause of action is such as to carry interest and judgment is delayed after verdict by the act of the defendant, by an unsuccessful motion for new trial or writ of error, in New York the plaintiff was held entitled to interest on the entire amount of the verdict for the time of the delay, to be taxed as part of the general costs in the cause.³⁸ Interest is so allowed in cases where the contract sued on carries it,³⁹ but only for the period during which the

³² *Mine & Smelter S. Co. v. Parke & L. Co.*, 47 C. C. A. 34, 107 Fed. 881.

An allegation as to the time crops were destroyed and a prayer for damages justifies the recovery of interest. *Trinity, etc. N. Co. v. Doke* (Tex. Civ. App.), 152 S. W. 1174.

³³ *Young v. Kimber*, 44 Colo. 448, 28 L.R.A.(N.S.) 626.

³⁴ *Pickett v. Handy*, 9 Colo. App. 357.

³⁵ *Merchants' Sav. Bank v. Moore*, 5 Kan. App. 362; *Sanders v. Bagwell*, 37 S. C. 145.

³⁶ *Hnetter v. Redhead*, 31 Wash. 320.

³⁷ *Camp v. First Nat. Bank*, 44 Fla. 497. See *Ashby v. Shaw*, 82 Mo. 76; *Abrams v. Columbia, etc. R. Co.*, 73 S. C. 542.

³⁸ *Lord v. Mayor*, 3 Hill 426; *People v. Gaines*, 1 Johns. 343; *Vredenbergh v. Hallett*, 1 Johns. Cas. 27; *Henning v. Van Tyne*, 19 Wend. 101; *Williams v. Smith*, 2 Cai. 253; *Bull v. Ketchum*, 2 Denio 188; *Bissell v. Hopkins*, 4 Cow. 53.

³⁹ *Vredenbergh v. Hallett*, *supra*.

plaintiff has been delayed in obtaining judgment by the act of the defendant.⁴⁰ In other jurisdictions interest during this interval has been computed and added to the judgment.⁴¹

If the demand sued for is of such a nature that it carries interest before verdict the plaintiff's right thereto between verdict and judgment for him, when there is delay by the act of the defendant, rests upon sound principles. The fact that he disputes his liability or the amount of it does not suspend interest before verdict; nor should the pendency of a defendant's motion

⁴⁰ *Bull v. Ketchum*, 2 Denio 188; *Vail v. Nickerson*, 6 Mass. 261. See *Buckman v. Davis*, 28 Pa. 211.

Where the verdict was taken subject to the opinion of the court on a case to be made and the plaintiff rested nearly thirty years before having judgment entered, he was allowed interest only from its entry. *Redfield v. Ystalyfera I. Co.*, 110 U. S. 174, 28 L. ed. 109.

Where the court refused to receive the verdict in a tort action until required to do so by the supreme court the plaintiff's right to interest did not accrue until the mandate of the latter court was acted upon by the trial court. *Kansas City, etc. R. Co. v. Berry*, 55 Kan. 186.

⁴¹ *Berry v. Kingsbaker*, 118 Ill. App. 198; *Hneni v. Freehill*, 125 id. 345; *Kansas City, etc. R. Co. v. Berry*, *supra*; *Griffith v. Baltimore & O. R. Co.*, 44 Fed. 574.

Interest may be computed from the day the verdict was rendered, whether the action be tort or contract. *Gibson v. Cincinnati Enquirer*, 2 Flap. 88; *Sproat v. Cutler*, *Wright* 157; *Winthrop v. Curtis*, 4 Me. 297; *Johnston v. Atlantic, etc. R. Co.*, 23 N. H. 410; *Weed v. Weed*, 25 Conn. 494; *Renther v. State*, 3 Ind. 86; *Carson v. Germania Ins. Co.*, 62 Iowa 433. But not from the first day of the term in which it was

rendered. *Gibson v. Cincinnati Enquirer*, *supra*.

In South Dakota if the recovery is for the breach of an obligation not arising out of contract the allowance of interest is within the discretion of the jury. *Hollister v. Donahoe*, 16 S. D. 206.

Interest is not to be added to the verdict on motion. By failing to ask for an instruction awarding it the right is waived. *Parsons v. Jamieson*, 70 N. H. 625.

In *Irvin v. Hazleton*, 37 Pa. 465, a verdict was taken in 1853; no further proceeding was had until 1860, when judgment was entered for the amount of the verdict with interest from its date. The allowance of interest was held, on error brought, to be proper. *Strong, J.*, said: It "was in substance an exercise of the ordinary and well recognized power of entering a judgment *nunc pro tunc*; and if they had the power we must presume, in the absence of reasons to the contrary, that it was rightfully exerted." Referring to *Kelsey v. Murphy*, 30 Pa. 340, he said the learned judge in that case "denied that interest was a necessary incident to a verdict." The case called for nothing more, and nothing more ought to be considered as decided by it.

for a new trial or in arrest of judgment on untenable grounds suspend it between verdict and judgment.⁴² The same rule has

⁴² American Nat. Bank v. National W. P. Co., 23 C. C. A. 33, 77 Fed. 85; Swails v. Cissna, 61 Iowa 693; Dowell v. Griswold, 5 Sawyer 23.

The reasoning in *Kelsey v. Murphy*, 30 Pa. 240, which seems to be disapproved in the later case of *Irvine v. Hazleton*, 37 Pa. 465, is plausible; but interest, in general, is not refused upon such grounds. Thompson, J., says: "Interest has been defined 'to be a compensation for delay of payment by the debtor,' and is said to be impliedly due 'whenever a liquidated sum of money is unjustly withheld.' 10 Wheat. 440. And again—but rather by way of amplification—it is said 'to be a legal and uniform rate of damages allowed in the absence of any express contract when payment is withheld after it has become the duty of the debtor to discharge the debt.' From these definitions, differing but little in essentials, two things must necessarily pre-exist to raise this duty on the part of the debtor; namely, the ascertainment of the amount to be paid, and its maturity. If these essentials are wanting, the debt, although existing, cannot be said to be due and withheld, and the duty to pay has not become imperative upon the debtor. Unliquidated demands, past due, will, if otherwise entitled, bear interest, upon the maxim of *ad certum*, etc. They can be rendered certain. But while the question of indebtedness, under all the ascertained facts in the case, is in abeyance, as is the case on a motion for a new trial, the contract of the debtor is suspended. The case is *gremio legis*, and is presumed to be held

under consideration by the ministers of the law. The debtor can neither pay nor tender so as to avail anything, even if disposed to abandon the contest. It is emphatically, and in truth, the 'law's delay.' It is an incident, inseparable from the civil machinery that the law puts in operation to ascertain the truth between man and man, and until the process is gone through with it presumes that errors may exist, and hence not only indulges such delays, occasionally, but sometimes brings out of them the finest achievements of its mission." See *Hoopes v. Brinton*, 8 Watts 73.

In *Johnson v. Atlantic, etc. R.*, 43 N. H. 410, it was held that interest between verdict and judgment upon the amount of the verdict should be added in rendering judgment. Such a motion was made and denied by the trial court. Bellows, J., said: "Upon the facts reported we are of opinion that the allowance of interest upon the amount of the verdict would have accorded with the general course of practice in this state, and is sustained both by principle and authority. Up to the time of the decision of *Robinson v. Bland*, 2 Burr. 1085, the general principle appears to have been the other way in England, and even to allow no interest after the commencement of the action. But the question was much discussed in that case by Lord Mansfield, and the allowance of such interest in general put upon very solid ground: holding that 'nothing can be more agreeable to justice than that the interest should be carried down quite to the actual payment; but as that cannot be, it

been applied to tort actions, interest being allowed on the verdict from the time of its rendition notwithstanding motions for

should be carried on as far as the time when the demand is completely liquidated; and he says he 'don't know of any court in any country which does not carry interest down to the time of the last act by which the sum is liquidated.' The recovery in this case was for money loaned, which was found by a special verdict to be £300, and to that interest was added by the court to the rendition of the judgment; and there are remarks which seem to point to a distinction, in this respect, between actions of *assumpsit* and actions of trespass and the like; but the general course of the reasoning applies to both kinds of actions. The decision accords also with the course of practice of courts of equity, where interest, after the master's report, is usually added in making up the decree. 2 Dan. Ch. Pr. 1442, and notes; *Brown v. Barkham*, 1 P. Wms. 652, and *Perkyns v. Baynton*, 1 Bro. Ch. 574. The general doctrine of these cases is recognized in *Vredenbergh v. Hallett*, 1 Johns. Cas. 27; *People v. Gaine*, 1 Johns. 343; *Williams v. Smith*, 1 Cai. 253; *Lord v. Mayor*, 3 Hill, 426; *Bull v. Ketchum*, 2 Denio, 188; *Vail v. Nickerson*, 6 Mass. 262; *Winthrop v. Curtis*, 4 Me. 297. In many or most of these cases, the allowance of interest upon the amount of the verdict is confined to cases where the delay was caused by the act of the defendant; and now, by statute in New York, this distinction is disregarded. By our statute interest is now payable on all executions in civil actions from the time judgment is rendered. Comp. St. 296, sec. 6. And it will be perceived that no distinction is

made as to the nature of the action in which the judgment is rendered; and it will also be observed that this law carries out the suggestion of Lord Mansfield, that justice requires that interest should be carried down to the time of payment. The verdict of the jury, if judgment is rendered upon it, must be regarded as showing the amount justly due at the time it is rendered, and, in most cases, whether *ex contractu* or *ex delicto* interest, *co nomine*, is included in the verdict, at least from the commencement of the suit; and in the other cases it may reasonably be supposed that it is in some form taken into account. No solid reason, we think, can be given for withholding the interest between the finding of the jury and the rendering of judgment, as it is quite clear that, under our law and practice, interest should be allowed at all other times from the commencement of the suit at least until payment and satisfaction of the judgment.

"In *Bull v. Ketchum*, 2 Denio 188, the defendant delayed judgment for a time by proceedings designed to set aside the verdict, but abandoned them; and the plaintiff afterwards took steps attended with delay for a new trial, the motion for which was denied. Interest was allowed on the verdict and taxed with the costs for the time judgment was delayed by the defendant, and then ceased; and no interest was given while the plaintiff's motion for new trial was pending."

A verdict of a stated sum "with interest" in an action on a contract which provided for payment in instalments, the amount of principal

new trial or in arrest of judgment.⁴³ As interest, regulated by law or the agreement of the parties, is a definite measure of damages not requiring testimony to prove or a jury to decide, there is no difficulty in the matter of practice in allowing it to run until judgment. The right and the convenience of practice concur to favor the allowance. Interest during this period, however, is not universally allowed. In Maryland, West Virginia, Colorado, Georgia and Louisiana it is denied.⁴⁴ Under a statute allowing interest after ascertainment of the balance due, where a judgment for the defendant was reversed and a new trial resulted in a judgment for the plaintiff his right to interest was limited to the rendition of the second verdict.⁴⁵ If a fund or property in court is subject to lien claims of different priorities interest is allowable only from the date of decree.⁴⁶ So far as the federal courts are concerned the question of interest generally as well as the matter of allowing it between verdict and judgment, is one of local law.⁴⁷ It has been suggested, however, that if the allowance of interest in the latter case rested solely upon a statute permitting its recovery on judgments it is difficult to see how it could be computed upon verdicts, "inasmuch as the specific allowance of interest upon judgments would seem to exclude the inference that interest should be allowed upon verdicts before judgment."⁴⁸ Interest on costs runs only from

found due being less than the last instalment, was construed to mean with interest from the maturity of such instalment. *Van Winkle v. Wilkins*, 81 Ga. 93, 12 Am. St. 299.

But in Kansas "it is error to allow interest in a verdict for unliquidated damages for the time between its finding and the rendition of the judgment thereon." *Clyde Milling & Elevator Co. v. Buoy*, 71 Kan. 293; *Roe v. Snattinger*, 91 Kan. 567.

⁴³ *Meyer v. Johnson*, 122 Ill. App. 87; *Hilton v. State*, 60 Neb. 421; *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531, 555, 8 Am. Neg. Rep. 463; *Fremont, etc. R. Co. v. Root*, 49 Neb. 914.

⁴⁴ *Baltimore City R. Co. v. Sewell*, 37 Md. 443; *Fowler v. B. & O. R. Co.*, 18 W. Va. 579, 7 Am. Neg. Cas. 105; *Hawley v. Barker*, 5 Colo. 118 (under statute); *Bonner v. Copley*, 15 La. Ann. 504; *Guernsey v. Phinizy*, 113 Ga. 898. See *Equitable L. Assur. Soc. v. Trimble*, 27 C. C. A. 404, 83 Fed. 85.

⁴⁵ *Priest v. Eide*, 19 Mont. 53.

⁴⁶ *McDonald v. Loewen*, 145 Mo. App. 49; *Anderson v. Red Metal M. Co.*, 36 Mont. 312; *Jourolmon v. Ewing*, 29 C. C. A. 41, 85 Fed. 103.

⁴⁷ *Massachusetts Benefit Ass'n v. Miles*, 137 U. S. 689, 34 L. ed. 834.

⁴⁸ *Id.*

the entry of judgment.⁴⁹ The right to recover interest on the verdict rests upon the law of the state in which the cause of action arose.⁵⁰

§ 389. **On judgments pending review.** On general principles a judgment or money decree bears interest from the time of being pronounced unless a different time is fixed for payment, because the moneys so adjudged or decreed are liquidated and due. But interest on such debts, being allowed only as damages for detention of money which ought to be paid, can only be recovered by action or judicially awarded in a pending proceeding. A ministerial officer, with the usual process for carrying into execution the judgment or decree, cannot assess and collect such interest as part of the debt he is authorized and required to levy unless he is empowered to do so by statute or by the execution.⁵¹ A defendant in an execution is not chargeable with interest upon the debt due by him beyond the return day of the writ, although the plaintiff does not receive his money, unless the delay is occasioned by the former.⁵²

In the distribution of a fund raised by a sheriff's sale interest is allowable on a mechanics' lien to the date of sale only, and not to that of distribution.⁵³ In an action upon an interpleader bond conditioned that the property shall be forthcoming on the determination of the issue, the issue is determined when judgment is rendered, not on the return of the verdict.⁵⁴ If the real estate of an insolvent's estate is sold by order of court to pay debts, creditors can claim interest only up to the return-day of the order of sale.⁵⁵ But if the estate is solvent interest may be recovered until payment is made.⁵⁶ Upon sale or confirmation

⁴⁹ *Matter of MacFarlane*, 65 App. Div. (N. Y.) 93.

⁵⁰ *Fromfelker v. Delaware*, etc. R. Co., 73 App. Div. (N. Y.) 350.

⁵¹ *Klock v. Robinson*, 22 Wend. 157.

In England on the reversal of a judgment denying the recovery of unliquidated damages and directing that judgment be entered for the plaintiff for a sum to be ascertained the right to interest from the

date of the trial of the action depends upon the action of the reviewing court. *Borthwick v. Elderslie* S. S. Co. (1905) 2 K. B. 516.

⁵² *Strohecker v. Farmers' Bank*, 6 Watts 96.

⁵³ *Allen v. Oxnard*, 152 Pa. 621.

⁵⁴ *Lowenstein v. Seff*, 6 Pa. Dist. 533.

⁵⁵ *Sollenberger's Est.*, 8 Pa. Dist. 626; *Ramsey's App.*, 4 Watts 71.

⁵⁶ *Yeatman's App.*, 102 Pa. 297.

of sale of the debtor's property to satisfy the debt, interest ceases to run.⁵⁷ In case of the sale by an assignee for the benefit of creditors under the Pennsylvania act of 1876, interest upon the liens divested ceases on final confirmation of the sale.⁵⁸ In the case of distribution of the property of a decedent in the ordinary administration of his estate, specialty creditors are entitled to interest until the order of distribution.⁵⁹ The same rule is applicable to the distribution of the assets of an insolvent bank.⁶⁰ Under a contract of indemnity providing for the payment of a specific sum on the payment thereof by the assured and giving the insurer the right to determine whether an appeal shall be taken from the judgment, interest does not run until the appeal is pending, the assured not having made payment theretofore.⁶¹

Unless a new judgment is rendered by the appellate court or by its direction all damages pending the review must be awarded in its judgment of affirmance; the adjudication below remains; if affirmed, it is available from the time it was made; and interest is not suspended by appeal, writ of error or *certiorari*. It may be collected by suit or by execution, legally including accruing interest, as though no proceedings had been had in an appellate court.⁶² The interest on a judgment pend-

⁵⁷ *Strohecker v. Farmers' Bank*, *supra*; *McCruden v. Jonas*, 6 Pa. Dist. 146.

⁵⁸ *Carver's App.*, 89 Pa. 276; *Tomlinson's App.*, 90 Pa. 224.

⁵⁹ *Shultz's App.*, 11 S. & R. 182.

⁶⁰ *Estate of Bank of Pennsylvania*, 60 Pa. 471; *Bank Com'rs v. Security T. Co.*, 70 N. H. 536.

⁶¹ *Saratoga T. R. Co. v. Standard Acc. Ins. Co.*, 143 App. Div. (N. Y.) 852; *Brewster v. Empire State S. Co.*, 145 App. Div. (N. Y.) 678.

⁶² *Lexington R. Co. v. Johnson*, 139 Ky. 323; *Oliver v. Love*, 104 Mo. App. 73. See *In re Ryer*, 120 App. Div. (N. Y.) 154.

In *Lord v. Mayor*, 3 Hill 426, a judgment of affirmance was rendered on *certiorari*, and this judgment. *Suth. Dam. Vol. I.*—79,

ment affirmed on writ of error in the court of last resort. The final judgment of affirmance expressly awarded to the successful party interest from the date of the judgment of affirmance below, and a question arose whether the right to interest from the rendition of the original judgment to the first affirmance was thereby taken away. It was held that the adjudication below, being affirmed, remained available from the time it was made, and such interest was allowed. *McLismans v. Lancaster*, 65 Wis. 240.

The omission of the trial court to award interest during the period the cause was pending on appeal cannot be remedied after its removal therefrom, no effort having been made to

ing appeal is to be added to the principal and, on affirmance, bears interest the same as the original principle.⁶³ And so where the appellate court corrects a decree as to the principal sum due, but affirms it otherwise, the interest accrued from the filing of the bill up to the time of the decree may be treated as principal upon which interest runs from the time the bill was filed.⁶⁴ If an appeal results in a trial *de novo* interest is suspended during its pendency.⁶⁵ A district court sitting as a court of admiralty, which has awarded a decree including interest, cannot after the modification thereof and the receipt of the mandate of the reviewing court directing the entry of a decree for a specified sum give interest thereon from the time the libellant's cause of action accrued.⁶⁶ The affirmance of the judgment of such a court which is silent concerning interest puts it beyond its power thereafter to allow interest on the decree of the reviewing court.⁶⁷ On the reversal of an order granting a new trial in a tort action and a remand of the cause with directions to enter judgment on the verdict interest is to be computed on the judgment only from the time it was entered in pursuance of the mandate.⁶⁸ If a judgment carrying interest is reversed and judgment directed to be given for a larger sum with interest the allowance of interest is to be made by the trial court from the same date as its original judgment.⁶⁹ In some states interest on so much of the judgment as the plaintiff retains after complying with the order of the reviewing court directing the remitter of a part thereof runs from the time the judgment was rendered;⁷⁰ but in Missouri the view has been taken that a remitter requires a new judgment which takes effect only from its

have the judgment corrected. *Huntington v. Newport News & M. V. Co.*, 78 Conn. 35.

⁶³ *Arkansas S. R. Co. v. German Nat. Bank*, 85 Ark. 136.

⁶⁴ *Montgomery I. Works Co. v. Capital City Ins. Co.*, 162 Ala. 420.

⁶⁵ *Smith v. Clark*, 38 Colo. 89.

⁶⁶ *Brown v. Merritt W. Organization*, 28 C. C. A. 38, 83 Fed. 720.

⁶⁷ *The Glenochil*, 128 Fed. 963.

⁶⁸ *Scullin v. Wabash R. Co.*, 192 Mo. 6.

⁶⁹ *Everett v. Gores*, 92 Wis. 527.

But in Washington if liability for interest depends upon the determination of the sum due it is to be computed only from the date of the judgment of the reviewing court. *Johnston v. Gerry*, 34 Wash. 524.

⁷⁰ *Rawlings v. Anheuser-B. B. Co.*, 69 Neb. 34; *McLimans v. Lancaster*, 65 Wis. 240.

entry, and destroys the original judgment.⁷¹ Where leave was granted a defendant to appeal from a judgment on paying into court the amount thereof with one year's interest and the appeal was kept pending for two years and a half, when it lapsed for lack of prosecution, the plaintiff was entitled to interest from the expiration of the year for which it had been paid to the receipt of the certificate showing the dismissal of the appeal.⁷²

Under a system of practice by which, on appeal or writ of error, a final judgment is entered in the appellate court the new judgment will of course embrace the former, in case of affirmance, as well as the costs and damages incident to the appeal or writ of error. But where the appeal is from a judgment of a single judge to the general term, as in New York, both judgments being in the same court, the general term does not enter a new judgment on affirmance for the original claim; but declares that it is satisfied to let the former judgment stand, and therefore merely affirms it. The judgment of affirmance is added to the original judgment roll, and in case of appeal to the court of last resort the whole case is carried up; but the former judgment is not thereby vacated.⁷³ Under this practice the judgment of affirmance should not include interest on the judgment which is affirmed. It has become the established practice in that state to exclude from the judgment of affirmance all sums secured by the judgment in the court below.⁷⁴

In an equity case the mandate of the supreme court directed the court of chancery to make a decree that the plaintiff should pay the defendant a certain sum as damages for an injunction, but directed nothing in respect to the interest on the same; and the court of chancery made the decree granting interest only from the date thereof. It was held that the decree was, in this respect, in accordance with the mandate, the plaintiff not being in default for not paying the damages until it was made, and therefore not liable for interest prior thereto. The defendants

⁷¹ *Stolze v. St. Louis T. Co.*, 122 Mo. App. 458.

⁷² *Smart v. O'Callaghan*, 4 Vict. L. R. (law) 448.

⁷³ *Eno v. Crooke*, 6 How. Pr. 462.

⁷⁴ *Beardsley S. Co. v. Foster*, 36 N. Y. 561; *Halsey v. Fink*, 15 Abb.

Pr. 367. See *Dougherty v. Miller*, 38 Cal. 548.

having appealed from the decision refusing interest, the plaintiff was also held not liable to pay interest while the cause was in the supreme court on appeal, but only from the time it was remanded to the court of chancery.⁷⁵ In Tennessee upon the affirmance of a money decree rendered by the court of chancery appeals the supreme court will enter a new judgment embracing the amount of the decree, with interest thereon from the date of its rendition to the date of its affirmance.⁷⁶ Where the original decree on a creditor's bill was reversed in part it was proper for the court on a second hearing to compute interest on the judgments from their dates, rather than on the sums found by the first decree.⁷⁷

In Pennsylvania, on affirmance of a judgment in the appellate court on error, interest is to be charged on the judgment below till affirmance and then the aggregate is to bear interest; and this results from the statute giving interest on every judgment. Whenever a judgment is given it is understood that interest on any former judgment in the same action is to be charged.⁷⁸ In Montana, in the absence of any special direction as to interest in a judgment of the supreme court, its clerk must add interest from its date to the time of the entry of such judgment, and that is the extent of his authority.⁷⁹ In Illinois interest may be allowed from the time of filing the master's report up to the date of the decree.⁸⁰

Where the damages for delay during an unsuccessful appeal or other mode of review by an appellate court are subject to the determination of that court its judgment controls the question of interest between the rendition of the judgment below and its affirmance in the superior court.⁸¹ If a new trial upon the facts takes place on appeal interest is to be computed in the appellate

⁷⁵ *Sturges v. Knapp*, 36 Vt. 439.
See *Vanvalkenbergh v. Fuller*, 6 Paige 10.

⁷⁶ *Cowan v. Donaldson*, 95 Tenn. 327.

⁷⁷ *Dilworth v. Curts*, 139 Ill. 508.

⁷⁸ *McCausland v. Bell*, 9 S. & R. 388. See *Brigham v. Van Buskirk*, 6 B. Mon. 197; *Young v. Pate*, 3

J. J. Marsh. 100; *Smith v. Todd*, *id.* 306, 20 Am. Dec. 142.

⁷⁹ *State v. Reece*, 43 Mont. 291.

⁸⁰ *Ruddy v. McDonald*, 149 Ill. App. 111.

⁸¹ *Buteher v. Norwood*, 1 H. & J. 485; *Contee v. Findley*, *id.* 331. See *Kelsey v. Murphy*, 30 Pa. 340.

court on such trial as though no previous trial had been had, and not on the judgment appealed from.⁸² Where under a statute interest is allowed from the finding of a verdict such interest is to be added in determining whether the amount involved is sufficient to authorize the suing out of a writ of error on a subsequent setting aside of the verdict.⁸³

If the successful party in the trial court withdraws funds in litigation after an adjudication adverse to intervenors and such judgment is reversed, and on a second trial they are successful, the party who has the funds will be liable for interest from the time they came to his possession.⁸⁴ Intervenor who secure the payment of money into court to abide the further order thereof are not liable for interest while it is detained there under an erroneous order, though they fail to establish their right to it.⁸⁵ On the reversal of a judgment turning over a fund to claimants they are chargeable with interest received by them pending the determination of the appeal, less expenses incurred in managing the fund.⁸⁶ It is immaterial that there are rival claimants to the fund if the holder could pay it into court or obtain a waiver of the right to interest.⁸⁷ The complainant in a bill in the nature of a bill of interpleader is not liable for interest on the fund which he deposits in court at the commencement of suit if he is not responsible for delays occurring in the course of the litigation.⁸⁸

⁸² *Tindall v. Mecker*, 2 Ill. 137; *Hamilton v. Baltimore & O. R. Co.*, 11 Ohio N. P. (N. S.) 437. See *Eno v. Crooke*, 6 How. Pr. 462.

⁸³ *Stone v. First Nat. Bank*, 72 W. Va. 171.

⁸⁴ *Heidenheimer v. Johnson*, 76 Tex. 200.

⁸⁵ *Van Gordon v. Ormsby*, 60 Iowa 510.

Money paid into court in satisfaction of a decree and for distribution does not bear interest in favor of the party who is entitled thereto pending an appeal, though the order of distribution is changed; but money to which the party was not

entitled bore interest against him. *Whitall v. Cressman*, 18 Neb. 508.

⁸⁶ *Independent Foresters v. Keliher*, 36 Ore. 501, 78 Am. St. 785.

⁸⁷ *Adams v. Cox*, 10 Ont. L. R. 96.

⁸⁸ *Phoenix Ins. Co. v. Carey*, 80 Conn. 426; *Groves v. Sentell*, 13 C. C. A. 386, 66 Fed. 179. In *Spring v. Insurance Co.*, 8 Wheat. 270, the complainant was required to pay interest on the fund because he had not paid it into court. In *Richards v. Salter*, 6 Johns. Ch. 445, interest was not required because the complainant had, with reasonable diligence, paid the money into court.

By section twenty-three of the judiciary act of 1789⁸⁹ it was provided that when the supreme or circuit court should affirm a judgment or decree they should adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion. Under this law there was no distinction made between cases in equity and at law. In either the allowance of damages in addition to the amount found to be due by the judgment or decree of the court below was confided to the discretion of the appellate court. If, upon affirmance, no allowance of interest or damages was made it was equivalent to a denial of either, and the court below, in carrying into effect the judgment or decree of affirmance, could not enlarge the amount thereby allowed, but was limited to the mere execution of the mandate in the terms in which it was expressed.⁹⁰ That court, in 1803 and 1807, made rules by which its discretion

⁸⁹ See § 1010, R. S. of U. S.

⁹⁰ This rule is not applicable when the question is whether interest shall be allowed on a verdict when an erroneous judgment thereon has been reversed and direction given by the supreme court to enter the proper judgment in favor of the prevailing party. In *Kneeland v. American L. & T. Co.*, 138 U. S. 509, 34 L. ed. 1052, a decree was reversed for error in a part of the sum for which it was given, another distinct part being approved. The mandate was to strike out certain allowances and to allow others as fixed, nothing being said as to interest. Upon that order the circuit court gave a second decree, allowing interest from the date of the first decree, which decree, upon a second appeal, was affirmed. Per Woods, C. J., in *Metcalf v. Watertown*, 16 C. C. A. 37, 42, 68 Fed. 859.

In the case last referred to the trial court made a finding of facts from which the sum due the plaintiff for principal and interest, if he was entitled to recover, could be

computed, but gave the defendant judgment. This judgment was reversed and the entry of judgment for the plaintiff on the finding was directed by the supreme court. The circuit court of appeals ruled that the plaintiff was entitled, under a local statute, to interest on the finding to the entry of judgment on the mandate of the supreme court upon the whole amount of principal and interest due him when the finding was made. The local statute forbidding the compounding of interest was not applicable; it and the statute allowing interest on verdicts must stand together.

If the right of equitable recovery has been settled by the supreme court and nothing remains for the court of original jurisdiction to consider except the amount for which judgment shall be given, if no intimation to the contrary has been given the latter court will allow interest from the filing of the bill. *Nashua & L. R. Co. v. Boston & L. R. Co.*, 9 C. C. A. 468, 61 Fed. 237.

was guided. By the seventeenth rule, when a case appeared to be brought merely for delay, damages were awarded at the rate of ten per cent. on the amount of the judgment; and by the eighteenth rule, the damages were to be at the rate of six per cent. when it appeared that there was a real controversy.⁹¹ Now, by the twenty-third rule, interest and damages are thus regulated:

"1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judg-

⁹¹ Perkins v. Fourniquet, 14 How. 338. In this case Taney, C. J., referring to Mitchell v. Harmony, 13 How. 115, 14 L. ed. 75, said: "The judgment brought up by the writ of error was rendered in the circuit court of New York, and was affirmed by this court. The sum recovered was large, and interest, even for a short time, was therefore important. And counsel for Harmony, the defendant in error, moved the court to allow him the New York interest of seven per cent. upon the amount of the judgment, and that the interest should run until the judgment was paid." But as the rules [mentioned in the text] were still in force, the court held that he was entitled to only six per cent., to be calculated from the date of the judgment in the circuit court to the day of affirmance here. The case now before us was decided in the early part of the last term, before the case of Mitchell v. Harmony, and consequently falls within the operation of the same rules, and damages upon the affirmance of the decree must be calculated in a like manner. Indeed, in the New York case, the claim for interest stood on stronger ground than the present one, for that was an action at law.

The act of 1842, therefore, applied to the judgment in the circuit court, and it would have carried the state interest until paid, if it had not been brought here by writ of error. But this is a decree in equity, and not embraced in the act of 1842, and, according to the settled chancery practice, no interest or damages could have been levied under process of execution upon the amount ascertained to be due and decreed to be paid if there had been no appeal. 2 Ves. 157, 168, n. 1, Sumn. ed.; 2 Dan. Chan. Pl. & Pr. 1442, 1437, 1438. Nor could any damages or interest have been given on its affirmance here but for the discretionary power vested by the act of 1789." Boyce v. Grundy, 9 Pet. 275, 9 L. ed. 127.

In Hoyt v. Gelston, 15 Johns. 221, it was said: "This court cannot pronounce any new judgment in this case. It can only carry into effect the judgment of the Supreme Court of the United States. In the computation of interest, therefore, the taxing officer must not go beyond the time of the judgment of affirmance, that being the last act of the court above. The practice in this respect in our state courts is regulated by statute, which cannot

ments bear interest in the courts of the state where such judgment is rendered.⁹²

"2. In all such cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment."⁹³

"3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court."⁹⁴

"4. In cases in admiralty, interest shall not be allowed unless specially directed by the court."⁹⁵

apply to this case." See same case, 3 Wheat. 246, 336, 4 L. ed. 381, 404. See, also, *Himely v. Rose*, 5 Cranch 313, 3 L. ed. 111; *Kilbourne v. State Sav. Inst.*, 22 How. 503, 16 L. ed. 370; *Hennessy v. Sheldon*, 12 Wall. 440, 20 L. ed. 446; *Insurance Co. v. Huchbergers*, id. 166.

⁹² Adopted 1803, 1851.

⁹³ Adopted 1803, 1871.

⁹⁴ See *Schell v. Cochran*, 107 U. S. 625, 27 L. ed. 543; *Whitney v. Cook*, 99 U. S. 607, 25 L. ed. 446.

⁹⁵ Adopted 1884.

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